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Thomas Gibson
Committee on Professional Responsibility, Association of the Bar of the State of New York

Diana Parker
Committee on Professional Responsibility, Association of the Bar of the State of New York

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THE NEED FOR FAIR TRIALS DOES NOT JUSTIFY A DISCIPLINARY RULE THAT BROADLY RESTRICTS AN ATTORNEY'S SPEECH

Committee on Professional Responsibility, Association of the Bar of the City of New York †

The degree to which limits can be placed on extrajudicial speech by attorneys during potential and pending criminal cases has long been the subject of debate. The Supreme Court's recent decision in *Gentile v. State Bar of Nevada*,[1] has intensified that debate and makes clear that New York's ethical restriction is in serious need of revision.

I. The Competing Interests

The Supreme Court has repeatedly acknowledged that the justice system, and particularly the criminal courts, play a critical role in a democratic state and that the public has a legitimate interest in their operations.[2] Indeed, the Court has stated that "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."[3]

At the same time, the Court has characterized the right to a fair trial as "the most fundamental of all freedoms,"[4] and accordingly has stated that when the exercise of First Amendment rights jeopardizes the right to a fair trial, the exercise of First Amendment rights must be limited.[5] In cases involving the First Amendment rights of the press, the Court has balanced those competing interests by requiring the showing of a "clear and present danger" to the fairness of a proceeding before the state may prohibit or punish publication of reports about that proceeding.[6]

An additional set of competing interests is present when the First

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† April 1992. The members of the Committee at the time this report was written are listed in Appendix A.

1. 111 S. Ct. 2720 (1990).

2. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

3. *Richmond Newspapers, Inc.*, 448 U.S. at 575.

4. Estes v. Texas, 381 U.S. 532, 540 (1965).

5. Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); *Estes*, 381 U.S. at 539.

6. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Bridges v. California, 314 U.S. 252 (1941).

Amendment freedoms at issue are those of an attorney who is involved in the proceeding. Many have argued that because an attorney is in a unique position to discover, interpret, and reveal the operations of the legal system (and its defects), the public has a fundamental right to such information from the attorney. Those who espouse this view, such as the petitioner in *Gentile*, argue forcefully against restrictions on the attorney's speech. Others have countered, however, that because lawyers have special fiduciary responsibilities to the judicial system, and because their special access to information makes it likelier that their extrajudicial statements could undermine the fairness of a trial, special restrictions are appropriate. Indeed, citing the latter considerations, the Supreme Court has long suggested that lawyers in pending cases are subject to restrictions on speech which could not be constitutionally applied to the press or to an ordinary citizen.[7]

Until *Gentile*, however, the Court did not have occasion to rule on how onerous those restrictions could be. When it did, the result was a sharply divided set of opinions with shifting majorities.

II. The Gentile Case

In *Gentile*, the State Bar of Nevada filed a complaint against an attorney alleging a violation of Nevada Supreme Court Rule 177, a rule governing trial publicity almost identical to ABA Model Rule of Professional Conduct 3.6 and New York's Disciplinary Rule 7-107.[8] Subsection (1) of Nevada Rule 177 prohibited an attorney from making "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."[9] Subsection (2) of the rule listed a number of statements that were considered to be "ordinarily . . . likely" to result in material prejudice.[10] Subsec-

7. *See Sheppard*, 384 U.S. at 363; *In re* Sawyer, 360 U.S. 622, 635 (1959); *see also* Edenfield v. Fane, 113 S. Ct. 1792 (1993) (state prohibition on in-person solicitation by an accountant violates the First Amendment, even though a similar restriction against lawyers is constitutional: "Unlike a lawyer, a CPA is not trained in the art of persuasion.").

8. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (1992) [hereinafter N.Y. CODE OF PROFESSIONAL RESPONSIBILITY].

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

10. The following matters were listed in the rule as ordinarily prejudicial: (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness; (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement; (3) the performance or results of any examination or test or the

tion (3) of the rule provided a safe harbor provision for an attorney, listing a number of statements that can be made without fear of discipline, including a statement about the "general nature of the defense," so long as it was made "without elaboration."[11]

Gentile's client was the criminal defendant in a highly publicized case involving the theft of large amounts of cocaine and travelers checks from a safety deposit vault. The drugs and money had been used as part of an undercover operation conducted by the Las Vegas Police Department's Intelligence Bureau. The defendant was the owner of the safety deposit vault in question. Prior to the indictment there was substantial press coverage of the investigation in which the press reported that through a process of elimination the investigation was narrowing down to focus on the defendant, who was identified by name. The press also reported that the two detectives with access to the vault had been "cleared" as possible suspects after taking lie detector tests.

