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GENTILE V. STATE BAR OF NEVADA: ABA MODEL RULE 3.6 AS THE CONSTITUTIONAL STANDARD FOR REVIEWING DEFENSE ATTORNEYS' TRIAL PUBLICITY¹

John Fletcher

I. INTRODUCTION

IN 1988, Dominic Gentile, a criminal defense attorney, held a press conference on the day of his client's indictment on theft charges.² Gentile hoped to rebut adverse press coverage that his client, Gary Sanders, had received over the preceding months. Gentile delivered a prepared statement that he believed conformed with ethical rules. In the statement, he maintained Sanders's innocence, claimed that a police detective was the likely culprit, and attacked the character and motives of three potential witnesses. Six months later, a jury acquitted Gentile's client.³

The State Bar of Nevada then charged Gentile with violating the Nevada Supreme Court rule on trial publicity.⁴ The Southern Nevada Disciplinary

1. 111 S. Ct. 2720 (1991).

2. *Id.* at 2723. The Las Vegas police department accused Gentile's client, Gary Sanders, of stealing money from safety deposit boxes at Sanders's facility that he had rented to undercover police agents. *Id.* at 2727-28.

3. *Id.* at 2730-31.

4. NEV. REV. STAT., Sup. Ct. R. 177 (1990)[hereinafter NEVADA RULES]. The rule is almost identical to Rule 3.6 of the Model Rules of Professional Conduct (1987). The Nevada Rule reads:

RULE 177. Trial publicity.

1. [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*. (emphasis added).

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

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

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

(c) The performance or results of any examination or test or the refusal or

Committee⁵ subsequently conducted a hearing and recommended a private reprimand.⁶ On appeal, the Nevada Supreme Court affirmed the decision.⁷ The court stressed Gentile's remarks about the police detective and potential witnesses to find that his comments posed a "substantial likelihood of materially prejudicing" the trial.⁸ Furthermore, the court summarily rejected Gentile's arguments that his statements fell within the rule's safe harbor⁹ and that the rule was unconstitutional under state or federal law.¹⁰

Gentile appealed to the United States Supreme Court.¹¹ The Court reversed and held that Nevada's application of Rule 177 was unconstitutional because it was "void for vagueness."¹² Furthermore, a state can balance its interest in an impartial trial against an attorney's First Amendment rights when reviewing discipline for an attorney's extrajudicial statement on a

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

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

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

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

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

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

(b) The information contained in a public record;

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

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

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

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

(g) In a criminal case:

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

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

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

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

5. Nevada Supreme Court Rules create two disciplinary committees that serve the southern and northern areas of the state. NEVADA RULES, *supra* note 4, at Rule 100.

6. *Gentile v. State Bar of Nevada*, 787 P.2d 386 (1990) (per curiam). The Nevada Supreme Court rules authorize the following types of attorney discipline: (1) disbarment; (2) suspension; (3) temporary restraining order regarding client funds; (4) temporary suspension; (5) public reprimand, fine, or both; (6) private reprimand, fine, or both. See NEVADA RULES, *supra* note 4, at Rule 102.

7. *Gentile*, 787 P.2d at 387.

8. *Id.* (finding *Gentile* violated the general prohibition of section 1 of Rule 177).

9. *Id.* Section 3 of rule 177 identifies types of statements that are deemed permissible. See *infra* notes 37-40 and accompanying text for discussion of this safe harbor provision.

10. *Gentile*, 787 P.2d at 387.

11. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991).

12. *Id.* at 2722.

pending trial.¹³ Thus, a state can use the "substantial likelihood of material prejudice" standard instead of the more restrictive "clear and present danger of actual prejudice" without violating an attorney's right to free speech.¹⁴

II. LEGAL BACKGROUND TO CASE

A. Identification of the Problem

Attempts to regulate the extrajudicial comment of attorneys on pending judicial proceedings invoke three fundamental interests: the attorney's right to free speech, the criminal defendant's right to a fair trial, and the public's interest in the judiciary. Like other citizens, attorneys are protected by the First Amendment¹⁵ prohibition against restrictions on free speech.¹⁶ The Sixth Amendment¹⁷ provides a right to a fair trial to defendants in prosecutions of serious crimes.¹⁸ In order to ensure an impartial forum for the public, the courts have assumed a state interest in the preservation of the integrity and impartial functioning of the judiciary.¹⁹ The question is whether courts, when attempting to ensure the proper functioning of the judiciary, deny a defendant's right to a fair trial or an attorney's right to free speech when they prevent counsel from speaking publicly about pending criminal proceedings.

Importantly, the Court imposes a strict standard for reviewing criminal convictions for possible prejudice. A showing of actual prejudice is generally

13. *Id.* at 2744-45.

14. *Id.*

15. U.S. CONST. amend. I (providing in part that "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press"). The Court has applied the first amendment to the state as a fundamental liberty protected under the due process clause of the Fourteenth Amendment. *E.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925)(rejecting challenge to the constitutionality of a New York statute that prohibited expression advocating the overthrow of organized government).

16. *See, e.g.*, *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957)(recognizing that a state bar could not select its members in an arbitrary or discriminatory manner that impinged on the candidate's freedom of association or political expression when California Bar denied admission to an attorney partly due to his editorial that criticized the Korean War, big business, and other aspects of American society); *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977)(applying commercial speech doctrine to protect attorney's right of expression in the advertising context). For a discussion of *Bates* see *infra* notes 86-95 accompanying text.

17. U.S. CONST. amend. VI (providing in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

18. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 148-49, 159-62 (1968) (applying the Sixth Amendment to the states as a fundamental liberty and holding that a Louisiana battery statute with punishment up to two years in prison was a serious crime that entitled defendant to a jury trial).

