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Constitutional Law - Attorney & (and) Client: First Amendment Rights for Lawyers: Where Should North Dakota Draw the Line

Shon Kaelberer Hastings

CONSTITUTIONAL LAW—ATTORNEY & CLIENT: FIRST AMENDMENT RIGHTS FOR LAWYERS: WHERE SHOULD NORTH DAKOTA DRAW THE LINE? *Gentile v. State Bar of Nevada*, 111 S. CT. 2720 (1991).

I. INTRODUCTION

Dominic P. Gentile, an attorney, was hired to represent Grady Sanders, who was indicted on criminal charges of larceny, racketeering, and drug trafficking.[1] Mr. Sanders was the owner of Western Vault Corporation, a company that safeguarded drugs and traveler's checks for the police as part of an undercover operation.[2] On January 31, 1987, the Intelligence Bureau of the Las Vegas Metropolitan Police Department discovered that four kilograms of cocaine and approximately $300,000 in traveler's checks had been stolen from the Western Vault safety deposit boxes rented by the police.[3] Shortly after the media reported the theft, other Western Vault customers claimed that money had been stolen from their safety deposit boxes as well.[4] Although Metro Police officers and employees of Western Vault were considered possible suspects, the police eventually charged Mr. Sanders with the crimes.[5] Progress reports on the investigation of the theft were highly publicized.[6]

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1. Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2727 (1991); Briefs for Petitioner and Respondent, joint app. at 127, Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991) (No. 89-1836) [hereinafter Joint Appendix] (quoting LAS VEGAS SUN, February 6, 1988, at 1A). Specifically, the indictment charged Grady Sanders with eight counts of grand larceny, two counts of racketeering and one count of trafficking in a controlled substance. *Id.* "The indictment included not only the theft of $1.3 million of narcotics and traveler's checks from the Metro [Police] safety deposit box but, in addition, a series of alleged thefts of more than $2 million from seven safety deposit boxes rented by other customers." Brief for Petitioner at 6, Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991) (No. 89-1836) (citation omitted).

2. *Gentile*, 111 S. Ct. at 2727.

3. *Id.*

4. *Id.*

5. *Id.* Two police officers in particular, Steve Scholl and Ed Schaub, had direct access to the safety deposit boxes during the period of time when the theft occurred. *Id.* In addition, the undercover team kept no record of access to the vault. *Id.* Although this evidence appeared to incriminate the police officers, they were cleared of suspicion approximately a week after the discovery of the theft. Petitioner's Brief at 3, *Gentile* (No. 89-1836).

Throughout the investigation the press continued to report that the two officers had been cleared as possible suspects. Joint Appendix at 91, 93, 98, 110, 132, *Gentile* (No. 89-1836). A report that the officers had voluntarily taken and passed polygraph tests may have added to the officers' credibility. Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2727 (1991).

6. *Gentile*, 111 S. Ct. at 2727-28, 2738. "[Mr. Gentile] had monitored the publicity surrounding the case, and prior to the indictment was personally aware of at least 17 articles in the major local newspapers, the *Las Vegas Sun* and *Las Vegas Review-Journal*, and numerous local televisions news stories which reported on the Western Vault theft and ensuing investigation." *Id.* at 2728.

In response to adverse publicity about his client,[7] Mr. Gentile sponsored a press conference during which he claimed that his client was innocent,[8] that evidence indicated that police officers committed the crimes,[9] and that other customers who reported thefts from their safety deposit boxes were not credible, because most of them were drug dealers or convicted money launderers who had accused Gentile's client in response to police pressure.[10] In preparation for the press conference, Mr. Gentile reviewed Nevada Supreme Court Rule 177, a rule governing trial publicity, and determined that it was proper to speak to the press on behalf of his client because the trial was more than six months away.[11] During the press conference, he commented about what the admissible trial evidence would prove and steered clear of inad-

7. *Id.* Mr. Sanders did not receive the benefit of positive press enjoyed by Officers Scholl and Schaub. Joint Appendix at 91, 93, 98, 110, 132, *Gentile* (No. 89-1836) (quoting LAS VEGAS REVIEW-JOURNAL, March 12, 1987, at 1B; LAS VEGAS REVIEW-JOURNAL, March 26, 1987, at 1B; and KLAS, Television Channel 8 News Summary, March 10, 1987 and June 1, 1987). As the investigation progressed, all of the Western Vault Company employees were cleared of suspicion, except for Mr. Sanders. Petitioner's Brief at 4, *Gentile* (No. 89-1836). Police sources alleged that Mr. Sanders was uncooperative because he refused to take a lie detector test, and because he failed to answer questions to the satisfaction of the Police Department. *Id.* at 3-5. Thus, Mr. Sanders appeared to be the guilty party because the police repeatedly released statements stating that the two officers had been cleared of wrongdoing, while claiming that Mr. Sanders had been uncooperative. As a result, Mr. Gentile decided that he had to point out weaknesses in the State's case in order to prevent the jury venire from being prejudiced. Petitioner's Brief at 7 & n.6, *Gentile* (No. 89-1836).

8. *Gentile*, 111 S. Ct. at 2736 (quoting *Petitioner's Opening Remarks at the Press Conference of February 5, 1988*).

9. *Id.* at 2736-37.

10. *Id.* at 2737. Mr. Gentile alleged that four of the customers who had reported thefts from their safety deposit boxes were "drug dealers; three of whom didn't say a word about anything until after they were approached by Metro [Police] and after they were already in trouble and [were] trying to work themselves out of something." *Id.*

11. *Id.* at 2729. Nevada Supreme Court Rule 177 is reprinted in Appendix B of the *Gentile* opinion. *Id.* at 2737-38.

Nevada Supreme Court Rule 177 is virtually identical to Rule 3.6 of the ABA Model Rules of Professional Conduct. *Gentile*, 111 S. Ct. at 2723. Rule 3.6 of the Model Rules of Professional Conduct provides:

> Trial Publicity
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> (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.
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> (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:
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> (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;
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> (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

missible evidence.[12] Several times during the press conference he declined to answer questions because he believed that the answers might result in a breach of the trial publicity rule.[13]

Approximately six months after the press conference, Gentile's client was tried and acquitted on all charges.[14] In December of 1988, the State Bar of Nevada filed an ethics complaint against Mr. Gentile in which it contended that he violated the Nevada trial publicity rule.[15]

The Southern Nevada Disciplinary Board of the State Bar conducted a hearing and concluded that Gentile violated Rule 177 and should be privately reprimanded.[16] Mr. Gentile appealed to

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failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

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

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

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

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

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

(2) the information contained in the public record;

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

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

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

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

(7) in a criminal case:

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

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

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

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

MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 (1991) (emphasis added).

12. *Gentile*, 111 S. Ct. at 2730.

13. *See id.* at 2731-32; Brief for Petitioner, Appendix to Petition for Writ of Certiorari at 6a-16a, Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991) (No. 89-1836).

14. *Gentile*, 111 S. Ct. at 2723.

15. *Id.* Nevada Supreme Court Rule 177 is reprinted in Appendix B of the *Gentile* opinion. *Id.* at 2737-38.

16. *Id.* at 2723. The Board concluded as follows:

> The statements made by Gentile violated SCR 177(1), (2)(a) and (2)(d) in that they were statements which Gentile knew would be disseminated by means of public communication; which (i) related to the character, credibility, reputation and criminal record of witnesses in the trial of Mr. Sanders, and (ii) contained an opinion of the guilt or innocence of Mr. Sanders; and were known or should have

the Nevada Supreme Court, and it found that Mr. Gentile knew or should have known that his statements during the press conference would have a "substantial likelihood" of materially prejudicing the trial of his client.[17] Accordingly, the Nevada court affirmed the decision of the Board.[18]

On appeal to the United States Supreme Court, Mr. Gentile argued that the Court should satisfy both First-Amendment-free-speech and Sixth-Amendment-fair-trial interests by insisting that "a 'clear and present danger' of 'actual prejudice or an imminent threat' " to a fair trial be demonstrated before protected speech is suppressed.[19] All nine members of the Court agreed that, under most circumstances, the right to freedom of speech is protected unless there is a "clear and present danger to the impartiality and good order of the courts."[20] The Court has also agreed that protection of this First Amendment right is especially important where the government suppresses political speech.[21] The Justices did not agree, however, on whether this speech-protective standard applies to lawyers who are participating in a judicial proceeding.[22]

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been known by Gentile to have a substantial likelihood of materially prejudicing the Sanders trial.

Joint Appendix at 5, *Gentile* (No. 89-1836) (quoting the State Bar of Nevada, Southern Nevada Disciplinary Board, May 12, 1989).

17. Gentile v. State Bar of Nev., 787 P.2d 386, 387 (1990). The Nevada Supreme Court stated that "[c]lear and convincing evidence supports the conclusion that appellant knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." *Id.* The "substantial likelihood" language is taken from Nevada Supreme Court Rule 177. NEV. CT. R. 177 (1991). Rule 177(1) provides that "[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." *Id.*

18. *Gentile*, 787 P.2d at 386.

19. Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2742 (1991); Petitioner's Brief at 15, *Gentile* (No. 89-1836). Mr. Gentile argued that the Sixth-Amendment-fair-trial interests of the state should not be given preference over the First-Amendment-free-speech rights of attorneys. Petitioner's Brief at 15, *Gentile* (No. 89-1836). This argument was based in part on the following language from *Nebraska Press Ass'n v. Stuart*: "The founders of the Bill of Rights did not assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." Petitioner's Brief at 15, *Gentile* (No. 89-1836) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976)).

20. *See Gentile*, 111 S. Ct. at 2726, 2742-43. Justice Kennedy reiterated the following definition of the "clear and present danger" standard:

> "Whenever the fundamental rights of free speech . . . are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

Id. at 2726 (citations omitted).

21. *Id.* at 2724.

22. *Id.* at 2732-36, 2743-45.

In the portion of the decision written by Justice Rehnquist,[23] the majority phrased the issue presented as follows: "The question we must answer in this case is whether a lawyer who represents a defendant involved with the criminal justice system may insist on the [clear and present danger] standard before he is disciplined for public pronouncements about the case, or whether the State instead may penalize that sort of speech upon a lesser showing."[24] The Court held that "the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's [Sixth Amendment] interest in fair trials."[25]

The second portion of the *Gentile* decision was written by Justice Kennedy.[26] In this part of the opinion, a different majority of the Court[27] held that, as interpreted by the Nevada Supreme Court, Rule 177(3) was unconstitutionally vague because the safe harbor provision in subsection (3) of the rule misled Gentile into thinking that he could violate subsections (1) and (2) during his press conference without fear of discipline.[28] The Court found that subsection three of Rule 177 failed to provide fair notice of what type of speech was prohibited.[29] The Court also noted that

23. *Id.* at 2738-45. Chief Justice Rehnquist wrote the majority opinion with respect to parts I and II of the decision. *Id.* Justices White, Scalia, Souter and O'Connor joined in this portion of the opinion. *Id.* at 2738, 2748. Parts I and II address the appropriate standard of review to be applied in cases where there is a conflict between a defendant's Sixth Amendment right to a fair trial and an attorney's First Amendment right to freedom of speech. *Id.* at 2738-45.