In response to this adverse publicity about his client, Gentile held a press conference on the day after indictment.[12] Before the press conference, Gentile carefully studied Rule 177 and its safe harbor provisions, in order to determine if he could issue an ethically permissible statement.[13] At the press conference, Gentile contended that the state sought the indictment and conviction of an innocent man as a "scapegoat" and "had not been honest enough to indict the people who did it . . . crooked cops."[14] The allegedly "crooked cops" were obviously witnesses who would testify at trial. Articles appeared in the local

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refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; (5) information the lawyer knows or reasonably should know is likely to be admissible 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. *Gentile*, 111 S. Ct. at 2737-38.

11. The Nevada rule, which was challenged and held unconstitutional in part in *Gentile*, has been redrafted and is currently pending before the Nevada Supreme Court. Ironically, the chief draftsperson for the amended rule was Gentile himself, who is currently the Nevada State Bar Governor. *See* Don J. DeBenedectis, Gentile's *Unanswered Questions*, A.B.A. J., Apr. 1993, at 28. The proposed revision in Nevada drops the safe harbor provision as well as the list of presumptively prejudicial statements, and also grants a lawyer a "right of reply" to publicity initiated by others.

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

13. *Id.* at 2732.

14. *Id.* at 2723.

press describing Gentile's comments. The trial took place six months later and the defendant was acquitted on all charges.

The Southern Nevada Disciplinary Board subsequently found that Gentile's pretrial comments had violated Nevada State Court Rule 177. In so finding, the Board stated that in light of the nature, timing and purpose of the statements, Gentile knew or should have known that there was a "substantial likelihood that the statements would materially prejudice the [defendant's] trial."[15] The Nevada Supreme Court affirmed the Board's decision.[16]

Gentile urged the United States Supreme Court to reverse the decision, arguing 1) that Nevada State Court Rule 177 was unconstitutionally vague as applied to him, and 2) that by punishing speech which merely posed a "substantial likelihood of material prejudice" to a trial, as opposed to a clear and present danger, the Nevada rule violated the First Amendment. Gentile's first argument was accepted by a 5-4 majority of the Court; his second was rejected by a different 5-4 majority.

Justice Kennedy, writing for the 5-4 majority on the issue of vagueness, found that the Nevada rule had misled Gentile into thinking that he could give his press conference without fear of discipline.[17] In so holding, Justice Kennedy cited subsection (3)(a) of the Rule, which provided that a lawyer "may state without elaboration . . . the general nature of the . . . defense," and that statements under that subsection were protected "[n]otwithstanding subsection 1 [the general prohibition against statements that have a substantial likelihood of materially prejudicing a trial] and 2(a-f) [the section proscribing discussion of the character, credibility, reputation or criminal record of a witness]."[18]

Justice Kennedy explained that, given the grammatical structure of the Rule and absent any clarifying interpretation by the state court, the Rule failed to provide the requisite fair notice and guidance to a lawyer seeking the protection of Rule 177(3)(a).[19] In particular, Justice Kennedy found that the provision gave inadequate guidance because the terms "general" and "without elaboration" were classic terms of degree, "which have no settled usage or tradition of interpretation in law."[20] As such, the rule left Gentile with "no principle for

15. *Id.* at 2739.
16. 787 P.2d 386 (Sup. Ct. Nev. 1990).
17. *Gentile*, 111 S. Ct. at 2731.
18. *Id.*
19. *Id.* at 2731.
20. *Id.*

determining when his remarks [would] pass from the safe harbor of the general to the forbidden sea of the elaborated."[21] As confirmation of the foregoing, Justice Kennedy cited the fact that Gentile had spent several hours researching the requirements of the Nevada rule, and that at his press conference, his remarks were guarded and general. Justice Kennedy asserted that "the fact that Gentile was found in violation of the rules after studying them and making a conscious effort at compliance demonstrates that [the Nevada rule] creates a trap for the wary as well as the unwary."[22]