19. *See, e.g.*, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (stating that "[w]e must not forget that public justice is no less important than an accused's right to fair trial"); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969) (rejecting defense counsel's argument that their extrajudicial comments could not threaten a fair criminal trial because the state interest limits both sides to a case). Some commentators criticize arguments that give equal priority to an individual's right to a fair trial and the public's interest in the fair administration of justice. *E.g.*, Monroe H. Freedman and Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 607-08 (1977).

required for reversal.²⁰ On occasion, however, the Court has found inherent prejudice without requiring a showing of actual prejudice via the veniremen.²¹ Nevertheless, numerous cases show the difficulty of overcoming the burden of proving prejudice.²²

B. Restrictions on Trial Publicity: A Historical Overview of American Bar Association Regulation

In 1908, the American Bar Association (ABA) adopted the Canons of Professional Ethics.²³ Canon 20 contained the relevant provision on trial publicity.²⁴ These original provisions remained in effect for nearly sixty years.²⁵ During the 1960s aftermath of the Kennedy assassination, the legal community debated, and commissions studied the potential for interference with the defendants' right to a fair trial by modern era mass communications.²⁶ In 1970, the ABA adopted an extensive trial publicity rule, Discipli-

20. *Murphy v. Florida*, 421 U.S. 794, 797-803 (1975) (sustaining robbery conviction when defendant failed to show prejudice in a case in which the media had exposed jurors to accounts of defendant's prior felony convictions and facts of the crime); *Irvin v. Dowd*, 366 U.S. 717, 720-28 (1961) (reversing murder conviction in case involving the following prejudicial factors: (1) authorities had issued extensively publicized statements that defendant had confessed to multiple murders; (2) the lower courts had allowed only one change of venue to an adjoining county; and (3) a majority of veniremen and jurors had expressed opinions on the defendant's guilt).

21. *See, e.g., Estes v. Texas*, 381 U.S. 532, 542-44 (1965) (reversing murder conviction when the trial court allowed extensive and disruptive television coverage that constituted a procedure inherently lacking in due process); *Turner v. Louisiana*, 379 U.S. 466, 473 (1965) (reversing conviction when two deputy sheriffs were key witnesses for the state and were also jury shepherds, despite oath that they did not speak to jurors); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963) (reversing murder conviction without examining voir dire testimony when trial court had denied a change of venue request after community had viewed a detailed, videotaped confession on three different broadcasts).

22. *See, e.g., Mu'Min v. Virginia*, 111 S. Ct. 1899, 1903-08 (1991) (affirming murder conviction despite widespread publicity containing numerous items of inadmissible, prejudicial information about the crime and the fact that eight of twelve jurors admitted exposure to pretrial publicity); *Stroble v. California*, 343 U.S. 181, 190-98 (1952) (affirming murder conviction despite widespread media coverage and the prosecutor's release of the defendant's confession since the confession was voluntary and admissible).

23. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* xxxiv (1985). The ABA based these original ethics on the Code of Ethics adopted by the Alabama Bar Association in 1887. *Id.* Justice Rehnquist cites the Alabama Code as historical support for the regulation of attorneys. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2740 (1991).

24. CANONS OF PROFESSIONAL ETHICS Canon 20, Newspaper Comment on Pending Litigation (as amended 1957):

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 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.

25. HAZARD & HODES, *supra* note 23, at xxxiv.

26. *See, e.g.,* ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1966) (making the following recommendations: (1) revise Canons of Professional Ethics to contain new trial publicity rule; (2) regulate statements by law enforcement agencies; and (3) use numerous precautionary devices during the

nary Rule (DR) 7-107²⁷, as part of the Model Code of Professional Responsibility.²⁸ The rule covered all phases and types of judicial proceedings,²⁹ and one section prohibited lawyers associated with pending criminal trials from making statements to the press that were "reasonably likely to interfere with a fair trial."³⁰

Finally, the ABA adopted the Model Rules of Professional Conduct in 1983,³¹ and Rule 3.6 contains the current formulation of the trial publicity standard: "substantial likelihood of materially prejudicing an adjudicative proceeding."³² The majority of states have officially adopted this standard.³³

course of criminal trial to minimize effects of publicity); Committee on the Operation of the Jury System, Judicial Conference of the U.S., Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 400-15 (1968)(recommending that each United States District Court adopt local rules with the following provisions: (1) restrict release of prejudicial information by attorneys; (2) control similar disclosures by courthouse personnel; and (3) regulate conduct of trial with precautionary devices); SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL 14-57 (Final Report 1967)(doubting constitutionality of imposing limits on the press through contempt powers, committee recommended the following changes within the judicial system: (1) revise Canon 20; (2) regulate law enforcement bodies; and (3) devise standards for preventive measures in court.

27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (amended 1987) [hereinafter MODEL CODE].

28. HAZARD & HODES, *supra* note 23, at xxxiv. Bar associations and courts officially adopted the code in a large majority of states, and "it has remained the basic law of the legal profession since then." *Id.*

29. *See, e.g.*, MODEL CODE *supra* note 27 at DR 7-107(A) (criminal investigation period); DR 7-107(B) (pretrial phase of criminal trial); DR 7-107(E) (post trial and/or sentencing period); DR 7-107(G) (civil cases).

30. *Id.* at DR 7-107(D)(the ABA derived the reasonable likelihood standard in part from Supreme Court *dicta* in Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966), and the lower courts were divided as to whether the standard was constitutional). *See* discussion *infra* notes 61-66.

Eleven states continue to employ this standard: ALASKA RULES OF CT., Code Prof. Resp. DR 7-107(D) (West 1991); COLO. REV. STAT. ANN., Rules of Court, Code Prof. Resp. DR 7-107(D) (West 1990); 4 GA. CODE ANN. Rules of Court, Code Prof. Resp. DR 7-107(D) (Harrison 1989); HAW. RULES OF CT., State & Fed., Sup. Ct. R. Exhibit A, Code Prof. Resp. DR 7-107(D) (West 1991); 40 IOWA CODE ANN. § 602 app. A, Code Prof. Resp. DR 7-107(D) (West 1991); MASS. ANN. LAWS, Sup. Ct. R. 3:07, DR 7-107(D) (Law Co-op. 1991); NEB. RULES OF CT., Code Prof. Resp. DR 7-107(D) (West 1991); N.C. GEN. STAT., R. Prof. Conduct 7.7(D) (1990); OHIO REV. CODE ANN. app. tit. 19, Code Prof. Resp. DR 7-107(D) (Anderson 1983); TENN. CODE ANN., Sup. Ct. R. 8, Code Prof. Resp. DR 7-107(D) (1991); VT. STAT. ANN., Admin. Orders & R., Code Prof. Resp. DR 7-107(D)(1991).