24. *Id.* at 2743. The "clear and present danger" standard is used to determine whether the First Amendment rights of the press or the general public have been violated. *Id.* at 2742-43.

25. *Id.* at 2745.

26. *Id.* at 2723-36.

27. *Id.* at 2723. Justice Kennedy wrote the majority opinion with respect to Parts III and VI of the decision. *Id.* Justices Marshall, Blackmun, Stevens and O'Connor joined in these parts of the opinion. *Id.* In part III, the Court held that Nevada Supreme Court Rule 177 was unconstitutionally vague. *Id.* at 2732. Part VI is simply the judgment of the Court—"the Supreme Court of Nevada is reversed." *Id.* at 2736.

Chief Justice Rehnquist delivered a dissenting opinion with respect to part III of the opinion. *Id.* at 2745-48. He argued that Nevada Supreme Court Rule 177 was constitutional on its face and as applied. *Id.* In reaching this conclusion, he rejected the Petitioner's argument that Rule 177 was vague and overbroad. *Id.* Justices White, Scalia, and Souter joined in the dissenting opinion. *Id.* at 2738.

28. *Id.* at 2731. In referring to Nevada Supreme Court Rule 177 as a safe harbor provision, Justice Kennedy argued that as long as an attorney makes some overt attempt to comply with one subsection of the rule, he will not be disciplined for violating a different subsection of the rule. *See Gentile*, 111 S. Ct. at 2731-32; NEV. SUP. CT. RULE 177 (reprinted in Appendix B of the *Gentile* opinion). The "notwithstanding" provision of Rule 177 leads an attorney to believe that if he or she makes an overt attempt to comply with Rule 177(3), namely, by making a statement about "the general nature of the . . . defense," the attorney will not be disciplined even if this statement appears to violate subsections 1 or 2. *See Gentile*, 111 S. Ct. at 2731-32. *See also infra* text accompanying notes 91-101 (discussing why Rule 177(3) was found to be void for vagueness).

29. *Id.* at 2732.

the rule was so imprecise that it allowed for discriminatory enforcement.[30] Accordingly, the Supreme Court reversed the decision of the Nevada Supreme Court.[31]

II. HISTORICAL BACKGROUND OF ATTORNEY "NO-COMMENT" RULES

Since 1908, the American Bar Association (ABA) has issued three model rules in an attempt to restrict extrajudicial statements made by lawyers. The first model rule was Canon 20 of the 1908 ABA Canons of Professional Ethics.[32] Pursuant to Canon 20, comments made by lawyers regarding pending or anticipated litigation were "generally" condemned.[33] This standard was seldom enforced, however, because courts considered it too vague.[34]

In the 1960s, fair trial and free speech issues were sharply

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30. *Id.*

31. *Id.* at 2736.

32. AMERICAN BAR ASS'N CANONS OF PROFESSIONAL ETHICS Canon 20 (1908). Canon 20 provides:

> 20. Newspaper Discussion of Pending Litigation.
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> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

Id.

33. *Id.*

34. *See, e.g.*, Hirschkop v. Snead, 594 F.2d 356, 365 (4th Cir. 1979) ("The trouble [with Canon 20] was that the standards were so general and vague that they were exceedingly difficult to apply and did little to forewarn speakers for publication about what was proscribed and what was permitted."); AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS Tentative Draft 80-81 (December 1966) (The general language in Canon 20 of the Canons of Professional Ethics "fails to give adequate guidance and it is perhaps for this reason that it has not been enforced.").

Varying interpretations of Canon 20 provide evidence for the assertion that the rule was vague and difficult to apply. For example, in State v. Van Duyne, 204 A.2d 841 (N.J. 1964), *cert. denied*, 380 U.S. 987 (1965), the court interpreted Canon 20 to ban statements to news media by prosecutors or defense counsel which may interfere with a fair trial. *Id.* at 852. The *Van Duyne* court stated that "[t]he right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by [defense counsel] to news media on the subject of his client's innocence." *Id.* However, the court in Koller v. Richardson-Merrell, Inc., 737 F.2d 1038 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 808 (1985), took the opposite approach:

> The Legal Ethics Committee of the District of Columbia Bar has emphasized with respect to the current D.C. version of DR 7-107(H) [which incorporated Canon 20] that it "would hesitate to interpret the Code of Professional Responsibility or the Canons of Professional Ethics in such a way as to thwart the communication of accurate factual information regarding legal proceedings to the press in the absence of *a substantial threat to the due administration of justice.*"

Id. at 1062-63 (citation omitted).

debated due to the press coverage of former President John F. Kennedy's assassination in 1962,[35] and the Court's ruling in *Sheppard v. Maxwell*[36] decided in 1966.[37] The *Sheppard* decision and the Warren Commission's report led to further professional study and the ABA's adoption of fair trial and free speech standards in 1968.[38] These standards limited lawyer publicity that presented a "reasonable likelihood that such dissemination [would] interfere

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35. Judicial Conference of the United States Committee on the Operation of the Jury System, *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391, 395 (1968) (quoting The President's Commission on the Assassination of President John F. Kennedy: *Report of the President's Commission on the Assassination of President Kennedy* 238 (1964)).

> The events surrounding the assassination of President Kennedy in November 1963 graphically illustrate the effect of pervasive news coverage and publicity on the right of a defendant to a trial by an impartial jury. Because of this publicity, the President's Commission felt, "it would have been a most difficult task to select an unprejudiced jury, either in Dallas or elsewhere."

Id.

36. 384 U.S. 333 (1966). In *Sheppard v. Maxwell*, Marilyn Sheppard, the pregnant wife of the defendant, was bludgeoned to death. *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966). Before the trial, the media was bombarded with stories about the case and Dr. Sheppard's personal problems. *Id.* at 338-42. Most of the stories tended to incriminate Dr. Sheppard. *Id.* at 340. Three months before the trial, the coroner called an inquest. *Id.* at 339. "Sheppard's counsel were present during the three-day inquest but were not permitted to participate." *Id.* Several weeks before the trial, the names of the prospective jurors were published, resulting in phone calls and letters about the case. *Id.* at 342. The trial court did nothing to limit the incriminating pretrial publicity. *Id.* at 338-42.

The negative publicity continued during trial. *Sheppard*, 384 U.S. at 342-49. Approximately twenty members of the press crowded the 26' X 48' courtroom and reporters continually disrupted the trial. *Id.* at 342-44. Pictures of the jury appeared more than 40 times in the local papers. *Id.* at 345. During deliberations, the jury was allowed inadequately supervised access to telephones. *Id.* at 349. "The jurors themselves were constantly exposed to the news media." *Id.* at 345. Some of the jurors may have seen stories that mentioned incriminating evidence not admitted during the trial. *Id.* at 340, 344. The trial judge did nothing to limit the massive publicity. *Id.* at 344, 346-49. In the end, Dr. Sheppard was convicted of second-degree murder. *Id.* at 335.

The Supreme Court concluded that the massive, pervasive and prejudicial publicity that accompanied Dr. Sheppard's murder prosecution denied him a fair trial. *Sheppard*, 384 U.S. at 362-63. The Court stated that, to secure a defendant's right to a fair trial, "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, . . . the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." *Id.* at 361.

In the conclusion of the majority opinion, Justice Clark also warned the courts to take control of their courtrooms. *Id.* at 363. "Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press . . . is highly censurable and worthy of disciplinary measures." *Id.*

The *Sheppard* Court, however, did not discuss the extent to which First Amendment rights might restrict the trial court's power to regulate the speech of trial participants. *See* AMERICAN BAR ASS'N ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 240 (1984) (discussing the legal background of Rule 3.6 of the Model Code of Professional Conduct); Gannett Co., Inc. v. State of Delaware, 571 A.2d 735, 742 (Del. 1989) ("While *Sheppard* did not specifically involve a First Amendment challenge, we nevertheless keep in mind its principles when extensive media activity threatens a party's fundamental right to a fair trial."). Thus, *Sheppard cannot be read as a limitation of First Amendment rights*; it is simply an assertion of the importance of the defendant's Sixth Amendment rights.

37. *See* Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2740-41 (1991).

38. AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE,

with a fair trial or otherwise prejudice the due administration of justice."[39]

In 1969, the ABA replaced the 1908 canons with the Model Code of Professional Responsibility.[40] Disciplinary Rule 7-107 (DR 7-107) of the Model Code of Professional Responsibility incorporated the 1968 fair trial-free press standards regarding lawyer no-comment rules.[41] Accordingly, the general test of DR 7-107 is

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STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS Tentative Draft 19 (December 1966).

> The Advisory committee on Fair Trial and Free Press, one of six advisory committees established by the American Bar Association to formulate minimum standards for the administration of criminal justice, was appointed in December 1964. It owes its origin in part to the report of the Warren Commission on the assassination of President Kennedy . . . .

Id.

The ABA initiated a study which suggested rules to govern public statements by lawyers in criminal cases. AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS Approved Draft (1968) [hereinafter REARDON REPORT]. The study was recommended to the ABA by the Committee on Fair Trial and Free Press, which was chaired by Paul C. Reardon. *Id.*

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

Other studies on the fair trial and free press issue were noted in Professor Matheson's article on the free speech issue. Scott M. Matheson, *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865 (1990). These studies include: Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, Freedom of the Press and Fair Trial: Final Report with Recommendations (1967); American Newspaper Publishers Association, Free Press and Fair Trial (1967); Judicial Conference of the United States Committee on the Operation of the Jury System, *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 404-05 (1969). Matheson, *supra*, at 873 n.37.

39. REARDON REPORT, *supra* note 38, § 1.1, at 2. The "reasonable likelihood" standard was taken from language in *Sheppard*. AMERICAN BAR ASS'N ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 241 (1984). *See Sheppard*, 384 U.S. at 363.

40. *See* AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY v-vi (Final Draft July 1, 1969).

41. *Id.* at 104 n.85. The Historical Comment to DR 7-107 provides:

> The provisions of Sections (A), (B), (C), and (D) of this Disciplinary Rule [DR 7-107 Trial Publicity] incorporate the fair trial-free press standards which apply to lawyers as adopted by the ABA House of Delegates, Feb. 19, 1968, upon the recommendation of the Fair Trial and Free Press Advisory Committee of the ABA Special Committee on Minimum Standards for the Administration of Criminal Justice.

Id. Disciplinary Rule 7-107 provides:

> DR 7-107 Trial Publicity
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> (A) *A lawyer participating in or associated with* the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
>
> (1) Information contained in a public record.
>
> (2) That the investigation is in progress.
>
> (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
>
> (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
>
> (5) A warning to the public of any dangers.

whether an extrajudicial comment is "reasonably likely" to have a

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(B) *A lawyer or law firm associated with* the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
  (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
  (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
  (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
  (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
  (5) The identity, testimony, or credibility of a prospective witness.
  (6) Any opinion as to guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:
  (1) The name, age, residence, occupation, and family status of the accused.
  (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
  (3) A request for assistance in obtaining evidence.
  (4) The identity of the victim of the crime.
  (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
  (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
  (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
  (8) The nature, substance, or text of the charge.
  (9) Quotations from or references to public records of the court in the case.
  (10) The scheduling or result of any step in the judicial proceedings.
  (11) That the accused denies the charges made against him.