The Court's 5-4 rejection of Gentile's second argument—that the First Amendment requires a state to demonstrate a "clear and present danger" of "actual prejudice or an imminent threat" rather than the mere showing of "substantial likelihood of creating material prejudice" before sanctioning attorney speech—was authored by Chief Justice Rehnquist. The Chief Justice found that the less stringent "substantial likelihood" test is a constitutionally permissible balancing of interests between lawyer and state because it is "designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech."[23]

Chief Justice Rehnquist's opinion confirmed the Court's earlier suggestions that the First Amendment does not grant lawyers representing clients in pending cases the same latitude that it grants the press. In so holding, Chief Justice Rehnquist reasoned that "lawyers representing clients in pending cases are key participants in the criminal justice system, and the state may demand some adherence to the precepts of that system in regulating their speech as well as their conduct."[24] The Chief Justice further noted that a lawyer's extrajudicial statements can have a significant impact on a pending trial because "lawyers' statements are likely to be received as especially authoritative,"[25] and he emphasized that the sort of disciplinary rule at issue was narrowly drawn to protect against the danger of an unfair trial because it "merely postpone[d] the attorney's comments until after the trial."[26]

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21. *Id.*

22. *Gentile*, 111 S. Ct. at 2732.

23. *Id.* at 2745.

24. *Id.* at 2744.

25. *Id.* at 2745.

26. *Gentile*, 111 S. Ct. at 2745. The remaining four justices expressed doubt, but ultimately declared it unnecessary to decide whether the Nevada standard was constitutionally permissible, noting that the difference between a "substantial likelihood of material prejudice" and a "clear and present danger" could prove to be "mere semantics," and finding that the State, in any case, had not established that Gentile's statements rose to the level of either standard. *Id.* at 2725.

III. New York's DR 7-107

The current version of New York's restriction on attorney speech—Disciplinary Rule 7-107[27]—is substantially identical to the Nevada rule that was at issue in *Gentile*.[28] Subsection (a) of the New York rule provides, as the Nevada rule did, a general prohibition against making "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."[29] In addition, and again like the Nevada rule, subsections (b) and (c) of the New York rule provide, respectively, a list of the sort of statements that "ordinarily" will be likely to materially prejudice an adjudicative proceeding,[30] and a "safe harbor" listing of statements that may be made "without elaboration," among which is a statement about "the general nature of the claim or defense."[31]

Thus, while the general standard stated in the first subsection of the New York rule is one that *Gentile* found to be constitutionally permissible, the safe harbor provision contains precisely the same "trap for

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27. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 8.

28. New York's DR 7-107 was amended in 1990, prior to *Gentile*, to bring it substantially in accord with Rule 3.6 of the MODEL RULES OF PROFESSIONAL CONDUCT.

29. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 8, DR 7-107(a).

30. The list of prohibited statements consists of statements about: (1) the character, credibility, reputation or criminal record of a party, suspect or witness, or the identity of a witness or the expected testimony of a party or witness; (2) the possibility of a plea of guilty or the existence or contents of any confession, admission or statement given by the accused or that person's refusal or failure to make a statement; (3) the performance or results of any examination or tests or the accused's refusal or failure 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; (5) information the lawyer knows or reasonably should know is inadmissible as evidence in a trial and if disclosed would create substantial risk of material prejudice; (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 innocent until and unless proven guilty. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 8, DR 7-107(b).

31. The full text of the safe harbor provision is as follows:

> (c) Provided that the statement complies with DR 7-107(a), a lawyer involved with the investigation or litigation of a matter may state the following without elaboration:
>
> (1) The general nature of the claim or defense.
>
> (2) The information contained in a public record.
>
> (3) That an investigation of the matter is in progress.
>
> (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

the wary as well as the unwary" that *Gentile* struck down as unconstitutionally vague.

Another problem with the current DR 7-107 is the inherent conflict between subsection (b)(4), which *prohibits* a statement of opinion concerning the guilt or innocence of the defendant, and subsection (c)(1), which *permits* a statement concerning the general nature of the claim or defense. There can be nothing more "general" than the defense counsel's statement that "my client is innocent," and yet that is the very type of statement which appears to run afoul of subsection (b)(4). Such a whipsaw effect undoubtedly violates the First Amendment under the analysis in *Gentile.*

As a result, it is clear that New York's rule cannot be left as it stands. The Committee notes that the ABA has come to the same conclusion and is in the process of drafting an amendment to Model Rule 3.6.[32]

Nor, of course, would it be an answer simply to delete the particular "safe harbor" that *Gentile* found to be fatally confusing. So amended, the rule would consist of: (a) a general provision that could bear widely differing interpretations; (b) a provision that essentially prohibits an extremely broad class of statements, even if the statements are made well before the trial, and without any distinction between jury trials and bench trials; and (c) a list of "safe harbor" statements that, by and large, are likely to be of interest only to the prosecution.[33] Such a rule would be neither fair, nor fairly described

there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.