31. HAZARD & HODES, *supra* note 23, at xxxv (stating that dissatisfaction with the MODEL CODE's confusing format, its failure to address certain topics, and the unconstitutionality of some of its provisions led to the adoption of the new rules).

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (amended 1989) [hereinafter MODEL RULES]. The drafters intended the "substantial likelihood" test to approximate the "clear and present danger" test. HAZARD & HODES, *supra* note 23, at 395. *See infra* notes 75-77 and accompanying text for a discussion of the "clear and present danger" test.

33. Thirty-two states have adopted the "substantial likelihood" standard: 23A ALA. CODE, Sup. Ct. R. 3.6(a) (1990); 17A ARIZ. REV. STAT. ANN., Sup. Ct. R. 42, ER 3.6(a) (1991); ARK. CODE ANN., Ct. R. Prof. Conduct 3.6(a) (Michie 1991); CONN. RULES OF CT., R. Prof. Resp. 3.6 (West 1991); 16 DEL. CODE ANN., R. Prof. Conduct 3.6 (1987); 35 FLA. STAT. ANN., Bar R. 4-3.6 (West Supp. 1991); IDAHO RULES OF CT., R. Prof. Conduct 3.6 (West 1991); IND. CODE ANN., Ct. R. Prof. Conduct 3.6(a) (Burns 1991); KAN. SUP. CT. R. 226, R. Prof. Conduct 3.6(a) (West 1991); KY. REV. STAT. ANN., Sup. Ct. R. 3.130, R. Prof. Conduct 3.6(a) (Michie/Bobbs-Merrill 1991); 21A LA. REV. STAT. ANN. app. § 37, State Bar

The first section of rule 3.6 is a general prohibition against statements by an attorney that are reasonably likely to be disseminated by the press and that pose a "substantial likelihood" of "materially prejudicing" a proceeding.³⁴ The second section³⁵ lists types of statements that would ordinarily violate the general prohibition.³⁶ The final section,³⁷ or safe harbor provision, states that notwithstanding the first two sections, an attorney can safely make certain statements if he does not elaborate on them.³⁸ By the rule's

Articles of Incorp. Art. 16, ch. 4, R. Prof. Conduct 3.6(a) (West 1991); MD. CODE ANN., Rules, app. tit. 8, R. Prof. Conduct 3.6(a) (1991); MICH. RULES OF CT., State, R. Prof. Conduct 3.6 (West 1991); 52 MINN. STAT. ANN., Ct. R. Prof. Conduct 3.6 (West Supp. 1991); MISS. RULES OF CT., R. Prof. Conduct 3.6(a) (West 1991); MO. RULES OF CT., State & Fed., Sup. Ct. R. 4, R. Prof. Conduct 3.6(a) (West 1991); MONT. RULES OF CT., R. Prof. Conduct 3.6(a) (West 1991); 1 NEV. REV. STAT., Sup. Ct. R. 177(l) (1990); N.H. RULES OF CT., R. Prof. Conduct 3.6(a) (West 1990); N.J. RULES OF CT., R. Prof. Conduct 3.6(a) (West 1991); 2 N.M. STAT. ANN. § 16-306 (Michie 1991); OKLA. STAT. ANN. tit. 5, ch. 1, app. 3-A, R. Prof. Conduct 3.6(a) (West Supp. 1991); PA. RULES OF CT., State, R. Prof. Conduct 3.6 (West 1991); R.I. GEN. LAWS, Sup. Ct. R. 47, R. Prof. Conduct 3.6 (1991); 22A S.C. CODE ANN., Sup. Ct. R. 32, Code Prof. Resp. DR 7-107(A) (Law. Co-op. 1991); 7A S.D. CODIFIED LAWS ANN. app. ch. 16-18, R. Prof. Conduct 3.6(a) (1991); SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 Rule 3.07(a) (1991) (located in pocket part for Volume 3 of Texas Government Code in title 2, subtitle G app., following § 83.006); UTAH CODE ANN., Ct. R., Code of Jud. Admin. ch. 13, R. Prof. Conduct 3.6(a) (1991); WASH. RULES OF CT., R. Prof. Conduct 3.6 (West 1991); W. VA. CODE, CT. R. PROF. CONDUCT 3.6(a) (1991); WIS. RULES OF CT., State, Sup. Ct. R. 20:3.6(a) (West 1991); WYO. STAT., Ct. R. Prof. Conduct 3.6 (1991).

Eleven states have retained the "reasonable likelihood" standard. See *supra* note 30.

Six states have adopted the "clear and present danger" or an equivalent test. The following five states have adopted this standard by statute or court rule: 110A ILL. ANN. STAT. app. ch. 774, Rule Prof. Conduct 3.6 (Smith-Hurd 1978) ("serious and imminent threat to the fairness of an adjudicative proceeding"); ME. RULES OF CT., State & Fed., Bar R. 3, Code of Prof. Resp. 3.7(j) (West 1991) ("substantial danger of interference with the administration of justice"); N.D. CENT. CODE, Ct. R. Prof. Conduct 3.6 (1990) ("serious and imminent threat of materially prejudicing an adjudicative proceeding"); OR. RULES OF CT., Code Prof. Resp. DR 7-107 (West 1991) ("serious and imminent threat to the fact-finding process"); 11 VA. CODE ANN., Sup. Ct. R. part 6, § 2, Code Prof. Resp. DR 7-106(A) (Michie 1991) ("clear and present danger of interfering with the fairness of the trial by a jury").

Although New York adopts a "substantial likelihood" test in its Code of Professional Responsibility, the courts have required the "clear and present danger" test in its application. 29 N.Y. JUD. LAW app. art. 22, § 850, Code Prof. Resp. DR 7-107(A) (McKinney 1972); see *Markfield v. Association of the Bar of the City of New York*, 370 N.Y.S.2d 82, 85 (App. Div. 1975), *appeal dismissed*, 37 N.Y.2d 794, 337 N.E.2d 612, 375 N.Y.S.2d 106 (1976). *Markfield* is discussed *infra* notes 74-76 and accompanying text.