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

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

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

(G) *A lawyer or law firm associated with* a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
  (1) Evidence regarding the occurrence or transaction involved.
  (2) The character, credibility, or criminal record of a party, witness, or prospective witness.

prejudicial impact on the court proceeding.[42] This standard is very protective of a defendant's right to a fair trial.[43] DR 7-107 was the second of three rules adopted by the ABA in an attempt to limit extrajudicial statements from lawyers.

The adoption of DR 7-107, however, did not quiet the debate about lawyer no-comment rules. While several courts upheld the restrictions imposed by the "reasonable likelihood" standard,[44] other courts held that the standard unduly restricted attorneys' First Amendment rights.[45] Three cases, *Hirschkop v. Snead*,[46]

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(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, *a lawyer or law firm associated therewith* shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
(5) Any other matter reasonably likely to interfere with a fair hearing.

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

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

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1969) (emphasis added). DR 7-107 has not been revised since 1969.

42. C. WOLFRAM, MODERN LEGAL ETHICS § 12.2, at 633 (1986). The terms "reasonably likely" were taken from DR-7-107 of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY. For the text of DR 7-107, see *supra* note 41.

43. *See* Hirschkop v. Snead, 594 F.2d 356, 365 (4th Cir. 1979). The *Snead* court stated that rules which endorse the "clear and present danger" standard "were inadequate to protect judicial processes from the kind of extraneous influences which impaired their frankness or objectivity or created the appearance of such unfairness." *Id.*

44. *See, e.g., In re* Dow Jones & Co., Inc., 842 F.2d 603 (2d Cir. 1988), *cert denied*, 488 U.S. 946 (1988); Central S.C. Chapter, Soc'y of Professional Journalists v. Martin, 431 F. Supp. 1182, 1188 (D.S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); Hirschkop v. Virginia State Bar, 421 F. Supp. 1137 (E.D. Va. 1976), *aff'd in part and rev'd in part sub nom*, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Younger v. Smith, 106 Cal. Rptr. 225 (Cal. Ct. App. 1973); Hughes v. State, 437 A.2d 559 (Del. 1981); *In re* Hinds, 449 A.2d 483 (N.J. 1982); *In re* Rachmiel, 449 A.2d 505 (N.J. 1982); State v. Carter, 363 A.2d 366, *rev'd*, 365 A.2d 473 (N.J. Super. Ct. App. Div. 1976).

45. *See, e.g.*, CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *In re* Oliver, 452 F.2d 111 (7th Cir. 1971); Markfield v. Association of the Bar, 370 N.Y.S.2d 82, *appeal dismissed*, 375 N.Y.S.2d 106 (N.Y. App. Div. 1975).

46. 594 F.2d 356 (4th Cir. 1979). The issue in *Hirschkop* was whether rule 7-107 of the Virginia Code of Professional Responsibility violated the First Amendment right of lawyers.

Chicago Council of Lawyers v. Bauer,[47] and *Markfield v. Association of the Bar of the City of New York*,[48] are frequently noted as examples of the varying interpretation of and support for the "reasonable likelihood" standard.[49] These cases, in addition to *Nebraska Press Association v. Stuart*,[50] are often cited as the inspiration for the re-evaluation of the 1968 ABA standards and the publication of the third ABA no-comment rule.[51]

The third ABA no-comment rule, Rule 3.6 of the Model Rules of Professional Conduct, was adopted in 1983 by the ABA House of Delegates.[52] Rule 3.6, like DR 7-107 of the Model Code of Professional Responsibility, emanates from ABA-drafted fair trial and free press standards.[53] The drafters of the Code of Professional Conduct, however, did not incorporate the "clear and present danger" standard which was recommended by the fair trial and

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Hirschkop v. Snead, 594 F.2d 356, 361-62 (4th Cir. 1979). The Fourth Circuit discussed the application of the "serious and imminent threat" standard to the review extrajudicial comment by lawyers but rejected this standard in favor of one which is more protective of a defendant's right to a fair trial. *Id.* at 362. The court stated that "[t]he more appropriate standard is that the publication present a reasonable likelihood that it will be prejudicial to the fair administration of justice." *Id.*

47. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). In *Bauer*, the court replaced the "reasonable likelihood" standard used in DR 7-107, with a narrower, more restrictive standard—the "serious and imminent threat standard. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). However, the *Bauer* court applied this standard in a very unique way: it placed the burden on the defendant-attorney to prove that his or her statements were not a "serious and imminent threat to the fair administration of justice." *Id.* at 251. The court stated:

> We think that it is proper to formulate rules which would declare that comment concerning certain matters will presumptively be deemed a serious and imminent threat to the fair administration of justice so as to justify a prohibition against them. One charge with violating such a rule would of course have the opportunity to prove that his statement was not one that posed such a serious and imminent threat, but the burden would be upon him.

Id.

48. 370 N.Y.S.2d 82, *appeal dismissed*, 375 N.Y.S.2d 106 (N.Y. App. Div. 1975). In *Markfield*, the court stated that the DR 7-107 "reasonable likelihood" standard may be constitutionally sufficient but concluded that discipline should be applied only when it is found that an attorney's extrajudicial statements present a "clear and present danger" to the fair administration of justice. Markfield v. Association of the Bar of the City of New York, 370 N.Y.S.2d 82, 85, *appeal dismissed*, 375 N.Y.S.2d 106 (N.Y. App. Div. 1975).

49. AMERICAN BAR ASS'N ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 240-41 (1984).

50. 427 U.S. 539 (1976).

51. AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE, Standard 8-1.1(a), 8-7 to 8-13 (2d ed. 1980). The *Bauer* decision led to the incorporation of the "clear and present danger" standard into the Fair Trial and Free Press standards. *Id.* at 8-7. *See also* Matheson, *supra* note 38, at 875 (footnotes omitted) (noting that the decision in *Nebraska Press* "spurred an ABA study on fair trial and free press issues"). *See generally* AMERICAN BAR ASS'N ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 240-44 (1984) (discussing the legal history of Rule 3.6 of the Model Rules of Professional Conduct).

52. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1991). For the text of Rule 3.6, see *supra* note 11. Although the current edition of Model Rule 3.6 is dated 1991, its 1983 version of Rule 3.6 has not been revised.

53. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1991).

free press committee.[54] Instead, Rule 3.6 endorses the "substantial likelihood" standard.[55]

Most states have adopted the "substantial likelihood" standard recommended by the Model Rules;[56] however, the application of that test varies widely. For example, some courts and commentators equate the "substantial likelihood" standard with the "clear and present danger" standard.[57] Other courts have interpreted the "substantial likelihood" standard to be less protective of an attorney's right to freedom of speech and more deferential to the

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54. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 and cmt. (1991). Compare AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE, Standard 8-1.1(a) (2d ed. 1980), which provides:

> Extrajudicial statements by attorneys
>
> (a) A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication if such dissemination would pose a *clear and present danger* to the fairness of the trial.

Id. at 8-5 (emphasis added). The committee that adopted this standard did so because "[t]he profound concern for fairness to the criminal defendant reflected in *Sheppard* has led to a serious distortion of first amendment values in high-publicity cases. The primary thrust of the updated standards is to correct that distortion." *Id.* at 8-4. The Committee also stated that "the reasonable likelihood test is too relaxed to provide full protection to the first amendment interests of attorneys." *Id.* at 8-10.

55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991). For the text of Rule 3.6, see *supra* note 11. "The 'substantial likelihood' test of the Model Rules plainly permits more extrajudicial commentary by lawyers than does the 'reasonable likelihood' test of DR 7-107." WOLFRAM, *supra* note 42, at 634.

56. Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2741 n.1 (1991). Thirty-two states have adopted Rule 3.6 of the Model Code of Professional Conduct either verbatim or with minor changes. *Id.* These states therefore endorse the "substantial likelihood" standard. For the text of MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6, see *supra* note 11.

57. *See, e.g.*, Cox Arizona Publications, Inc. v. Collins, 818 P.2d 174 (Ariz. Ct. App. 1991) (interpreting the "substantial likelihood" standard to require proof that the "extrajudicial statement would pose a clear and present danger to the fairness of the trial"), *review granted*, 1991 Ariz. LEXIS 79 (Ariz. 1991); *In re* Hinds, 449 A.2d 483, 493 (N.J. 1982) (stating that the "substantial likelihood" standard is the "linguistic equivalent" of the clear and present danger test); Hirschkop v. Snead, 594 F.2d 356, 379 (4th Cir. 1979) (Winter, J., and Butzner, J., concurring and dissenting) (stating that the Supreme Court has "equated the clear and present danger test with language that connotes a real and substantial threat to the fairness of a trial"); 1GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 397 (2d ed. 1990) ("To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)"); Joseph T. Rotondo, Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 CORNELL L. REV. 1106, 1110-11 (1980) ("there is no constitutionally significant difference between the reasonable likelihood of prejudice standard and the serious and imminent threat standard. To properly apply either standard, courts must exercise judgement by weighing numerous relevant factors. Courts, therefore, should candidly adopt a balancing approach.").

Justice Kennedy, in Part I of his opinion, appears to equate the "substantial likelihood" standards with the "clear and present danger" standard. *See* Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2725 (1991). He points out that the difference between the two standards could prove to be "mere semantics." *Id.* According to Justice Kennedy, the words used to describe the test are not as important as the application. *Id.* "Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application." *Id.*

defendant's right to a fair trial.[58] The diverse interpretation of the "substantial likelihood" standard is troublesome because it does not provide a concrete test. Unfortunately, the *Gentile* decision does not clear the cloud of confusion. As one commentator noted: "An attorney can only guess what will be protected speech when four justices applying the same standard say it was a clear violation and four others say that it was not even close."[59]

As the history of the no-comment rules demonstrates, the correct standard of review applicable to extrajudicial speech by lawyers has been a topic of debate for years. Depending on the philosophy of a particular court, or the jurisdiction in which the legal proceeding is held, an attorney may be subject to one of the following trial publicity standards: 1) reasonable likelihood of prejudice to a fair trial, 2) substantial likelihood of material prejudice, 3) serious and imminent threat of material prejudice, or 4) clear and present danger of material prejudice.[60]

III. ANALYSIS OF THE DECISION

A. STANDARD OF REVIEW

In *Gentile v. State Bar of Nevada*,[61] the Court debated whether lawyers who are participating in judicial proceedings may be subjected to First-Amendment-free-speech restrictions that could not be imposed on the press or the general public."[62] The Court concluded that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the [clear and present danger test]; namely, the "sub-

58. *See* United States v. Simon, 664 F. Supp. 780, 783, 791-93 (S.D.N.Y. 1987) (In its decision to modify a restraining order which prohibited lawyers from commenting on a case, the court rejected the argument that "specific findings must be made that the expression 'restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest.'" Instead, the court appeared to endorse the "reasonable likelihood" or "substantial likelihood" of an unfair trial standard: "[T]he Court finds that an unrestrained field of attorneys and defendants would add enough fuel to an already voracious fire of publicity to create, at the very least, a real and substantial likelihood that some, if not all, defendants might be deprived of a fair trial."); *In re* Eisenberg, 423 N.W.2d 867, 874 n.4 (Wis. 1988) (refusing to adopt the clear and present danger standard of review in its trial publicity rule because it concluded that the "substantial likelihood" standard was adquate and proper), *petition denied*, 470 N.W.2d 898 (1991).