(7) In a criminal case:

(i) The identity, age, 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, resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

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

N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 8, DR 7-107(c).

32. *See generally* Lynn S. Fulsome, Gentile v. State Bar of Nevada: *Trial in the Court of Public Opinion and Coping With Model Rule 3.6—Where Do We Go From Here?*, 37 VILL. L. REV. 619 (1992).

33. For example, the prosecution is far more likely to take advantage of safe harbor provisions concerning information necessary to aid in apprehension of the accused, or information concerning the evidence seized, than is the defense. *See* Monroe Freedman, *Muzzling Trial Publicity: New Rule Needed*, LEGAL TIMES, Apr. 5, 1993, at 24. The fact that many of the safe harbor provisions are more often invoked by the prosecution does not itself render the rule unconstitutional. *See* United States v. Cutler, 815 F. Supp. 599

as "impos[ing] only narrow and necessary limitations on lawyers' speech."[34] Accordingly, this Committee believes a more substantial reworking of DR 7-107 is in order.

A. The Timing of Statements

One obvious criterion for determining whether a statement creates the necessary level of prejudice is the timing of the statement. A public statement made nine months before jury selection will obviously have a lesser impact upon the jury venire than the same statement made the day jury selection begins. This point was made by Justice Kennedy, who argued in dissent in *Gentile* that the statements made by Gentile were too far in advance of trial to create a substantial likelihood of material prejudice to the proceeding:

> A statement which reaches the attention of the venire on the eve of voir dire might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process. . . . As turned out to be the case here, exposure to the same statement six months prior to trial would not result in prejudice, the content fading in memory long before the trial date.[35]

Indeed, in an analogous context, the Supreme Court has recognized that pre-trial publicity is far less likely to prejudice the fairness of a trial when it occurs substantially in advance of the trial. Thus, in *Patton v. Yount*,[36] the defendant was convicted of murder, but the state supreme court reversed the conviction on the ground that his confession was illegally admitted and ordered a new trial. During the first trial, there was extensive inflammatory publicity. Defendant was convicted in a second trial, and argued that this conviction was tainted by the publicity surrounding the first trial. The Court rejected

(E.D.N.Y. 1993) (rejecting the argument that the safe harbor provisions in Local Rule 7 of the Eastern District Rules of Court—substantially identical to the safe harbor provisions of DR 7-107—so favor prosecutorial speech as to violate the First Amendment; noting that these matters "could be discussed by either party to the proceeding"). However, it does speak to a certain unfairness in the rule, especially when read in tandem with the rule's broad and undifferentiated prohibition on pre-trial statements.

34. *Gentile*, 111 S. Ct. at 2745. No court has upheld an across-the-board prohibition on attorney speech that applies regardless of its impact on the likelihood of influencing a trial. In fact, the Seventh Circuit has held that since "a blanket prohibition on certain areas of comment—a *per se* proscription—" without any consideration of the effect on a fair trial grossly violates the First Amendment, statements by an attorney can only be prohibited if they are likely to influence the jury. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975).

35. *Gentile*, 111 S. Ct. at 2729.

36. 467 U.S. 1025 (1984).

this argument, and emphasized that the defendant's second trial occurred four years after most of the publicity in connection with the first trial.[37] The Court noted that the passage of time between publicity and a trial is a "highly relevant fact"[38] and concluded that "in the circumstances of this case, we hold that [the passage of time] clearly rebuts any presumption of partiality or prejudice"[39] stemming from the inflammatory publicity.[40]

B. A Better Balancing of Interests

An ethical restriction on attorney statements that utilizes a "substantial likelihood of material prejudice" standard, or indeed any general standard, has a chilling effect on attorney statements. No mechanism exists for obtaining an advisory opinion on whether particular statements would run afoul of the standard. Further, many attorneys will be unwilling to run the risk of an adverse ruling, choosing instead simply to remain silent. At the very least, this chilling effect casts doubt on the wisdom of an across-the-board prohibition of speech that could be construed to violate a standard of "substantial likelihood of material prejudice."