California does not have a trial publicity rule in its Code of Professional Conduct. See CAL. RULES OF CT., STATE, R. Prof. Conduct §§ 1-100 to 1-600, 5-100 to 5-320 (West 1991).

For a catalogue of the state rules on trial publicity, consider the discussion in Justice Rehnquist's opinion. See *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2741 n.1-3 (omitting Alabama and including New York in the majority of states).

34. MODEL RULES, *supra* note 32, Rule 3.6(a); NEVADA RULES *supra* note 4, Rule 177(1).

35. MODEL RULES, *supra* note 32, Rule 3.6(b); NEVADA RULES *supra* note 4, Rule 177(2).

36. *E.g.*, MODEL RULES *supra* note 32, Rule 3.6(a)(1) (statements about the character or credibility of an expected witness, among others). The Nevada Supreme Court found that *Gentile's* statements about the potential witnesses violated this section of the Nevada rule. *Gentile* 787 P.2d at 387.

37. MODEL RULES *supra* note 32, Rule 3.6(c); NEVADA RULES *supra* note 4, Rule 177(3).

38. *E.g.*, MODEL RULES, *supra* note 32, Rule 3.6(c)(1) (the general nature of the defense). The Nevada Supreme Court rejected without comment *Gentile's* arguments that his statements fulfilled this provision. *Gentile*, 787 P.2d at 387.

literal terms, these safe harbor statements are automatically immune.³⁹ As one commentator has noted, this "unfortunate draftsmanship" creates a potential conflict if a statement violates the general prohibition, but also falls within the safe harbor provision.⁴⁰

C. *Supreme Court Treatment of Restrictions on Attorney Speech*

1. *In Re Sawyer*⁴¹

Before *Gentile*, the Supreme Court had not addressed the constitutionality of limits on extrajudicial comments placed on attorneys associated with pending trials.⁴² In *In re Sawyer*⁴³, the Court had the opportunity to address the issue, but decided the case on factual grounds.⁴⁴ Sawyer, who was associated with a highly publicized prosecution under the Smith Act, gave a speech six weeks into the trial that criticized the presiding judge. After the trial, an ethics committee determined that Sawyer had violated two canons.⁴⁵ On appeal, the Ninth Circuit affirmed the committee's findings and the order of the Supreme Court of Hawaii suspending Sawyer from the Bar for one year.⁴⁶

Reversing the sanction, Justice Brennan's plurality opinion found that Sawyer's comments were a general attack on Smith Act prosecutions and were not directed at the trial judge.⁴⁷ After noting that lawyers were free to criticize law enforcement bodies and the state of the law,⁴⁸ Brennan observed that the pendency of litigation would not make an attorney's extrajudicial statements "more censurable, *other than that they might tend to obstruct the administration of justice.*"⁴⁹

Justice Stewart refused to join Brennan's opinion because of its "intimations" that the First Amendment would shield attorneys from discipline for clear ethical violations,⁵⁰ and he indicated that ethical rules could require attorneys to refrain from otherwise "constitutionally protected speech."⁵¹

39. HAZARD & HODES, *supra* note 23, at 401 (commenting that a statement can violate the general prohibition yet be *per se* admissible under the safe harbor provisions).

40. *Id.*

41. 360 U.S. 622 (1959).

42. The Court refused to hear at least one lower court case directly addressing the issue. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (holding parts of MODEL CODE DR 7-107 unconstitutional). For a discussion of *Bauer*, see *infra* notes 60-66 and accompanying text.

43. 360 U.S. 622 (1959).

44. *Id.* at 626.

45. *Id.* at 625-26. Sawyer was charged with violating canon 1 (Duty of Lawyers to Courts) and 22 (Candor and Fairness) of the Canons of Professional Ethics, but not Canon 20 relating to public comment on pending litigation. *Id.* at 625-26 n.3.

46. *Id.* at 623.

47. *Id.* at 630-36.

48. *Id.* at 631-32.

49. *Id.* at 636 (emphasis added). Since the ethics committee had not charged Sawyer with obstructing justice, this issue was not before the Court. *Id.*

50. *Id.* at 646 (Stewart, J., concurring in judgment).

51. *Id.* at 646-47.

In dissent⁵², Justice Frankfurter strongly denied constitutional protection to attorneys for comment on pending litigation in which they are associated.⁵³

2. Sheppard v. Maxwell⁵⁴

The Supreme Court's most notable statement on the constitutional protection of attorney speech came in its reversal of Sam Sheppard's murder conviction⁵⁵. After finding grounds for reversing the conviction,⁵⁶ the Court in *dicta* addressed the methods that the trial judge should have used to avoid the prejudice.⁵⁷ The Court stated that the trial judge should have acted to prevent prejudice when "there [was] a *reasonable likelihood* that prejudicial news prior to trial [would] prevent a fair trial."⁵⁸ The record indicated that the prosecution and defense counsel were the source of some of the prejudicial information, and the Court strongly criticized their actions.⁵⁹

3. Lower Court Treatment

After the numerous states adopted DR 7-107, several lower courts addressed the constitutionality of the rule, producing three general standards. This section reviews the leading cases for each of these alternate standards.

a. Chicago Council of Lawyers v. Bauer⁶⁰

In *Chicago Council*, the Seventh Circuit reviewed the constitutionality of Model Code DR 7-107(D)⁶¹ and held that the reasonable "likelihood standard" was unconstitutional.⁶² The court held that the provision for comment on pending criminal trials was constitutional if the "'serious and

52. *Id.* at 647 (Justices Clarke, Harlan, and Whittaker joined Justice Frankfurter's dissent).

53. *Id.* at 668-69 (stating that "[i]t is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press").

54. 384 U.S. 333 (1966).

55. *Id.* at 335.

56. *Id.* at 352-57 (holding that Sheppard was denied a fair trial as guaranteed by due process and the Fourth Amendment based on evidence of massive, pervasive, and prejudicial publicity).