59. Nina J. Emerson, *Attorney Speech on Pending Trials*, WIS. LAWYER, Oct. 1992, at 16.

60. Every state except California has adopted a trial publicity rule which incorporates either the reasonable likelihood, substantial likelihood, serious and imminent threat, or clear and present danger standard. *See* Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2741 n.1-3 (1991); *supra* note 56 & *infra* note 102.

61. 111 S. Ct. 2720 (1991).

62. The "clear and present danger" standard is used to determine whether the First Amendment rights of the press or the general public have been violated. *Id.* at 2742-43.

stantial likelihood" standard recommended by Rule 3.6 of the Model Code of Professional Conduct.[63]

The Court based its conclusion on several considerations. First, prior decisions of the Court, such as *Sheppard v. Maxwell*[64] and *In re Sawyer*,[65] indicated that "the speech of *those participating before the courts* could be limited."[66] Second, lawyers have unique access to the courts and information about specific cases.[67] Third, lawyers are "officers of the court," and are therefore subject to stringent ethical standards by virtue of their status.[68] Fourth, the history of lawyer no-comment rules and the standard approved by most lower courts support the "substantial likeli-

63. *Id.* at 2744-45. For the text of Rule 3.6, see *supra* note 11.

64. 384 U.S. 333 (1966).

65. 360 U.S. 622 (1959).

66. *Gentile*, 111 S. Ct. 2720, 2743 (1991) (footnote omitted). Justice Rehnquist cited to *In re* Sawyer, 360 U.S. 622 (1959), and Sheppard v. Maxwell, 384 U.S. 333 (1966), in support of this statement. *Id.* He interpreted *Sawyer* to support the proposition that "lawyers in pending cases [may be] subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id. But see infra* note 71 (noting that *Sawyer* cannot be used as an example of the Court imposing restrictions on the First Amendment rights of attorneys by virtue of their status). The Court also quoted the following statement from *Sheppard*: "*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.*" *Gentile*, 111 S. Ct. at 2743 (quoting Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)).

67. *Gentile*, 111 S. Ct. at 2745 (1991). *See also In re* Hinds, 449 A.2d 483, 496 (N.J. 1982) ("[Attorneys are] individuals who have confidential information and an intimate knowledge of the merits of the prosecution. Their views are invested with particular credibility and weight in light of their positions. Hence, their statements relating to the trial are likely to be considered knowledgeable, reliable and true."); *In re* Rachmiel, 449 A.2d 505, 511 (N.J. 1982) ("[Attorneys] have a unique role and responsibility in the administration of criminal justice and, therefore, have an extraordinary power to undermine or destroy the efficacy of the criminal justice system." (citations omitted)); Matheson, *supra* note 38, at 885-89 (discussing the unique ethical duties of prosecutors because of their role in the judicial system).

68. *Gentile*, 111 S. Ct. at 2743-45. The Court indicated that because lawyers play a unique role in the judicial system, their right to publicly discuss legal proceedings may be limited. "As officers of the court, court personnel and 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." *Id.* at 2744 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (1976). *See also* Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice, and have historically been 'officers of the courts.' "), *rehearing denied*, 423 U.S. 886 (1975); Theard v. United States, 354 U.S. 278, 281 (1957) ("Membership in the bar is a privilege burdened with conditions.") (citation omitted); Hirschkop v. Snead, 594 F.2d 356, 370 (4th Cir. 1979) ("Lawyers are officers of the courts and . . . they have very special responsibilities for lending support to maintenance of the integrity of the judicial system. The mores of the marketplace are not the measures for the conduct of lawyers and judges, and lawyers may be held to higher standards than policemen."); National Broadcasting Co. v. Cooperman, 501 N.Y.S.2d 405, 408 (N.Y. App. Div. 1986) ("[A]ttorneys, as officers of the court, have a legal and ethical responsibility to safeguard the right to a fair trial.") (citation omitted); *In re* Cieminski, 270 N.W.2d 321, 327 (N.D. 1978) ("As to standards of conduct we have, on several occasions, stated that lawyers, being officers of the court, hold a position of public trust and are held to a higher standard than laymen.") (citations omitted).

hood" standard.[69]

Justices Kennedy, Marshall, Blackmun, and Stevens disagreed with the majority's creation of a lower standard for lawyer's speech regarding a legal proceeding.[70] Justice Kennedy argued that there was no justification for relegating attorneys to a constitutionally inferior status. He noted that the cases upon which the State Bar of Nevada relied to justify restrictions on lawyer's speech did not place restrictions on lawyers by virtue of their status, but rather, placed restrictions only on the information released.[71] Citing to *In re Primus*[72] and *Bates v. State Bar of Arizona*,[73] Justice

69. *Gentile*, 111 S. Ct. at 2740-43. Since the publication of the Model Rules of Professional Conduct, most states have endorsed the "substantial likelihood" standard. *See supra* note 56.

70. *Gentile*, 111 S. Ct. at 2732-36.

71. *Id.* at 2733-34. The Respondent and Justice Rehnquist, who was writing for the majority in parts I and II of the decision, relied upon Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), *In re* Sawyer, 360 U.S. 622 (1959), Sheppard v. Maxwell, 384 U.S. 333 (1966), and Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), to support the proposition that an attorney's speech concerning ongoing legal proceedings could be subjected to a lower standard of review. *Gentile*, 111 S. Ct. at 2743-45. Justice Kennedy argued that in each of these cases the Court suggested restrictions upon the information released, not a limitation on the entire scope of speech by attorneys. *Id.* at 2733-34.

For example, in *Seattle Times*, the Court placed restrictions on the release of information learned via the discovery process. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984). The Court restricted the release of specific information—not an attorney's right to speak. *Gentile*, 111 S. Ct. at 2733.

Similarly, in *Sawyer*, an attorney was disciplined for allegedly impugning the impartiality and fairness of the presiding judge because she made statements about Smith Act prosecutions. *In re* Sawyer, 360 U.S. at 623-26. The *Sawyer* Court did not even address the First Amendment issue. *Id.* at 627. Instead, it decided that the evidence was insufficient to support a charge of professional misconduct. *Id.* at 626. Thus, there is strong support for Justice Kennedy's argument that *Sawyer* cannot be used as an example of the Court imposing restrictions on the First Amendment rights of attorneys by virtue of their status. *See Gentile*, 111 S. Ct. at 2733.

Justice Kennedy also claimed that *Sheppard* cannot be viewed as a case which supports blanket restrictions on the scope of a lawyer's speech because "the prejudice to Dr. Sheppard's fair trial right can be traced in principal part to police and prosecutorial irresponsibility and the trial court's failure to control the proceedings and the courthouse environment." *Gentile*, 111 S. Ct. at 2734. Thus, Justice Kennedy implies that if the trial court had imposed the necessary restrictions, and if the police officers and prosecutors had acted responsibly, there would be no need for a blanket restriction on the speech of lawyers involved in the judicial proceeding. *See id.* The penalty was imposed by the Court because of the specific circumstances of this case, namely, regulation of the release of specific information; not because there was a need to restrain the speech of all participants in a trial by virtue of their status. *Id.*

In *Nebraska Press*, the Court addressed the question of whether a judge could restrain the press from publishing information that may prejudice prospective jurors against the defendant. *Nebraska Press*, 427 U.S. at 541-44 (1976). Because the *Nebraska Press* court addressed the issue of whether prior restraints could be imposed on the press, not on attorneys, Justice Kennedy claimed that respondent's reliance on this case to impose a lower standard of review on attorney's speech was improper. *Gentile*, 111 S. Ct. at 2734.

72. 436 U.S. 412 (1978). The *Primus* Court found that an attorney who sent letters to potential clients on behalf of the ACLU could not be disciplined for violating an attorney disciplinary rule, because the solicitation was a form of expression protected by the First Amendment. *In re* Primus, 436 U.S. 412, 439 (1978).

73. 433 U.S. 350, *reh'g denied*, 434 U.S. 881 (1977). The *Bates* Court favored a lawyer's right to advertise, a limited First Amendment right, over a state disciplinary rule which

Kennedy concluded that First Amendment rights are not sacrificed at the expense of ethics regulations.[74] Accordingly, he argued that a blanket rule imposing a lower standard of review on the speech of attorneys who are participating in legal proceedings was impermissible "without careful First Amendment scrutiny."[75]

Justice Kennedy was not the first Supreme Court Justice to refuse to subordinate First Amendment rights to Sixth Amendment rights. In *Nebraska Press Association v. Stuart*,[76] the Court stated: "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."[77] Thus, as early as 1976, the Court emphasized the importance of serving both constitutional rights equally.

The State Bar of Nevada argued that the *Procunier v. Martinez*[78] balancing test should be used to assess the restrictions on attorneys' First Amendment rights.[79] Justice Kennedy disagreed, noting that the balancing test should not apply to political speech.[80] However, for the sake of argument, he applied the bal-

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prohibited lawyers from advertising in newspapers or other media. Bates v. State Bar of Ariz., 433 U.S. 350, 384, *reh'g denied*, 434 U.S. 881 (1977).

74. *Gentile*, 111 S. Ct. at 2734. Justice Kennedy stated that "[a]t the very least our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Id.* Thus, he refused to condone the imposition of categorical restrictions of First Amendment rights for lawyers, under the circumstances in this case. *Id.*

75. *Id.* at 2734-35. Justice Kennedy was careful to point out that Model Rule 3.6 was not unconstitutional as long as the "substantial likelihood" standard is interpreted to punish "only speech that creates a danger of imminent and substantial harm." *Id.* at 2725. "Each standard requires an assessment of proximity and degree of harm." *Id.*

76. 427 U.S. 539 (1976).

77. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976).

78. 416 U.S. 396 (1974), *rev'd on other grounds*, Thornburgh v. Abbott, 490 U.S. 401 (1989). One of the issues in *Procunier v. Martinez* was "whether a particular regulation or practice . . . constitutes an impermissible restraint of First Amendment liberties." Procunier v. Martinez, 416 U.S. 396, 413 (1974). The "particular regulation" referred to in *Procunier* permitted prisoner mail censorship. *Id.* at 398, 413. In applying a balancing test that weighed the First Amendment rights of the prisoners against the state interest in censoring the mail, the Court decided in favor of the inmates. *Id.* at 415-16.

