1990

The Prosecutor, The Press, and Free Speech

Scott, Jr. M. Matheson

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol58/iss5/1
THE PROSECUTOR, THE PRESS, AND FREE SPEECH

SCOTT M. MATHESON, JR.*

TABLE OF CONTENTS

Introduction ................................................... 866

I. Restrictions on Extrajudicial Lawyer Comment .......... 871
   A. Disciplinary Rules ........................................ 872
   B. Court Rules ............................................... 877
   C. Judicial Restraints ....................................... 877

II. The Context of Extrajudicial Prosecutor Speech ........ 878
   A. The Competing Values: Free Speech, Fair Trial, and Other Concerns ............................................. 879
      1. Nature of the Speech and Free Expression Values 879
      2. Constitutional Protections for the Accused .......... 881
      3. Fair and Efficient Administration of Justice ....... 882
      4. Public Confidence in the Judicial Process .......... 883
      5. Reputation, Privacy, and Security Interests of the Accused, Victim, and Witnesses ................... 884
   B. Prosecutor Role .......................................... 885
      1. Unique Advocate ........................................ 885
      2. Officer of the Court ................................... 886
      3. Executive Branch Employee ............................ 887
      4. Political Actor ......................................... 888
      5. Prosecutor Role and Motives .......................... 888
   C. Working Relationships and Prosecutor Speech ......... 889
      1. Prosecutor and the Press ................................ 889
      2. Relations with Victims, Witnesses, Law Enforcement Officials, and Defense Counsel ................... 891
   D. Regulatory Context: The Role of the Court, the Audience of Primary Concern, the Timing of the Speech, and the Problems of Assessing Prejudice ........................................... 892
      1. Role of the Trial Judge .................................. 892
      2. Prospective and Actual Factfinders as the Audience of Primary Concern ...................................... 893
      3. The Timing of the Statements ........................... 894
      4. The Problem of Determining Potential and Actual Prejudice ..................................................... 896

III. Constitutional Analysis .................................... 897

* Visiting Associate Professor in the Frank Stanton Chair on the First Amendment, Joan Shorenstein Barone Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University (1989-90); Associate Professor of Law, College of Law, University of Utah.
INTRODUCTION

The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.1

The Attorney General assures me that our case [against General Manuel Noriega] is strong, our resolve is firm and our legal representations are sound.2

3. See A. Friendly & R. Goldfarb, Crime and Publicity 55-72 (1967); R. Graber, Crime News and the Public 40, table 2.9 (1980) (finding Chicago Tribune reported only .65 of 1 percent of crimes in Chicago); Antunes & Hurley, The Representation of Criminal Events in Houston's Two Daily Newspapers, 54 Journ. Q. 756 (1977) (Houston dailies published stories on no more than .75 of 1 percent of crimes reported to police); Cohen, A Comparison of Crime Coverage in the Detroit and Atlanta Newspapers, 52 Journ. Q. 726 (1975) (Detroit newspapers covered 1.9 percent and Atlanta papers 3.19 percent of reported crimes); Frasca, Estimating the Occurrence of Trials Prejudiced by Press Coverage, 72 Judicature 162, 165 (Oct.-Nov. 1988) (estimating 7 percent of all felony cases resulting in arrest are reported by metropolitan newspapers). Judge J. Skelley Wright once esti-
Enough charges do receive such attention, however, to raise questions about the constitutional rights of free speech and fair trial, the integrity of the judicial process, the interaction between lawyers and journalists, and the professional obligations of attorneys.

Some of those questions concern extrajudicial public comment from prosecutors about pending criminal cases, a phenomenon that appears to be on the rise. There is no definitive Supreme Court precedent concerning the scope of first amendment protection for such speech, though the Court said in 1966 that "collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."5

Lawyer speech is strictly regulated in the courtroom. Rules of procedure and evidence and the need to preserve some degree of order and decorum strictly limit what lawyers and other trial participants can say, especially in the presence of the jury. For example, the prosecutor is barred from expressing a personal opinion on the guilt of the accused, from referring to evidence that may be relevant but has not been admitted because it is unduly prejudicial (prior criminal record) or was obtained improperly (coerced confession), or from alluding to plea bargain.
negotiations. No serious first amendment claim can be made that such courtroom speech should be free from restriction.

But what happens when the prosecutor steps outside the courtroom? Lawyers cannot go directly to jurors before or during trial and advocate their case out of court—why should they be able to do so publicly when jurors or prospective jurors might hear them? Can the court or the lawyer disciplinary process impose limits on such speech without running afoul of the first amendment? Is the prosecutor entitled to as much constitutional protection as is afforded to the press or the general public, or should it be easier to gag the prosecutor than the press?

Most commentary on extrajudicial lawyer speech has focused on criminal defense counsel; several authors have argued that defense attorneys should enjoy freedom from ethical rules limiting extrajudicial comment. No one makes such arguments on the prosecutor's behalf, for it is the prosecutor's extrajudicial publicizing, not defense counsel's, that might imperil the defendant's fair trial right. The prevailing view is that prosecutor statements are more likely to influence prospective jurors.