Although the shifting majorities in *Gentile* disagreed on a great deal, the Justices were unanimous in affirming the public's interest in not restricting the free flow of information about the criminal justice system.[41] The attorneys involved in a particular case are usually best situated to alert the public to perceived abuses of power and to explain what has occurred in a particular case so that the public can more effectively follow and monitor the workings of the criminal justice system. Those considerations militate against any ethical restriction on attorney speech that encourages attorneys to err on the side of silence.

Moreover, an ethical restriction on attorney speech is not the only means of regulating public statements that would imperil fair trial rights. Trial judges have the power to issue "gag" orders when they believe that unrestricted public statements might prevent a fair trial.[42] It is true that, like ethical rules, gag orders are subject to First Amendment limitations; the court must explore possible alternatives to a restraint on speech, and the restraint must be narrowly tailored to

37. *Id.* at 1031.
38. *Id.* at 1035.
39. *Id.*
40. *Id.* at 1035.
41. *See Gentile*, 111 S. Ct. at 2724, 2742.
42. *See, e.g.*, E.D.N.Y. R. 7(c) (authorizing the trial court to issue a gag order "in a widely publicized or sensational case").

combat prejudicial publicity.[43] The point, however, is that unlike a broad, vague ethical restriction, a gag order can (and indeed must) be tailored to the specific circumstances of each case; and such an order can (and must) be accompanied by specific guidance to the attorney on what sort of statements should be avoided.[44]

The gag order that was issued in the recent World Trade Center bombing case illustrates how these orders can be particularized.[45] Instead of allowing the attorneys to determine whether the vague standards of a disciplinary rule would be violated by pre-trial statements, the trial judge imposed direct limitations on both the prosecution and the defense. To the extent the limitations remained unclear, counsel could seek, and indeed did seek, clarification from the judge who issued the order. To the extent the limitations on speech were considered onerous, counsel could and did seek to appeal the order; the appeal was successful on First Amendment grounds.[46] Thus, a gag order is easier to clarify or challenge than an ambiguous disciplinary rule. Assuming that some regulation of prejudicial pretrial publicity is required in a particular case, a gag order is a more appropriate means of regulation than a vague disciplinary rule.[47] In light of the availability of the gag order alternative, this Committee believes that a broad ethical restriction on attorney speech is especially difficult to justify.

To the extent that some ethical restriction on attorney speech is necessary, we propose that the best approach is to identify the specific circumstances under which attorney statements are most likely to imperil fair trial rights and to limit the ethical restriction only to those circumstances. Where the risk of prejudice is minimal, or could be effectively countered by voir dire or jury instructions or some other remedy, we believe that it is better to have no prohibition at all, rather than to have a general "substantial likelihood" standard, the applica-

43. *See* United States v. Salameh, 992 F.2d 445 (2d Cir. 1993) (vacating gag order where restraint on attorneys' speech was not narrowly tailored and where trial court failed to explore alternatives to gag order).

44. *See id.* (stating that order must be particularized to circumstances and narrowly drawn).

45. *Id.*

46. *Id.*

47. *See In re* Application of Dow Jones & Co., 842 F.2d 603 (2d Cir. 1988) (upholding gag order prohibiting all participants in the Wedtech trial from making any statement concerning the case, except to report courtroom and other proceedings). We do not propose or approve of the routine use of gag orders. Rather, we merely conclude that if there is a problem of prejudicial publicity which imperils a fair trial, the use of a narrowly tailored gag order is preferable to the after-the-fact application of a disciplinary rule which uses broad language to limit speech.

bility of which could never be accurately predicted by the attorney.[48]

C. Bench Trials

While it is conceivable that an attorney's public statements could unfairly influence a bench trial, the likelihood of that actually occurring is quite remote. In fact, as the Fourth Circuit has suggested in *Hirschkop v. Snead*,[49] a judge in a bench trial is presumed to disregard evidence that she has ruled inadmissible, and it is therefore illogical to conclude that the same judge is unable to disregard a lawyer's statements to the press.[50] Accordingly, instead of broadly regulating statements pertaining to all "adjudicative proceedings," New York's rule should be narrowed in scope to include only those statements pertaining to jury trials.[51]