79. *Gentile*, 111 S. Ct. at 2734. The *Procunier v. Martinez* balancing test is as follows:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Procunier, 416 U.S. at 413. Justice Rehnquist, writing for a majority of the Court, found that Nevada had a substantial interest in limiting lawyers' speech and that this restraint on speech was narrowly tailored to achieve the state's objectives. *Gentile*, 111 S. Ct. at 2745.

80. *Gentile*, 111 S. Ct. at 2733-36. Justice Kennedy stated that the cases used by the respondent to support the use of the balancing test did not apply to the present situation. *Id.* at 2733. Those cases decided issues relating to commercial speech or to a limitation on the use of information learned during discovery. *Id.* The rationale applied in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), and Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984),

ancing test and concluded that Nevada Supreme Court Rule 177, as interpreted by the Nevada court, failed the test.[81]

Justice Kennedy applied the first prong of the balancing test and determined that the State does not have a substantial interest in limiting the First Amendment rights of lawyers without applying exacting scrutiny.[82] To further this argument, he noted that very few cases are prejudiced by pretrial publicity.[83] He also suggested that there is less justification for imposing restrictions on the speech of defense attorneys than for prosecuting attorneys.[84]

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does not apply to this case because Mr. Gentile was punished for "pure" political speech. *See Gentile*, 111 S. Ct. at 2733. Political speech is subject to greater First Amendment protection than commercial speech. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977), *rehearing denied*, 434 U.S. 881 (1977). In addition, Mr. Gentile did not release any information acquired through the discovery process. *See Gentile*, 111 S. Ct. at 2733. Therefore, *Gentile* is distinguishable from *Seattle Times* and *Bates*. *Id.*

81. *Gentile*, 111 S. Ct. 2720, 2734-36 (1991).

82. *Id.* at 2734-35. For the text of the *Procunier v. Martinez* balancing test, see *supra* note 79.

83. *Gentile*, 111 S. Ct. at 2734. In concluding that very few cases are prejudiced by pretrial publicity, Justice Kennedy relied on the following sources: Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515, 528 (1977) (concluding that "for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning and greater detachment."); 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, 35 (1989) (concluding that "the magnitude of the fair trial-free press issue may be overblown. Most trial judges and other judicial sources do not seem to perceive frequent, major problems with prejudicial publicity.") (footnote omitted). *Gentile*, 111 S. Ct. at 2734.

Another study on the topic is reported at Ralph Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 JUDICATURE 162, 169 (1988). Professor Frasca found that only two percent of jurors who are prejudiced by press coverage retain this prejudice until they deliberate the guilt or innocence of the defendant. *Id.* He further concluded that "assuming random distribution of all variables, press-induced bias would occur .0001 per cent of the time, or in one of every 10,000 cases." *Id.* at 169. Professor Frasca also noted that U.S. Circuit Court Judge William J. Bauer conducted a study which concluded that only six percent of prospective jurors said, during voir dire, that they remembered news stories about a highly-publicized case. *Id.* at 168. Scott Matheson also provides a list of sources which support Justice Kennedy's argument that very few trials are prejudiced by pretrial publicity because very few crimes are reported by the press. Matheson, *supra* note 38, at 866 n.3 (1990).

Justice Kennedy was not the first Supreme Court justice to point out that few cases are prejudiced by pretrial publicity. In *Nebraska Press*, Chief Justice Burger noted that "[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important [Sixth Amendment] right." *Nebraska Press*, 427 U.S. at 551. He also stated that "pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Id.* at 554.

84. Gentile v. State of Nev., 111 S. Ct. 2720, 2734 (1991). Justice Kennedy relied on the following articles to argue that there is less justification for suppressing the speech of defense lawyers than there is for prosecuting attorneys: Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003, 1031-49 (1984) and 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, 35 (1989). *Gentile*, 111 S. Ct. at 2734-35.

Other sources in support of this position are: Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 253 (7th Cir. 1975) (stating that DR 7-107 should not be applied to defense

In applying the second prong of the balancing test,[85] Justice Kennedy argued that attorneys' speech cannot be suppressed simply because it is persuasive.[86] He concluded that Nevada Supreme Court Rule 177, as interpreted by the Nevada Supreme Court, "represents a limitation of First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood."[87]

Thus, while a majority of the Court concluded that the "substantial likelihood" standard should be applied to lawyers,[88] four members of the Court argued that attorneys' speech should not be subjected to a lower standard simply by virtue of their status.[89] Instead, each situation should be reviewed to determine if the attorney's speech "creates a danger of imminent and substantial harm."[90]

B. VAGUENESS

The *Gentile* Court reviewed Nevada Supreme Court Rule 177 and found that "absent any clarifying interpretation" by the Nevada Supreme Court, Rule 177(3)[91] was unconstitutionally

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attorneys before an indictment is issued), *cert. denied*, 427 U.S. 912 (1976); AMERICAN BAR ASS'N ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 246 (1984) ("It has been argued that limitations on extrajudicial comment should be applied only to prosecuting lawyers and to plaintiffs' counsel."); AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE, Standard 8-1.1(a), 8-7 n.4 (2d ed. 1980) (stating that Standard 8-1.1(a) applies equally to prosecuting attorneys and defense attorneys, but notes that several courts and commentators are in disagreement with this position); Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607 (1977) (arguing that a defense attorney's right to comment should not be limited); Matheson, *supra* note 38, at 884-88 (arguing that a prosecutor's role as advocate for the state, officer of the court, executive branch employee, and political actor may subject him to restrictions on his or her extrajudicial comment that do not apply to defense attorneys).

85. For the text of the *Procunier v. Martinez* balancing test, see *supra* note 79.

86. *Gentile*, 111 S. Ct. at 2735. Justice Kennedy stated that "[i]f the dangers of [attorneys'] speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent." *Id.*

87. *Id.* at 2736. There are less restrictive ways of ensuring that trial publicity does not prejudice a fair trial. For example, a court could use procedural remedies such as change of venue, continuances, searching voir dire and sequestration. Nina J. Emerson. *Attorney Speech on Pending Trials*, WIS. LAWYER, Oct. 1992, at 64.

88. *Id.* at 2745.

89. *Id.* at 2733-34.

90. *Id.* at 2725.

91. Nevada Supreme Court Rule 177 is reprinted in Appendix B of the *Gentile* opinion. *Id.* at 2737-38. *See also* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6, *supra* note 11. Rule 177(3) is identical to Rule 3.6(c) of the Model Code of Professional Conduct except for the paragraph numbering system. *Compare* NEV. CT. R. 177 *with* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6.

vague.[92] Subsection 177(3) provides, in pertinent part: "Not withstanding Subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration: (a) the general nature of the claim or defense: . . . (c) . . . the general scope of the investigation . . . ."[93] Thus, subsection three appears to permit an attorney to make certain statements even though subsections one and two forbid such discussion. The rule was found to be void for vagueness because the adjectives "general" and "elaboration" in subsection three were "classic terms of degree" providing no real guidance to the lawyer who wants to make a public statement.[94] "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."[95] Thus, five members of the Court held that subsection three of Nevada Supreme Court Rule 177 was unconstitutionally vague on its face because of its susceptibility to discriminatory enforcement.[96]

The Court also found that Rule 177(3) was vague as applied to Mr. Gentile.[97] In reviewing the press conference, the Court noted that Mr. Gentile made a genuine attempt to comply with Rule 177.[98] "The fact that Gentile was found in violation of the rules after studying them and making a conscious effort at compliance

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92. *Gentile*, 111 S. Ct. at 2731.

A statute will be held void for vagueness if the conduct forbidden by it is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). "[G]enerally stated, the void-for-vagueness doctrine requires that a penal statute define the *criminal* offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (emphasis added). Thus, the main concerns of the vagueness doctrine are notice and arbitrary enforcement.

However, at least one court has asserted that the vagueness test will be applied less stringently in cases where the defendant has been punished for breaking an administrative rule as opposed to a criminal statute. Sloman v. Board of Pharmacy Examiners, 440 N.W.2d 609, 611 (Iowa 1989). *See also* Gust v. Pomeroy, 466 N.W.2d 137, 140 (N.D. 1991) (rejecting an argument that a regulatory statute was vague, the court stated that "the requirement of notice of proscribed conduct is not more and may be less, stringent as applied to statutes imposing non-criminal penalties"). For additional information regarding the vagueness doctrine as applied to disciplinary or administrative rules, see *infra* text accompanying notes 137-49.

93. NEV. CT. R. 177. Nevada Supreme Court Rule 177 is reprinted in Appendix B of the *Gentile* opinion. *Gentile*, 111 S. Ct. at 2737-38. *See also* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6, *supra* note 11. Rule 177(3) is identical to Rule 3.6(c) of the Model Code of Professional Conduct except for the paragraph numbering system. *Compare* NEV. CT. R. 177 *with* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6.

94. *Gentile*, 111 S. Ct. at 2731. Because Model Rule 3.6 contains the same verbage, many states may face similar vagueness problems unless state courts narrowly construe their no-comment rule. For the text of Rule 3.6 of the Model Code of Professional Conduct, see *supra* note 11.

95. *Gentile*, 111 S. Ct. at 2731.

96. *Id.* at 2732.

97. *Id.*

98. *Id.*

demonstrates that Rule 177 creates a trap for the wary as well as the unwary."[99] The Court reasoned that because Mr. Gentile was found to be in violation of Rule 177, the rule was too imprecise to survive a constitutional challenge.[100] Accordingly, the Court held that Rule 177(3) was void for vagueness.[101]

IV. IMPLICATIONS AND APPLICATION TO NORTH DAKOTA LAW

A. STANDARD OF REVIEW

North Dakota is one of only six states to endorse a trial publicity standard of scrutiny which is more speech-protective than Rule 3.6 of the Model Rules of Professional Conduct.[102] Rule 3.6 of the North Dakota Rules of Professional Conduct provides:

> Trial Publicity
>
> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of mass public communication if the lawyer knows or reasonably should know that the statement will create a *serious and imminent threat of materially preju-*

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99. *Id.*

100. *Id.*

101. *Id.* at 2732. In a dissenting opinion written by Justice Rehnquist, however, four members of the Court argued that subsection three, as applied to Mr. Gentile, was not unconstitutionally vague. *Id.* at 2746-47. Justice Rehnquist noted that the two issues addressed by the vagueness doctrine were the "defendant's right to fair notice and adequate warning." *Id.* at 2746. He concluded that because Mr. Gentile "admitted that his primary objective in holding the press conference was the violation of Rule 177's core prohibition—to prejudice the upcoming trial by influencing potential jurors," Gentile could not claim that he was not given notice or a warning. *Id.* Thus, Justice Rehnquist argued that Rule 177 gave Mr. Gentile adequate notice that his statements at the press conference were "substantially likely" to have a prejudicial effect. *Id.* Justice Rehnquist also stated that Rule 177 was constitutional on its face, thereby dismissing Mr. Gentile's argument that the rule was facially vague and overbroad. *Id.*

102. The six states are Alabama, Illinois, Maine, Oregon, North Dakota and Virginia. *See* ALA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1990) ("substantial likelihood of materially prejudicing an adjudicative proceeding." However, the comments to the rule provide that the "serious and imminent threat" standard is to be applied.); ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992) ("serious and imminent threat to the fairness of an adjudicative proceeding"); ME. CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.7(j) (1992) ("substantial danger of interference with the administration of justice"); N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992) ("serious and imminent threat of materially prejudicing an adjudicative proceeding"); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1991) ("serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect"); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1992) ("clear and present danger of interfering with the fairness of the trial by a jury").