57. *Id.* at 352, 361. *Sheppard* mandates the use of alternative measures to avoid prejudice resulting from trial publicity: (1) change of venue; (2) sequestration of jury; (3) stricter rules for media's use of courtroom, closer regulation of conduct of newsmen in courtroom; (4) insulation of witnesses from media; and (5) controlling leaks from police, witnesses, and counsel. *Id.* The Court further implied that these devices should be used before placing limits on the press. *Id.* at 352-63.

58. *Id.* at 363 (emphasis added).

59. *Id.* (stating that "[c]ollaboration 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*") (emphasis added).

60. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). For a discussion of the case see Christopher Hicks, *Chicago Council of Lawyers v. Bauer: Gag Rules — The First Amendment v. the Sixth*, 30 Sw. L.J. 507, 511-13 (1976) (arguing that *Bauer's* "clear and present danger" test is too inflexible and that the DR 7-107(D) standard gives trial courts the appropriate discretion to address threats to an impartial trial on an individual basis).

61. The court reviewed all sections of DR 7-107, but this Article focuses only on the relevant section dealing with on criminal trials. See *Bauer*, 522 F.2d at 252-58.

62. *Bauer*, 522 F.2d at 249 (applying the rule that limits on first amendment freedoms

imminent threat' of interference with the fair administration of justice" was applied.⁶³ The court placed equal priority on the defendant's right to fair trial and the public's interest in the judiciary.⁶⁴ Furthermore, it stated that the public is likely to believe attorneys since they are privy to reliable information and due to their role as officers of the court.⁶⁵ The court also relied on *Sheppard* to conclude that courts can take preventive measures to preserve a fair trial and to subordinate the free speech rights of attorneys to the public's interest in impartial trials.⁶⁶

b. *Hirschkop v. Snead*⁶⁷

The Fourth Circuit also reviewed DR 7-107(D), but found that it was constitutional.⁶⁸ The court disagreed with *Bauer* in holding that the "reasonable likelihood" standard was not overbroad.⁶⁹ The court emphasized that the Court in *Sheppard* had utilized similar language when admonishing the trial court to take remedial actions, and it extrapolated that the same standard should apply for preventive measures.⁷⁰ The New Jersey Supreme Court supported the *Hirschkop* holding in *In re Hinds*,⁷¹ and listed objective factors to assess the risk of prejudice under the "reasonable likelihood" standard.⁷² Other courts have also approved this standard.⁷³

c. *Markfield v. Association of the Bar of the City of New York*⁷⁴

A New York state court concluded that the "clear and present" danger test was required when applying DR 7-107(D).⁷⁵ The court noted that the *Sheppard* Court had indicated that the "reasonable likelihood" standard was

"must be no greater than is necessary or essential to the protection of the particular governmental interest involved." (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

63. *Id.* at 249 (quoting *Chase v. Robson*, 435 F.2d 1059, 1061-62 (7th Cir. 1970)).

64. *Id.* at 250-51. *Contra* *Freedman & Starwood*, *supra* note 19 at 607-08 (arguing that defense generated publicity could not deny the accused's constitutional rights since they are designed to protect the individual from state action, not the reverse).

65. *Bauer*, 522 F.2d at 250.

66. *Id.* at 248-50.

67. 594 F.2d 356 (4th Cir. 1979).

68. *Id.* at 370.

69. *Id.* at 362.

70. *Id.* at 369-70.

71. 449 A.2d 483, 493-94 (N.J. 1982).

72. *Id.* (The court listed seven factors: (1) nature of the statement; (2) timing of the statement; (3) extent to which the information has already been publicized; (4) nature of the proceeding and its vulnerability to prejudice; (5) attorney's status in the case; (6) attorney's unique status as an informed and accurate source of information in the case; and (7) effect of unrestricted comment on the interests of the litigants and the integrity of the proceeding).

73. *See, e.g.*, *United States v. Tijerina*, 412 F.2d 661, 667-68 (10th Cir. 1969), *cert. denied*, 396 U.S. 990 (1969) (relying in part on statements in *Sheppard* to uphold order limiting statements by attorneys involved in case that would pose a "reasonable likelihood" of prejudicial news which would make the impanelling of an impartial jury difficult); *Younger v. Smith*, 106 Cal. Rptr. 225, 240-43 (1973) (determining that "clear and present danger" test was not appropriate for assessing the validity of protective order designed to curb prejudicial publicity in a criminal case, and adopting "reasonable likelihood" standard as realistic approach that allows trial court to assess factors that would otherwise never satisfy the stricter test).

74. 49 A.D.2d 516 (N.Y. App. Div. 1975), *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1976).

75. *Id.* at 85.

appropriate but nevertheless determined that only when a statement poses a "clear and present" danger will it be likely to interfere with a fair trial.⁷⁶

In summary, the lower courts all relied on *Sheppard* to support court action in protection of the public's interest in an impartial judiciary. The courts could not agree on a uniform standard. The majority view, however, was that attorneys associated with pending criminal trials could be subject to greater scrutiny than the press.⁷⁷

E. Ability of States to Regulate the Press

In contrast to the standards imposed on attorneys, the Supreme Court has addressed the proper standard for limiting the freedom of the press in many cases. This section summarizes the Court's treatment of the press in the context of contempt cases and the modern treatment of gag orders.

1. Contempt for Out-Of Court Statements

Unlike the dicta concerning regulation of attorneys, the Supreme Court has placed strict limits on attempts to regulate the press through contempt measures.⁷⁸ *Bridges v. California*⁷⁹ is the landmark case for contempt orders for out-of-court statements. The Court cited the "clear and present danger" test as the proper standard for reviewing contempt orders and stated that expression should have the broadest protection allowable in a democratic society.⁸⁰ In other contempt cases, courts continued to apply the clear and present danger standard with some slight linguistic variations.⁸¹

2. Modern Treatment

*Nebraska Press Association v. Stuart*⁸² represents the modern Supreme Court's statement of the presumption against the constitutionality of prior

76. *Id.* (stating that this standard did not unreasonably restrict expression while it fully protected the judicial process).