D. Pre-Trial Statements

Whether statements made prior to trial will have an effect on the empaneling of an impartial jury, or a jury's deliberations, obviously depends both on the nature of the statements and on how far in advance of trial the statements were made. Conceivably, there may be some statements so incendiary that they pose a substantial risk to a fair trial regardless of how far in advance of trial they are uttered. This is extremely unlikely, however, given the possibility of voir dire, change of venue, and the use of jury instructions and peremptory challenges. Also, it is worth remembering that the fair trial right is

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48. The Committee notes that the enforcement of the "substantial likelihood of material prejudice" test has not been uniformly applied among the states. For example, in *In re* Sullivan, 586 N.Y.S.2d 322 (App. Div. 1992), defense counsel gave a television interview after all the evidence in a highly publicized trial had been presented and before the jury began deliberating. In the interview, the lawyer discussed the testimony of three witnesses who did not testify at trial, including the defendant. He also charged that one of the witnesses had been manipulated by the prosecution so that he would not testify for the defense. The jury was not sequestered. Nonetheless, the court refused to impose any disciplinary measures, reasoning that the lawyer's interview was "a mere drop in the ocean of publicity," *id.* at 326, and "was not of a kind to so qualitatively alter public knowledge or mood that he should have known it would carry a substantial likelihood of materially prejudicing the proceeding." *Id.* Gentile, on the other hand, was disciplined for statements made in a sea of publicity several months before the jury was even empaneled.

49. 694 F.2d 356, 371 (4th Cir. 1979).

50. *See also* Craig v. Harney, 331 U.S. 367 (1947) (stating that trial judges need not be protected from pre-trial publicity because they are people of "fortitude, able to survive in a hardy climate").

51. It is notable that Chief Justice Rehnquist's opinion in *Gentile*, when discussing the dangers of pre-trial publicity, focused exclusively on the danger of prejudicing the jury. *See* 111 S. Ct. at 2738-45; *see also* Freedman, *supra* note 2, at 33 (arguing that bench trials should be excluded from pre-trial publicity limitations).

not implicated merely because the jurors have been subjected to publicity. The question instead is whether "the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant."[52]

The most significant factor with respect to jury selection will often be exposure to the charges, which are public. No ethical restrictions, regardless of how severe, will prevent exposure to charges in a highly publicized case. Therefore, the possibility of a tainted jury venire cannot ordinarily be a valid reason for limiting speech by attorneys. If the jury venire has not been prejudiced by publicity given to the charges, it is unlikely that there will be any statements by an attorney that will prejudice the jury venire prior to jury selection.

From all these considerations, the Committee concludes that, in most cases, pretrial statements are very unlikely to pose a substantial risk to a fair trial unless they are made extremely close to the time of trial. Accordingly, this Committee recommends that any general ethical regulation of pretrial statements be limited to statements made one month or less prior to the scheduled commencement of trial.

In so recommending, the Committee does not, of course, intend to suggest that a lawyer who makes a substantially prejudicial statement several months prior to trial is any less worthy of reprimand than one who does so two weeks prior to trial. Instead, our recommendation merely reflects the belief that relatively few statements made more than a month prior to trial are likely to pose a substantial risk of material prejudice. Further, the desirability of promulgating an ethical restriction broad enough to encompass those few cases is outweighed by the general chilling effect on all attorney speech that such a restriction would inevitably produce. A bright-line rule is especially appropriate to provide clear guidance to attorneys in these circumstances.[53]

Considering the various methods that are available to negate the effects of prejudicial statements, the necessity of imposing *any* limits on an attorney's pre-trial statements seems questionable. This is particularly true in light of Model Rule 3.5 and DR 1-102(A)(5). These rules can be read as independently proscribing attorney conduct that is intended to prejudice a trial. Why, then, is a rule relating to pre-

52. Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) (finding that extensive sensational publicity did not violate the defendant's right to fair trial, and concluding that "it is not required that the jurors be totally ignorant of the facts and issues involved").

53. *See generally* Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 688 (1991) (arguing for the adoption of "clear and explicit ethical rules").

trial statements necessary? The short answer is that the existence of a rule directed specifically to attorney statements makes clear that free speech cannot justify the use of speech to prejudice a trial.