The District of Columbia also adopted a very speech protective standard. *See* D.C. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992) ("serious and immiment [sic] threat to the impartiality of the judge or jury").

dicing an adjudicative proceeding.[103]

There have been no North Dakota appellate decisions interpreting Rule 3.6, nor has the State Bar Association of North Dakota Ethics Committee issued a formal or informal opinion on the issue of trial publicity.[104] Therefore, a review of North Dakota Supreme Court decisions regarding the topic of trial publicity, in its general sense, may provide guidance in interpreting the standard.

Many North Dakota trial publicity cases address the question of whether a defendant is entitled to a change of venue.[105] In most of the cases, the North Dakota Supreme Court upheld lower court decisions refusing to grant a change of venue due to pretrial publicity.[106] In determining whether to grant a change of venue,

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103. N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991) (emphasis added).

North Dakota modeled its rule after a District of Columbia trial publicity rule. North Dakota Attorney Standards Comm., Minutes of the Professional Conduct Subcomm., at 12 (November 8, 1985) ("PAUL EBELTOFT MADE AND JUDGE KERIAN SECONDED A MOTION TO APPROVE THE DISTRICT OF COLUMBIA DRAFT RULE 3.6 WITHOUT CHANGE TO REPLACE THE ABA MODEL RULE 3.6. PASSED UNANIMOUSLY."). Minor revisions were made to Rule 3.6 of the North Dakota Rules of Professional Conduct on January 31, 1986, but the standard remained unchanged. *See* North Dakota Attorney Standards Comm., Minutes of the Professional Conduct Subcomm., at 12 (January 31, 1986).

The "serious and imminent threat" standard appears to have originated from Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The court in *Bauer* adopted the "serious and imminent threat" standard. *Id.* at 249. The Comments to Rule 3.6 of the North Dakota Rules of Professional Conduct cite to the "ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978" as the source of the standard. N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1992). The ABA Standards Relating to Fair Trial and Free Press adopted the "clear and present danger" standard. AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE, Standard 8-1.1(a), 8-5 (2d ed. 1980). The decision in *Chicago Council of Lawyers v. Bauer* led to the incorporation of the "clear and present danger" standard into the Fair Trial and Free Press standards. AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE, Standard 8-1.1(a), 8-7 (2d ed. 1980).

104. The author of this article conducted an electronic search and a manual search in an effort to find a recent appellate decision discussing Rule 3.6 of the North Dakota Rules of Professional Conduct. The manual search included a review of *Shepard's Citators*, the comments to Rule 3.6, and the legislative history of Rule 3.6. No decisions were discovered.

The search for an ethics opinions on point was conducted by requesting the State Bar Association of North Dakota Ethics Committee to send a copy of all decisions issued in North Dakota. No opinions on trial publicity were discovered. In addition, the author searched the *ABA/BNA Lawyer's Manual on Professional Conduct* for copies of or articles on North Dakota Ethics Opinions and court decisions. The search was fruitless. If there are any trial publicity decisions, it appears that they have not been published.

105. *See, e.g.*, cases cited *infra* note 106.

106. *See* State v. Leidholm, 334 N.W.2d 811 (N.D. 1983) (holding that the trial court did not abuse its discretion in refusing to change the venue due to pretrial publicity in a case in which the defendant was convicted of murdering her husband); Houle v. North Dakota Dist. Court, 293 N.W.2d 872 (N.D. 1980) (determining that the pretrial publicity was not prejudicial to the defendant and would not prevent him from receiving a fair trial. Thus, the decision to deny defendant's change of venue request was affirmed.); Basin Elec. Power Coop. v. Boschker, 289 N.W.2d 553 (N.D. 1980) (refusing to grant a change of venue was not an abuse of discretion); State v. Engel, 289 N.W.2d 204 (N.D. 1980) (denial of defendant's request to a change of venue was not an abuse of discretion); State v. Page, 277 N.W.2d 112 (N.D. 1979) (denial of defendant's request for a change of venue was not an abuse of discretion).

Two cases differ from this pattern. In *Jerry Harmon Motors v. First Nat'l Bank*, the

the court generally applied the "reasonable likelihood of prejudice" standard.[107]

In all other cases, however, the North Dakota Supreme Court applied a more speech-protective standard. For example, in *State v. McLain*[108] the court stated: "We will not presume unfairness of a constitutional magnitude unless a trial atmosphere existed which was *utterly corrupted by media coverage.*"[109] In *State v. Klem*,[110] *KFGO Radio, Inc. v. Rothe*,[111] and *State v. Teigen*,[112] the court stressed the importance of the public's right to information about court proceedings.[113] The court also supports the presumption that jurors will remain impartial regardless of pretrial publicity.[114]

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court upheld a district court decision to grant a change of venue. Jerry Harmon Motors v. First Nat'l Bank, 440 N.W.2d 704 (N.D. 1989). "The district court stated that the pre-trial publicity was not inherently prejudicial, but recognized the likelihood that 'some polarization' still existed. In our view there was ample evidence presented to the district court to suggest that 'some polarization' still existed.' " *Id.* at 708.

In *Olson v. North Dakota District Court*, the court overruled a lower court decision to deny defendant's motion for change of venue from Fargo to Minot. Olson v. North Dakota Dist. Court, 271 N.W.2d 574 (N.D. 1978). The court applied the "reasonable likelihood of prejudice" standard and determined that the motion should have been granted. *Id.* at 579-83 (N.D. 1978).

107. The "reasonable likelihood" standard was adopted in Olson v. North Dakota Dist. Court, 271 N.W.2d 574, 579 (N.D. 1978).

108. 301 N.W.2d 616 (N.D.), *appeal denied*, 312 N.W.2d 343 (N.D. 1981).

109. State v. McLain, 301 N.W.2d 616, 623 (N.D.) (citations omitted) (emphasis added), *appeal denied*, 312 N.W.2d 343 (N.D. 1981).

110. 438 N.W.2d 798 (N.D. 1989).

111. 298 N.W.2d 505 (N.D. 1980).

112. 289 N.W.2d 242 (N.D. 1980).

113. State v. Klem, 438 N.W.2d 798, 801 (N.D. 1989); KFGO Radio, Inc. v. Rothe, 298 N.W.2d 505, 513 (N.D. 1980); State v. Teigen, 289 N.W.2d 242, 245 (N.D. 1980).

In *Klem*, the court held that the trial court was required to hold a hearing before excluding the public from a courtroom during the testimony of a child. *Klem*, 438 N.W.2d at 802-03. In reaching this conclusion, the court noted that " '[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " *Id.* at 801 (quoting Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984)). *See also* State v. La Fontaine, 293 N.W.2d 426 (N.D. 1980) (affirming a lower court's decision to refuse to close a pretrial proceeding).

In *KFGO Radio*, the court upheld the district court's decision to allow the press access to a state's attorney's inquiry. *KFGO Radio*, 298 N.W.2d at 514. The court emphasized the importance of a defendant's right to a fair trial by declaring that "the right of access to judicial proceedings is limited both by the constitutional right to a fair trial and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." *Id.* at 513. The holding of the court, however, appears to give priority to the First Amendment freedom of the press. The court decided to open the state's attorney's inquiry because there was an "absence of legislation which requires that the inquiry be closed to the public." *Id.* at 514. The court could have given more deference to the defendant's right to a fair trial, but instead chose to support the freedom of the press in the absence of legislation to the contrary.

The *Teigen* court stated that "[t]he publication of judicial proceedings may be to the disadvantage of a particular individual. However, such proceedings are events of legitimate public concern. It is important both to the community and to the criminal process that the public be informed of events that transpire in the courtroom." *Teigen*, 289 N.W.2d at 245.

114. State v. Olson, 274 N.W.2d 190 (N.D. 1978). In *Olson*, the court determined that pretrial publicity was not prejudicial enough to cause a mistrial. *Id.* at 193. In reaching this conclusion, the court stated that:

Thus, if an attorney is disciplined for making extrajudicial statements, it appears that the North Dakota Supreme Court would uphold the "serious and imminent threat" standard.[115]

Although *Gentile v. State Bar of Nevada*[116] may tempt the Professional Conduct Subcommittee and the North Dakota Supreme Court to lower the standard of scrutiny, Justice Kennedy's argument for a more speech-protective standard should be persuasive to North Dakota decision-makers for several reasons. First, discussion regarding judicial proceedings is political speech. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. . . . The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legiti-

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> In determining whether a defendant was deprived of a fair and impartial jury, the court will not readily discount the assurances of a juror as to his impartiality. It remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror to overcome a presumption of impartiality and raise a presumption of partiality.

Id.

See also State v. Olson, 290 N.W.2d 664, 668 (N.D. 1980) (stating that "knowledge obtained from news coverage and 'common gossip' does not automatically disqualify a person from serving as a juror."); State v. Lueder, 242 N.W.2d 142, 147 (N.D. 1976) (stating that proof of prejudice is required in order to prove that pretrial publicity prevented a fair trial).

In addition, Justice Kennedy noted that very few cases are prejudiced by pretrial publicity. *See supra* note 83 and accompanying text.

115. In only one case did the court appear to subordinate First Amendment rights to a defendant's right to a fair trial. In Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72 (N.D. 1983), the court stated:

> The news media's access to the courtroom is subordinate to the defendant's right to a fair trial. The news media under the North Dakota Constitution does not have any greater right than it has under the United States Constitution. Consequently, the opinions of the United States Supreme Court on this topic have full application in this state. If anything is different, it is the caveat contained in Article I, Section 4, North Dakota Constitution, in effect providing that the persons who write, speak and publish their opinions are . . . 'responsible for the abuse of that privilege.'

Id. at 79 (citations omitted). *But see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976) (stating that "[t]he authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."); Waller v. Georgia, 467 U.S. 39, 46 (1984) ("there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and the public.")

However, *Jorgensen* is distinguishable from the other trial publicity cases discussed above. In determining whether to grant the press access to a preliminary examination, the court in Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72 (N.D. 1983), was careful to note that "[t]he preliminary examination is not a trial nor is it a pretrial proceeding." *Id.* at 75. Thus, the court was not setting a policy of prioritizing a defendant's Sixth Amendment rights over the First Amendment right to freedom of the press. Instead, the court considered the prejudicial effect of publicizing a preliminary examination and determined that under the circumstances of this case, the trial court did not abuse its discretion in issuing an order to close a preliminary hearing. *Id.* at 79-81. *See also* Minot Daily News v. Holum, 380 N.W.2d 347 (N.D. 1986) (providing a procedure for determining when motions to close preliminary examinations may be granted).