77. *Markfield* represented a minority position with the strict "clear and present" danger test. See generally, JOHN W. HALL, JR., PROFESSIONAL RESPONSIBILITY OF CRIMINAL LAWYERS § 18.5, at 529-30 (1987 & Supp. 1991)(summarizing lower courts' views of constitutional considerations such that at least two things were known: (1) ethical rules could not place an absolute prohibition on attorney comments on pending criminal matters; and (2) statements must actually threaten the impartiality of a trial before they could be limited).

78. E.g., *Wood v. Georgia*, 370 U.S. 375 (1962) (denying contempt power in political free speech context when media had accused judge of discrimination in grand jury proceeding).

79. 314 U.S. 252 (1941) (reversing conviction of contempt imposed on union representative who had threatened to release telegram that threatened a major strike if judge ruled against his interests). *Bridges'* companion case, *Times-Mirror Co. v. Superior Court of California*, 98 P.2d 1029 (Cal.), cert. granted, 310 U.S. 623 (1940), had the same result. *Id.* (reversing contempt convictions of newspaper officials who had printed editorials criticizing a judge's probation sentence in an assault case involving union-related violence).

80. *Bridges*, 314 U.S. at 262-63.

81. E.g., *Craig v. Harney*, 331 U.S. 367, 373 (1947) (reversing contempt finding for media criticism of judge's handling of a pending case and stating "serious and imminent threat" as standard); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (in reversing contempt conviction, Court balanced interest in freedom of discussion against danger of coercion and intimidation by the courts; for borderline cases, "[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice").

82. 427 U.S. 539 (1976).

restraints when placed on the press.⁸³ The case involved a trial court's gag order on the press that both sides in a highly publicized criminal case had requested. The Court found the order unconstitutional, and it formulated a standard for imposing prior restraints that will rarely, if ever, be satisfied.⁸⁴

F. *Balancing of Interests in the Commercial Speech Area*

When reviewing restrictions on First Amendment rights in a relevant context, the Court has imposed a lower level of scrutiny than it has for the press.⁸⁵ In the context of attorney advertising and solicitation, the Court has balanced the attorney's right to free speech and the state's interest in the legal profession.⁸⁶ The Court has applied the commercial speech doctrine to invalidate numerous state bar restrictions on advertising.⁸⁷ These cases, however, have recognized that the state can restrict the attorney's freedom of speech since commercial speech merits less protection than core First Amendment political expression.⁸⁸ Thus, the state can prevent false, misleading, or deceptive advertising, statements that promote an illegal transaction⁸⁹ and in person solicitation by attorneys for the purpose of pecuniary gain.⁹⁰ If these elements are not present, the Court imposes a test on the validity of restrictions that favors the disclosure of truthful information.⁹¹

Throughout the Court's treatment of this area, Justice Rehnquist,⁹² and

83. *Id.* at 570.

84. *Id.* (stating that order was not justified because it was not "clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court"); see also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-45 (1978) (reversing conviction of newspaper that had violated a Virginia criminal statute prohibiting disclosing the identity of a judge who is subject to a pending investigation and rejecting state legislature's finding that such disclosures posed a "clear and present" danger to the administration of justice).

85. See *In re R.M.J.*, 455 U.S. 191, 203 (1982) (adopting four part test for validity of restraints on advertising: (1) Is the advertisement truthful?; (2) Is the government's interest in opposing the expression substantial?; (3) Does the regulation directly advance the state's interest?; and (4) Is the state's regulation broader than necessary?).

86. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) (applying commercial speech doctrine for the first time to the context of attorney advertising in order to prohibit the Arizona Bar from placing a complete ban on truthful, non-deceptive advertising). See generally Peter J. Gunas, III, Note, *Liberalizing Attorney Advertising Restraints: Targeted Direct-Mailing Gains First Amendment Freedom in Shapero v. Kentucky Bar Ass'n*, 42 Sw. L.J. 999 (1988) (discussing the development of the commercial speech doctrine from *Bates* up to the current court).

87. See, e.g., *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472-78 (1988) (categorical ban of sending truthful, non-deceptive letters to solicit business to persons with known legal problems); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647-49 (1985) (ban of printed advertisement containing truthful, non-deceptive legal advice and an accurate, non-misleading illustration); *Bates*, 433 U.S. at 384 (complete ban of newspaper publication containing truthful advertising of routine legal services and their costs).

88. *E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (state may discipline a lawyer for soliciting clients in person for pecuniary gain).

89. *Zauderer*, 471 U.S. at 638.

90. *Ohralik*, 436 U.S. at 449.

91. *Id.* (stating test that allows restrictions only if state proves a substantial governmental interest and only in a manner that directly advances that end).

92. *E.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 404 (Rehnquist, J., dissenting) (reit-

later Justice O'Connor⁹³, have opposed the decisions. Their opinions, especially Justice O'Connor's, have stressed that the Court should show greater deference to the states' attempts to exercise their inherent regulatory power over attorneys.⁹⁴ With the addition of Justice Scalia,⁹⁵ this Rehnquist-O'Connor faction represents an emerging trend toward a return to a lower level of scrutiny in the context of state regulation of the legal profession.

III. *GENTILE V. STATE BAR OF NEVADA*⁹⁶

A. *Overview of Supreme Court Opinion*

The *Gentile* case created two opinions with different majorities on the Court. In Justice Kennedy's majority opinion,⁹⁷ the Court performed an independent review of Nevada's application of Rule 177 and found that given the grammatical conflict between the general prohibition and the safe harbor provision, the rule was void for vagueness.⁹⁸ More importantly, Justice Rehnquist's majority opinion⁹⁹ held that a state can balance its interest in an impartial trial against an attorney's First Amendment rights when re-

erating a prior dissent to the recognition of commercial speech as protected speech under the first amendment); see also *In re Primus*, 436 U.S. 412, 440 (1978) (Rehnquist, J., dissenting).