E. Statements Made During Trial

It is at the trial stage of the proceedings that attorneys' extrajudicial statements pose the greatest threat to the fair administration of justice. As soon as jurors have been selected, their sensitivity to media taint becomes more pronounced. Moreover, after jury selection the exclusion of tainted jurors from the judicial process becomes markedly more difficult.

Still the Committee recognizes that the public's interest in news of the trial is probably greatest while the trial is in progress, and that the fundamental right of the public to information about the workings of the criminal justice system calls for limiting the restrictions on speech to only those absolutely necessary to insure a trial untainted by improper outside influences. To achieve this balance, the Committee, for the reasons outlined above, recommends the replacement of the "substantial likelihood" standard with a standard prohibiting only that speech which presents a clear and present danger of prejudicing a trial. While a broader standard such as "substantial likelihood" is constitutionally permissible after *Gentile*, the Committee has concluded that the clear and present danger test strikes a better policy balance, especially in light of the gag order alternative. If the trial judge does not see the necessity of a gag order during the trial, we find it difficult to conclude that discipline should be imposed on the basis of a retrospective view that the attorney's speech was likely to prejudice the proceeding. Therefore, such discipline should be permissible only in egregious circumstances where there is a clear and present danger of prejudicing the trial.

The Committee notes the crucial role of the trial judge in governing the conduct of the trial. The Committee does not advocate a listing of presumptively improper speech in this portion of an amended rule. We prefer to leave such determinations to the courts, given their unique vantage point from which to fashion appropriate orders.

F. Post-Trial Statements

Since a jury's verdict obviously cannot be influenced once it has been rendered, the rule should make clear that it does not apply to statements made after the jury has been discharged. Disciplinary Rule 7-107 as it exists today makes no reference whatsoever to the timing of the proscribed statements. As the Chief Justice stated in

Gentile, however, the rule is constitutionally permissible only because it "merely postpones the attorney's comments until after the trial."[54]

IV. The Proposed Rule

We propose that DR 7-107 be amended to read as follows:

> During a jury trial, and during the month immediately preceding the scheduled commencement of that trial, no lawyer participating in or associated with that trial shall 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 present a clear and present danger of material prejudice to the trial.

So amended, the rule would encourage silence only when speech would be truly likely to have an impact on the fairness of a trial. To be sure, the result of such a rule might well be an increase in what some would regard as undignified or even obnoxious speech. However, the chief article of faith of the First Amendment is that a society is ultimately best served by giving voice to, not suppressing, its dissidents. And it is the view of this Committee that an area as critical as the conduct of the criminal justice system is the last place in which that article of faith should be abandoned.

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54. *Gentile*, 111 S. Ct. at 2745. The New York Court of Appeals, in *In re* Holtzman, 78 N.Y.2d 184 (1991), upheld the imposition of discipline on the basis of post-trial comments made by a district attorney, in which the attorney criticized the performance of the trial judge. No attempt was made in *Holtzman* to apply DR 7-107 to post-trial comments. Instead, the Court of Appeals held that Holtzman could be constitutionally disciplined under DR 1-102(A)(5) (prohibiting conduct "prejudicial to the administration of justice") and DR 1-102(A)(7) (prohibiting conduct "adversely reflecting on the lawyer's fitness to practice law"). This Committee filed an amicus brief on behalf of the attorney in *Holtzman*, and we continue to believe that the interest in protecting the integrity of the judiciary is not so compelling as to outweigh the attorney's right to speak on matters of public interest. Nonetheless, the practitioner should note that while DR 7-107 should not limit post-trial statements, other even more nebulous provisions may be violated and may subject the attorney to discipline.

Appendix A

The Committee on Professional Responsibility
Daniel J. Capra, *Chair*
Marianne Fogarty, *Secretary*

Maria Helen Bainor
Howard Benjamin
Lester Brickman
Timothy Brosnan
Susan Brotman
Alice Lynn Brown
Karen B. Burrows
Karl Coplan
James Cott
Anthony E. Davis
Richard Friedman
Thomas Gibson*
Arthur Handler
Gregory P.N. Joseph
John Koeltl
Joan B. Lobis
Barbara Brooke Manning
Leslie Marshall
Sarah Diane McShea
Richard Painter
Diana Parker*
Robert L. Plotz
Sol Schreiber
Cora T. Walker
Amy Walsh
Paul D. Wexler

* Co-authors of this Report.