116. 111 S. Ct. 2720 (1991).

mate interest in their operation."[117] The "substantial likelihood" standard suppresses lawyers' speech, thereby preventing the people who best understand the legal process from commenting on the judicial system. The lower standard also interferes with the public's right to know because it limits access to information from an attorney.[118] There is no constitutional justification for suppressing political speech from lawyers, simply because they participate in the judicial system.[119]

Second, the "substantial likelihood" standard should not be adopted in North Dakota because there are less restrictive ways of ensuring that pretrial publicity does not prejudice a fair trial. For example, a court could use procedural remedies such as change of venue, continuances, searching voir dire, or sequestration.[120] In the event that these remedies do not work, a court may order a new trial.[121] A court could also consider drafting a judicial order that "directly define[s] protected and unprotected speech after considering evidence presented at an adversarial proceeding."[122]

Third, Justice Kennedy's argument for a more speech-protective standard should be persuasive to North Dakota decision-makers because they do not appear willing to subordinate attorneys' First-Amendment-free-speech rights to defendants' Sixth-Amendment-fair-trial rights. The "substantial likelihood" standard is a blanket limitation on lawyers' speech about pending trials which elevates Sixth Amendment fair trial interests over First Amendment rights.[123] However, the North Dakota Supreme Court is very protective of the First Amendment right to freedom of speech.[124] Additionally, the Professional Conduct Subcommittee is apparently concerned about the First Amendment rights of law-

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117. *Gentile*, 111 S. Ct. at 2724.

118. Nina J. Emerson, *Attorney Speech on Pending Trials*, WIS. LAWYER, Oct. 1992, at 64 [hereinafter *Attorney Speech*].

119. *Gentile*, 111 S. Ct. 2735-36.

120. *Attorney Speech*, *supra* note 118, at 64.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.*, City of Jamestown v. Beneda, 477 N.W.2d 830 (N.D. 1991); City of Bismarck v. Schoppert, 469 N.W.2d 808 (N.D. 1991); State v. Klem, 438 N.W.2d 798 (N.D. 1989); State v. McLain, 301 N.W.2d 616 (N.D.), *appeal denied*, 312 N.W.2d 343 (N.D. 1981); KFGO Radio, Inc. v. Rothe, 298 N.W.2d 505 (N.D. 1980); State v. Olson, 290 N.W.2d 664 (N.D. 1980); State v. Teigen, 289 N.W.2d 242 (N.D. 1980); State v. Olson, 274 N.W.2d 190 (N.D. 1978); State v. Leuder, 242 N.W.2d 142 (N.D. 1976). *See also* Charles A. Stock, Comment, *Constitutional Law—First Amendment—North Dakota's Disorderly Conduct Statute: Is it Limited to Fighting Words, or Unconstitutionally Overbroad and Vague?*, 67 N.D. L. REV. 123, 150-51 (1991) (noting that the North Dakota Supreme Court endorsed a progressive First Amendment position when it tacitly acknowledged that a police officer must exercise a higher degree of restraint when verbally challenged or criticized).

yers, because it adopted the "serious and imminent threat" standard instead of endorsing the lower "substantial likelihood" standard recommended by Rule 3.6 of the Model Code of Professional Conduct.[125] Therefore, the drafters of Rule 3.6 of the North Dakota Rules of Professional Conduct should not change the standard of scrutiny as a result of *Gentile*.

B. OVERBREADTH AND VAGUENESS

The decision in *Gentile v. State Bar of Nevada*[126] also raises questions about the constitutionality of Rule 3.6 of the North Dakota Rules of Professional Conduct. In *Gentile*, Justice Rehnquist argued that Nevada Supreme Court Rule 177 was not overbroad because it "applie[d] only to lawyers involved in the pending case at issue."[127] The North Dakota no-comment rule, however, is not limited to attorneys participating in pending litigation.[128] In fact, the authors of the rule specifically intended the rule to apply to all lawyers whether or not they are involved in the

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125. For the text of Rule 3.6 of the North Dakota Rules of Professional Conduct, see *supra* text accompanying note 103. *See also* N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1991). For the text of Model Rule 3.6, see *supra* note 11.

126. 111 S. Ct. 2720 (1991).

127. *Id.* at 2746. (Rehnquist, J., dissenting). Justice Rehnquist clarified that the Court was not ruling on the issue of whether Rule 177 would be unconstitutional if applied to a lawyer that was not participating in a pending case. *Id.* at 2744 n.5. However, he did point out that the Court has applied the "clear and present danger" standard to the speech of an "officer of the court" when he made the statements in "his capacity as a private citizen." *Id.* at 2744 n.5 (citing Wood v. Georgia, 370 U.S. 375 (1962)). Thus, it appears that Justice Rehnquist considers participation in a legal proceeding a significant factor in the determination of whether a no-comment rule is overbroad.

A statute or rule is overbroad if "it offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected [First Amendment] freedoms.'" Zwickler v. Koota, 389 U.S. 241, 250 (1967). "Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963). Statutes regulating speech must "punish only unprotected speech and not be susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 522 (1972). When a statute "is susceptible of application to protected speech, . . . [it] is constitutionally overbroad and therefore is facially invalid." Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974).

128. *See* N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992).

Of the six states that endorse a more speech-protective standard, two specifically provide that the rule governing trial publicity applies to lawyers participating in an adjudicative proceeding only. *See* ALA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1990) ("A lawyer shall not make an extrajudicial statement . . . ."); ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992) ("A lawyer shall not make an extrajudicial statement . . . ."); ME. CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.7(j) (1992) ("A lawyer involved in the prosecution or defense of a criminal matter or in representing a party to a civil cause . . . ."); N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992) ("A lawyer shall not make an extrajudicial statement . . . ."); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1992) ("A lawyer shall not make an extrajudicial statement . . . ."); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1992) ("A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter . . . .").

The District of Columbia also narrowed its rule to apply to lawyers participating in a

pending case about which the comment was made.[129] It appears that the *Gentile* Court would find this broad construction unconstitutional.[130]

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legal proceeding. *See* D.C. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992) ("A lawyer engaged in a case being tried to a judge or jury . . . . ").

In addition to Alabama, Illinois, North Dakota and Oregon, thirty states endorse a no-comment rule which applies to all lawyers: "A lawyer shall not make an extrajudicial statement . . . ." *See* ARIZ. RULES OF PROFESSIONAL CONDUCT ER 3.6 (1992); ARK. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); CONN. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991); DEL. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1987); FLA. RULES REGULATING THE FLORIDA BAR Rule 4-3.6 (1992); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1986); IND. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); KY. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); RULES OF PROFESSIONAL CONDUCT OF THE LA. STATE BAR ASSOCIATION Rule 3.6 (1991); MD. LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); MICH. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991); MINN. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991); MISS. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); MO. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); MONT. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991); NEV. CT. R. 177 (1991); N.H. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); N.J. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-306 (1991); OKLA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991); PA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991); R.I. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991-92); S.C. RULES OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1991); S.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1987); TEX. RULES OF PROFESSIONAL CONDUCT Rule 3.07 (1991); UTAH RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); WASH. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); W.VA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991); WIS. RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS Rule 3.6 (1991); WYO. RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 3.6 (1986). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6, *supra* note 11.

In addition to Maine, Virginia, and the District of Columbia, thirteen states endorse a no-comment rule that only applies to lawyers participating in or associated with a legal proceeding. ALASKA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1992-93); COLO. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1990); GA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1992); HAW. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1991); IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 7-107 (1992); KAN. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1988); MASS. CANONS OF ETHICS AND DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW DR 7-107 (1992); NEB. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1991); N.C. RULES OF PROFESSIONAL CONDUCT Rule 7.7 (1992); N.Y. RULES OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1991); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1991-92); TENN. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1992-93); VT. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1986). *See also* MODEL RULE OF PROFESSIONAL RESPONSIBILITY DR 7-107, *supra* note 41.

129. North Dakota Attorney Standards Comm., Minutes of the Professional Conduct Subcomm., at 5 (January 31, 1986) ("There was a discussion of the scope of the attorney universe to which the rule applies and it was agreed that it applies to all attorneys, whether of record in the case or not.")

130. Justice Rehnquist argued in his dissent that Nevada Court Rule 177 was not overbroad because it "applie[d] only to lawyers involved in the pending case at issue." *Gentile*, 111 S. Ct. at 2746. (Rehnquist, J., dissenting). In addition, Justice Rehnquist, speaking for five members of the Court, noted that the Court has applied the "clear and present danger" standard to the speech of an "officer of the court" when he made the statements in "his capacity as a *private citizen*." *Id.* at 2744 n.5 (citing Wood v. Georgia, 370 U.S. 375 (1962)) (emphasis added). Thus, it appears that if an attorney who was not participating in the pending litigation was punished for commenting about a case, the Court would find that the no-comment rule was overbroad.

In addition, the four members of the Court who did not join in this part of the opinion would likely find that Rule 3.6 is overbroad, if applied to an attorney who was not participating in the pending litigation. The four members, Justices Kennedy, Marshall, Blackmun, and Stevens, argued for a more speech-protective standard. *Gentile*, 111 S. Ct.

Several legal scholars also argue that a no-comment rule that is applied to all lawyers is unconstitutionally overbroad.[131] An application of their argument follows: If Rule 3.6 of the North Dakota Rules of Professional Conduct is literally enforced, a lawyer-politician may be disciplined for publicly commenting on a legal proceeding taking place anywhere in North Dakota.[132] Lawyers who are participating in a legal action are prohibited from sharing certain information about the case because they have access to certain privileged information not provided to the public.[133] Clearly, this rationale cannot apply to lawyers who are *not* participating in the case.[134] If Rule 3.6 were enforced against all lawyers, persons who best understand how our system of justice works would be forbidden from commenting on a legal proceeding even if they had no inside information about the case. For example, the trial publicity rule would prohibit a lawyer from criticizing a state attorney's method of prosecuting a case even if the lawyer lived in a different county and had not participated in the proceeding.[135] This rule, if applied in this manner, would create a danger of chilling protected speech. Thus, without the proper narrowing construction, Rule 3.6 is overbroad and should be

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at 2723-36. Although they did not address the overbreadth issues, it is very likely that they would find that the rule was overbroad if there were a risk of chilling speech. *See id.*

131. *See, e.g.*, WOLFRAM, *supra* note 42, at § 12.2. In discussing the Model Rules of Professional Conduct Rule 3.6, Professor Wolfram argues that if the rule is interpreted to apply to all lawyers, it is overbroad.

> Possibly through oversight, MR 3.6 is not limited to a lawyer connected with a case in any way and thus might be thought to extend to any lawyer, including, for example, a lawyer in public office. The policy and constitutional infirmities of such a wide application are patent. Possibly the rule assumes that only a lawyer intimately connected with the case would be in a position to satisfy the requirement that a lawyer know that the statement will have a substantial likelihood of material prejudice to the proceeding.