93. *Zauderer*, 471 U.S. at 673-80 (O'Connor, J., dissenting, joined by J. Rehnquist and Burger). See also *Shapero v. Kentucky Bar Ass'n*, 486 U.S. at 480, 487 (O'Connor, J., dissenting, joined by J. Rehnquist and Scalia); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 110 S. Ct. 2281, 2297-98 (1990) (O'Connor, J., dissenting, joined by J. Rehnquist and Scalia).

94. *E.g.*, *Peel*, 110 S. Ct. at 2297-8 (O'Connor, J., dissenting, joined by J. Rehnquist and Scalia) (taking away broad latitude for the states has resulted in "micromanagement" of state's inherent power to regulate the legal profession); *Zauderer*, 471 U.S. at 673-80 (O'Connor, J., dissenting, joined by J. Rehnquist and Scalia) (arguing Court should show greater deference to substantial state interests underlying the professional rules); *Shapero*, 486 U.S. at 480, 487 (O'Connor, J., dissenting, joined by J. Rehnquist and Scalia) (categorizing *Bates* doctrine as analytically flawed and arguing that Court should return to states their usurped legislative function); *Primus*, 436 U.S. at 440-46 (1978) (Rehnquist, J., dissenting) (asserting that state should be able to restrict attorneys from promoting political goals at the possible expense of their duty to client interests).

95. See *supra* note 93.

96. 111 S. Ct. 2720 (1991).

97. *Id.* at 2723-38 (5-4 decision) (Kennedy, J., majority opinion in Part III and judgment in Part VI). Justices Marshall, Blackmun, and Stevens joined all six parts of Kennedy's opinion. *Id.* Justice O'Connor joined only parts III and VI to provide a 5-4 majority. *Id.* (O'Connor, J., concurring).

Kennedy's six part opinion addressed the following areas: (I) limiting discussion to Nevada's interpretation of Rule 177 and defining the issue as the constitutionality of a ban on "classic" political speech; (II) performing an independent review of facts; (III) holding rule is void for vagueness; (IV) challenging the Rehnquist majority's adoption of a deferential balancing test in this context; (V) arguing reversal is required even using the deferential standard; (VI) reversing the Nevada Supreme Court's judgment. *Id.*

98. *Id.*

99. *Id.* at 2738-48 (Rehnquist, J., majority opinion in Part I and II). Justices Scalia, White and Souter joined all three parts of Rehnquist's opinion. *Id.* Justice O'Connor joined only parts I and II to provide a 5-4 majority. *Id.* at 2748-49 (O'Connor, J., concurring).

Rehnquist's three part opinion addressed the following areas: (I) brief review of facts; (II) holding that state can employ balancing test when applying Rule 177; (III) arguing that rule was not overly broad or vague and that the judgment should have been affirmed. *Id.* at 2738-48.

viewing discipline for extrajudicial comments on a pending criminal trial.¹⁰⁰ Thus, a state can use the “substantial likelihood of material prejudic[e]” standard in MODEL RULE 3.6 instead of the more restrictive “clear and present danger” test that is applied when states limit the press’ ability to comment on trials.¹⁰¹

B. *The Not So Safe Harbor Provision of Rule 177*

Kennedy emphasized throughout his opinion that the case involves “classic” political speech.¹⁰² Therefore, Kennedy felt the attendant risk that states will enforce vague statutes in a discriminatory fashion was particularly relevant in this context.¹⁰³ In applying the prohibition against vague regulations of speech, Kennedy analyzed the grammatical conflict between Rule 177’s general prohibition and its safe harbor,¹⁰⁴ as well as the relative terms employed within the safe harbor provision.¹⁰⁵ Because of the rule’s grammatical ambiguity and the safe harbor’s failure to provide a meaningful principle to guide an attorney’s determination of permissible extrajudicial statements, the Court concluded that Nevada’s interpretation of the rule was void for vagueness.¹⁰⁶ Gentile’s efforts to comply with the rule¹⁰⁷ and his refusal to answer questions from the press¹⁰⁸ illustrated to the Court that the rule failed to provide fair notice.¹⁰⁹

Justice O’Connor’s concurrence with Kennedy’s analysis of the rule provided a majority to reverse the Nevada Supreme Court judgment.¹¹⁰ She added that the ability of the disciplinary board and Gentile to make cogent arguments regarding whether Gentile remained within the scope of the safe harbor provision illustrates the rule’s failure to provide sufficient guidance.¹¹¹

In dissent, Rehnquist denied that the rule is overly vague.¹¹² He stated

100. *Id.* at 2738-48.

101. *Id.*

102. *Id.* at 2724-26, 2731-36 (highlighting Gentile’s charge that the criminal authorities had framed his client and stressing that the criminal defense bar has the important mission of challenging the government).

103. *Id.* at 2731-32, (Kennedy, J., majority opinion). The court assumed Nevada had not enforced the rule in a discriminatory manner. *Id.*

104. *Id.* at 2732 (pointing out that the grammatical structure of the rule indicates that an attorney can violate the first two sections of the rule but avoid discipline by complying with the safe harbor provision).

105. *Id.* (the section’s allowance for “general” comments “without ‘elaboration’ ” fails to provide an attorney with sufficient guidance).

106. *Id.* Kennedy also stressed that Rule 177, and therefore MODEL RULES Rule 3.6, was not void on its face and that states can correct the flaw with a clarifying interpretation. *Id.* at 2725-26.

107. *Id.* at 2731 (Gentile stated that he and two colleagues had reviewed the rules for several hours in order to prepare a statement in compliance with the rule).

108. *Id.* at 2731-32 n.2. Gentile refused to respond to several questions during the press conference. For example, he refused to elaborate on the existence of proof concerning police involvement in the theft or the legitimacy of polygraph results. *Id.*

109. *Id.* at 2731-32.

110. *Id.* at 2748-49 (O’Connor, J., concurring).