Id. at 634 n.2. *See also* Matheson, *supra* note 38, at 875 n.51 ("Unless read with an implicit limitation to lawyers commenting on their own cases, MR [Model Rules of Professional Responsibility] 3.6 plainly is overbroad.").

132. *See supra* note 131 and accompanying text.

133. *See* Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2745 (1991).

134. *See* Wood v. Georgia, 370 U.S. 375 (1962). In *Wood*, a county sheriff was held in contempt by a county court for publicly criticizing a judge. *Id.* at 376. "Although the sheriff was technically an 'officer of the court' by virtue of his position, the Court determined that his statements were made in his capacity as a private citizen, with no connection to his official duties." Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2744 n.5 (1991) (citing Wood v. Georgia, 370 U.S. 375, 393 (1962). Therefore, the lower court conviction was reversed. *Wood*, 370 U.S. at 395.

135. Taking this example a step further, the rule could be interpreted to prohibit members of the North Dakota Bar from serving as a legal commentator for the local newspaper or television station. In addition, the rule appears to prohibit members of the North Dakota Bar who are practicing in other states from commenting on a North Dakota proceeding even if they are not participating in the case.

amended.[136]

Rule 3.6 of the North Dakota Rules of Professional Conduct is also susceptible to a vagueness challenge.[137] Rule 3.6 consists of a single standard of scrutiny, unlike Rule 3.6 of the Model Code of Professional Conduct which contains a single standard of scrutiny, a list of prohibitions, and a summary of circumstances in which the rule should be applied.[138] At least one court has noted that a standard of review, by itself, will not withstand First Amendment scrutiny.[139] In *Chicago Council of Lawyers v. Bauer*,[140] the court stated that "specific rules are . . . necessary in order to avoid vagueness."[141] By applying the *Bauer* rationale to Rule 3.6, one could argue that a single standard alone, without an accompanying list of prohibitions, does not adequately clarify what conduct is forbidden. Thus, the rule does not provide sufficient notice of what conduct is prohibited and is therefore susceptible to arbitrary

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136. The comments to Rule 3.6 of the North Dakota Rules of Professional Conduct appear to encourage this kind of narrowing.

> Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence.

N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1992).

137. For an explanation of the vagueness doctrine, see *supra* note 92.

138. *Compare* N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991).

139. Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). In *Bauer*, the court stated that:

> [The] standard [of review] is not constitutionally sufficient by itself. While the application of the standard to these rules can eliminate overbreadth, the specific rules are also necessary in order to avoid vagueness. The rules furnish the context necessary to determine what may constitute a 'serious and imminent threat' of interference with the fair administration of justice.

Id. at 249-50. *But see In re* Keiler, 380 A.2d 119, 126 (D.C. 1977) ("language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen."), *overruled by In re* Hutchinson, 534 A.2d 919 (D.C. 1987).

140. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

141. *Id.* at 249-50. In his analysis of the *Bauer* decision, one commentator noted that:

> The traditional requirement that criminal statutes speak with certainty applies with equal force to bar regulations because only specific language can assure evenhanded enforcement of disciplinary rules. While the law demands specificity from all occupational regulations, the Supreme Court in *In re Ruffalo* specifically characterized the disciplining of attorneys as a quasi-criminal process. Due process requires that lawyers receive adequate notice of disciplinary restrictions that might subject them to disbarment, and speech restrictions require even greater precisions to avoid chilling first amendment rights. . . . The quasi-criminal sanctions of the trial publicity rules, coupled with their prior restraint characteristics, warranted the *Bauer* court's review for overbreadth and vagueness.

William Ogden, Note, *Professional Responsibility—Trial Publicity—Speech Restrictions Must Be Narrowly Drawn.* Chicago Council of Lawyers v. Bauer, 54 TEX. L. REV. 1158, 1162-63 (1976) (footnotes omitted).

enforcement.[142]

Conversely, one could argue that vagueness is less of a concern in the context of lawyer disciplinary rules because they impose different penalties than criminal statutes. In that regard, the North Dakota Supreme Court has stated that "the requirement of notice of proscribed conduct is not more, and may be less, stringent as applied to statutes imposing non-criminal penalties. . . ."[143] Lawyer disciplinary procedures and penalties, however, are at least quasi-criminal in nature.[144] Thus, disciplinary rules, like criminal statutes must be drawn precisely to comply with the stringent notice requirements of the vagueness

142. *See supra* note 92. Conversely, one could argue that by limiting Rule 3.6 to a single standard, rather than providing a detailed list of prohibitions, the writers of the rule intended to avoid substituting a blanket rule for rationale. *See supra* note 75 and accompanying text. In providing attorneys with a detailed list of what to say and when to say it, the rule provides guidance to judges who must decide if attorneys violate the rule. This may be a problem if the judge enforces the rule without considering the reasons for it. For example, subsection a of Model Rule 3.6 provides that "a lawyer shall not make an extrajudicial statement . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6, *supra* note 11. The rule applies to *all* lawyers; it is not limited to lawyers participating in pending litigation. *Id.* Clearly the interest of a fair trial would not extend to an attorney who worked in a different district or county and who was not in any way associated with the case. *See supra* note 131 and accompanying text. However, this interpretation would infringe on the attorney's First Amendment rights because the rule is overbroad. *Id.* If a judge interpreted the rule to apply to all lawyers, he or she would be substituting the rule for rationale.

Rule 3.6, as written, forces the court or disciplinary board to look at the circumstances of each case and determine whether an attorney's comments about a judicial proceeding "create a serious and imminent threat of materially prejudicing" the case. N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992). *See supra* note 103 and accompanying text. Thus, a North Dakota court or disciplinary board that reviews a lawyer's extrajudicial comments is forced to justify its disciplinary decision rather than merely relying on a listed standard. It must apply the traditional First Amendment standard to attorneys, who may have certain limits on the information they can convey. The standard does not permit the court or the disciplinary board to penalize the attorney simply because he or she is an attorney, without first considering the circumstances of the speech. *See supra* notes 71 & 75 and accompanying text. However, because application of the North Dakota no-comment rule is solely the discretion of the judge, the rule is susceptible to arbitrary enforcement and may be unconstitutionally vague for that reason alone. *See supra* note 92.

143. Gust v. Pomeroy, 466 N.W.2d 137, 140 (N.D. 1991). *See also* Sloman v. Board of Pharmacy Examiners, 440 N.W.2d 609, 611 (Iowa 1989) (stating that "when the action taken for violation of the statute is civil in nature . . . the test for vagueness is less stringent: 'Even if more specific language could be devised, it is apparent the absence of criminal sanctions requires less literal exactitude to comport with due process; unless the statute clearly, palpably and without doubt infringes the constitution it will be upheld.' ") (citations omitted); *In re* Fadeley, 802 P.2d 31, 39 (Or. 1990) ("the potential sanction, [for violating DR 7-107 of the Oregon Code of Professional Responsibility] though of course serious to a lawyer, is not punitive but professional. It is civil, not penal." (quoting *In re* Lasswell, 673 P.2d 855, 857 (Or. 1983)).

144. In *In re* Ruffalo, 390 U.S. 544, *reh'g denied*, 391 U.S. 961, *modified*, 392 U.S. 919 (1968), the United States Supreme Court found that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge. . . . These [lawyer disbarment processes] are adversary proceedings of a quasi-criminal nature." *Id.* at 550-51 (citations omitted).

doctrine.[145]

The *Gentile* decision also supports the proposition that disciplinary rules, like criminal statutes, are subject to stringent notice requirements. In *Gentile*, the Court held that subsection three of Nevada Supreme Court Rule 177, a non-criminal rule, was void for vagueness.[146] In finding that the rule was unconstitutionally vague, the Court did not imply that the test for vagueness was less stringent for disciplinary rules than for criminal statutes.[147]

In addition, the North Dakota Supreme Court has noted that "a higher degree of specificity may be required when First Amendment rights are involved."[148] Thus, the North Dakota Professional Conduct Subcommittee may want to consider rewriting Rule 3.6 of the North Dakota Rules of Professional Conduct to include a list of specific prohibitions similar to those set out in Rule 3.6 of the Model Code of Professional Conduct or Disciplinary Rule 7-107 of the Model Code of Professional Responsibility.[149]

V. CONCLUSION

In *Gentile v. State Bar of Nevada*,[150] the Court concluded that a lawyer who is representing a criminal defendant in a legal proceeding may be disciplined for making statements to the press even though the lawyer's remarks do not present a "clear and present danger" to the fair adjudication of the case.[151] The Court held that the disciplinary board must merely make a showing that the attorney knew or reasonably should have known that his or her statements would have a "substantial likelihood of materially prejudicing that proceeding."[152] While the standard applied to the press and the general public is the "clear and present danger" standard, the Court determined that attorneys participating in a legal proceeding could be subject to a lower standard of scrutiny because attorneys have unique responsibilities to the judicial system.[153]

The *Gentile* decision may tempt the North Dakota Profes-

145. *Id.*
146. Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2731 (1991).
147. *See id.* at 2731-32.
148. State v. Dallmann, 441 N.W.2d 912, 915 (N.D. 1989) (citing Stanford v. Texas, 379 U.S. 476, 485 (1965)). *See* United States v. Scharfman, 448 F.2d 1352, 1354 (2d Cir. 1971) ("when First Amendment rights are not involved, the specificity requirement is more flexible"), *cert. denied*, 405 U.S. 919 (1972).
149. For the text of the model rules, see *supra* notes 11 and 41.
150. 111 S. Ct. 2720 (1991).
151. *Id.* at 2742-45.
152. *Id.* at 2745.
153. *Id.* at 2742-45.

sional Conduct Subcommittee and the North Dakota Supreme Court to revise the "serious and imminent threat" standard in North Dakota's trial publicity rule.[154] However, Justice Kennedy's argument for a more speech-protective standard should be persuasive to North Dakota decision-makers.[155] Neither the North Dakota Supreme Court nor the Professional Conduct Subcommittee appear willing to subordinate an attorney's First-Amendment-free-speech rights to a defendant's Sixth-Amendment-fair-trial rights.[156] Both rights are considered carefully.[157] Accordingly, two changes in the North Dakota trial publicity rule are necessary. First, the "serious and imminent threat" standard in Rule 3.6 of the North Dakota Rules of Professional Conduct must be combined with a list of specific prohibitions similar to those contained in Rule 3.6 of the Model Code of Professional Conduct. Second, Rule 3.6 must be amended to discipline only those attorneys who comment about a legal proceeding in which they are participating. If these changes are made, the new trial publicity rule will grant North Dakota lawyers the full panoply of free speech rights guaranteed by the First Amendment to the Constitution.

Shon Kaelberer Hastings

154. The *Gentile* decision does not directly affect North Dakota because the Court's holding was limited to the Nevada rule and because the state endorses a standard approximating the clear and present danger standard in its trial publicity rule. *See* N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6, *supra* note 103 and accompanying text. *See also* N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1992).

155. *Id.* at 2724-25. *See also supra* notes 124 & 125 and accompanying text.

156. *See supra* notes 124 & 125 and accompanying text (discussing North Dakota rules and case law).

157. *Id.*