111. *Id.*

112. *Id.* at 2745-48 (Rehnquist, J., dissenting).

that the grammatical conflict results from a literal reading of the rule, and he argued that the ABA intended the safe harbor provision to be read in light of the general prohibition.¹¹³ Furthermore, Rehnquist argued that the safe harbor's terms convey a precise standard for determining allowable comments.¹¹⁴ Rehnquist concluded that the rule provides sufficient notice to attorneys,¹¹⁵ and he stressed that the Court should defer to Nevada's determination that Gentile had violated the rule.¹¹⁶

Due to the Court's focus on Nevada's interpretation of the rule and its fact specific holding, Kennedy's majority opinion is of less significance. Despite Rehnquist's failure to sway the Court to adopt his view of the judgment, he obtained a majority for the proper standard for states to apply when reviewing attorney comment.

C. Adoption of Deferential Balancing Test

1. Rehnquist Majority

Rehnquist's majority opinion addresses the proper standard for reviewing a state's discipline of an attorney for making extrajudicial comments while associated with a pending trial.¹¹⁷ Gentile argued that the strict standard for reviewing regulations of press comments on trials should apply when attorneys made the comments as well.¹¹⁸ Nevada asserted that an attorney's presence distinguished the cases involving regulations of the press and pointed to the dicta from *Sawyer* and *Sheppard* to justify stricter regulations of attorney speech.¹¹⁹

Rehnquist began his analysis with a historical survey of state regulation of the legal profession.¹²⁰ He then reviewed authority supporting stricter regulations of attorney speech. First, the dicta in *Sawyer* stated that courts could place greater restrictions on attorneys than ordinary persons.¹²¹ Second, *Sheppard* asserted that courts must take precautionary actions that are arguably within their powers to restrict attorney speech.¹²² Third, the *Shep-*

113. *Id.*

114. *Id.* For Rehnquist, the combination of the relative terms "general" and "without elaboration" created a definite principle to guide attorney action. *Id.*

115. *Id.* Rehnquist is making a type of estoppel argument, asserting that Gentile could not complain about lack of notice when his motivation for the press conference was to influence potential jurors to offset prior publicity. *Id.*

116. *Id.*

117. *Id.* at 2740-45 (J. Rehnquist, majority opinion).

118. *Id.* (citing modern standard for regulating press in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and the "clear and present danger" test from the contempt cases beginning with *Bridges*). Recall the discussion of the standards for regulating the press *supra* notes 74-80 and accompanying text.

119. *Gentile*, 111 S. Ct. at 2740-41. For a discussion of the *Sawyer* and *Sheppard* cases, see *supra* notes 41-59 and accompanying text.

120. *Gentile*, 111 S. Ct. at 2740-43 (stating that it was mandatory to review the history of a regulation to understand the issue and surveying the regulation from the first canons in the 19th century Alabama Code to the modern formulation of the rules).

121. *Id.* at 2743 (pointing to statements from the separate opinions in *Sawyer* that were joined by a majority of the justices). See *supra* notes 49-52 and accompanying text for the discussion of the opinions by Stewart and Frankfurter in *Sawyer*.

122. *Gentile*, 111 S. Ct. at 2743.

pard Court imposed limits on participants in trials preventing them from disclosing information obtained solely by their court access.¹²³ Finally, the Court had allowed states to balance interests in the regulation of attorney advertising.¹²⁴

In light of this authority and the historical regulation of the profession, the Court¹²⁵ adopted a more deferential standard for reviewing restrictions on attorney speech regarding pending litigation.¹²⁶ Specifically, the Court held that the "substantial likelihood of material prejudice" standard reflects a proper balance between the state's interest in fair trials and the attorney's right of free speech.¹²⁷

2. *Kennedy's Attack on the Adoption of a Deferential Standard*

In contrast to the Rehnquist majority's focus on the heritage of attorney regulation, the critical factor to Justice Kennedy was that the case involves classic political speech.¹²⁸ Kennedy made a strong attack on the majority's reliance on obiter dicta from *Sheppard* and *Sawyer*.¹²⁹ Furthermore, he argued that the proposition that parties cannot disclose information obtained solely by their access to the courts is inapplicable here because all of Gentile's statements related to previously disclosed material.¹³⁰ Finally, he readily distinguished the commercial speech cases due to the political nature of Gentile's statements.¹³¹

IV. CONCLUSION

The grammatical conflict in Rule 177 split the Court on the issue of whether Rule 177 was unconstitutional under the prohibition against statutes that are overly vague. The lower courts should either interpret the safe harbor provision of Model Rule 3.6 as providing full immunity, or reexamine the rule and provide notice to attorneys that the safe harbor is simply a presumption that the general prohibition can override.

The Rehnquist Majority's adoption of a lower standard for reviewing ex-

123. *Id.* at 2743-44. The Court cited *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984), in which it had upheld the constitutionality of a protective order that prevented disclosure by a defendant newspaper of information obtained solely by virtue of discovery during the pre-trial phases of a civil defamation suit. *Id.*

124. *Gentile*, 111 S. Ct. at 2344. Rehnquist stresses the *Bates* line of cases as authority for regulation of attorney speech outside the context of pending litigation. *Id.*

125. Justice O'Connor concurred fully with Chief Justice Rehnquist's analysis of the proper standard. *Id.*, at 2748-49 (O'Connor, J., concurring).

126. *Id.* at 2744-45 (Rehnquist, J., majority opinion).

127. *Id.* (stating that few goals can be more legitimate than the state's interest in fair trials and that the 'substantial likelihood' standard imposes sufficiently narrow limitations on attorneys, thus striking a satisfactory balance).

128. *Id.* at 2732-34 (Kennedy, J., minority opinion) (stressing that attorney Gentile was criticizing the actions of state authorities). *Id.*

129. *Id.* at 2733-34 (stating that even if those cases stand for greater restrictions on attorney speech, none of the cases addressed the proper scope of those limits).

130. *Id.* (distinguishing *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), the case relied on by the majority).

131. *Id.* at 2732-33.

trajudicial attorney comments regarding pending trials makes manifest the Rehnquist-O'Connor agenda to provide greater deference to state regulation of the legal profession. Great deference was shown to Nevada in its balance of the countervailing considerations of the defendant's right to a fair trial and the attorney's right to free speech. With the retirement of Justice Marshall, the current Court will likely continue this retreat from close scrutiny of state regulation of attorneys that was evident in the *Bates* line of cases.