8. Indeed, "[a] prosecutor may not directly refer to or even allude to evidence that was not adduced at trial." United States v. Murrah, 888 F.2d 24, 26 (5th Cir. 1989).

9. In Smith v. United States, 431 U.S. 291 (1977), Justice Stevens stated broadly that "offensive language in a courtroom . . . may surely be regulated." Id. at 318 (Stevens, J., dissenting).

10. The ethical rules flatly prohibit such contact. Disciplinary Rule ("DR") 7-108(A) provides that "[b]efore the trial of a case a lawyer . . . shall not communicate with . . . anyone he knows to be a member of the venire." Model Code of Professional Responsibility DR 7-108(A) (1981). DR 7-108(B) provides that during the trial of a case a lawyer connected with the case "shall not communicate with . . . any member of the jury." Model Code of Professional Responsibility DR 7-108(B) (1981). Model Rule ("MR") 3.5 provides that a lawyer shall not "seek to influence a judge, juror, prospective juror or other official by means prohibited by law" or "communicate ex parte with such a person except as permitted by law." Model Rules of Professional Conduct Rule 3.5 (1987).


and that prosecutors, more than defense lawyers or lawyers in other settings, may more readily violate no-comment rules.\(^{16}\)

Lawyers, especially prosecutors, should not, in my judgment, "try their cases in the press" and should confine to the courtroom what they say in public about a pending case. Notwithstanding what may be desirable and prudent, "[w]e must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."\(^{17}\) Not long ago it was readily assumed that, although the press generally could not be restrained from, or punished for, publishing information about matters of public concern, lawyers were amenable to court discipline for statements that might affect the right to a fair trial.\(^{18}\)

Cases in the lawyer advertising area, however, have shown that official efforts to discipline lawyer speech are subject to first amendment scrutiny.\(^{19}\)

The extreme cases are easy to resolve. Few, if any, would justify a prosecutor calling a press conference on the eve of trial to reveal that a defendant in a high-profile case had been on the verge of entering a plea agreement. Conversely, few would question the right of a prosecutor to disclose publicly, in advance of trial, the identity of another prosecutor who would be assisting in the courtroom. In many instances, however, the answers are not so clear. Courts, prosecutors, and the press need to know the scope of permissible prosecutor speech.


The prosecutor does not relinquish free speech rights by virtue of being a prosecutor.\textsuperscript{20} The press and the public have a first amendment interest in receiving his statements.\textsuperscript{21} Accordingly, the prosecutor merits free speech shelter. However, his role in the criminal justice system and the accused's fair trial and other rights complicate the first amendment analysis. Indeed, of all lawyers, criminal and civil, the prosecutor wishing to make a public comment about a pending case faces the most difficult considerations in deciding what he can say. Also, of all lawyers, prosecutors generally are considered to be the least entitled to make public comment on a pending case.\textsuperscript{22}

It is under precisely these circumstances—uncertainty about limits and general sentiment that a particular speaker should be regulated—when great care is needed to reconcile free expression with competing interests. Although the Supreme Court has held consistently that restraints on free expression may be "permitted for appropriate reasons,"\textsuperscript{23} the challenge in regulating prosecutor speech is to resist unnecessary compromise of speech values.

Restrictions on prosecutor speech relating to a pending case constitute content regulation, which normally is subject to the most stringent first amendment scrutiny. The context of extrajudicial prosecutor speech, however, justifies regulation under certain circumstances. This Article briefly reviews the evolution of government restrictions on lawyer comment about pending cases, largely an interplay between the formulation of rules limiting lawyer speech and landmark judicial opinions in fair trial and free press cases. The Article then examines the competing values at issue when prosecutor speech occurs and identifies common features of the situations in which such speech takes place. It next presents a constitutional analysis of speech limits based on the government interests involved and relevant features of these contexts. The Article attempts to account for the clash of values and the complexity of context.

\textsuperscript{20} See In re Hinds, 90 N.J. 604, 614, 449 A.2d 483, 489 (1982) ("Like other citizens, attorneys are entitled to the full protection of the First Amendment, even as participants in the administration of justice.").


\textsuperscript{22} "[T]he Court believes that of the three separate groups subject to the restraints [on extrajudicial speech] (Government, defendants, defense counsel), the Government is most susceptible to supervision by the Court." United States v. Simon, 664 F. Supp. 780, 785 n.9 (S.D.N.Y. 1987), aff'd sub nom. In re Dow Jones & Co., 842 F.2d 603 (2d Cir.), cert. denied, 109 S. Ct. 377 (1988); see Levine v. United States Dist. Ct., 764 F.2d 590, 602 (9th Cir. 1985) (Sneed, J., concurring), cert. denied, 476 U.S. 1158 (1986).

without surrendering the search for practical standards to accommodate those values and guide conduct. It attempts to avoid slavish adherence to formal abstractions of decisional law without breaking unrealistically from first amendment doctrine that courts are likely to follow and respect.

The Article concludes that rules in this area have been evolving in an appropriate direction but that refinements are needed to better account for the unique role of the speaker, the changing context of the speech, and the competing interests at stake. Those refinements concern degree of threatened harm, burden of proof, intent of the speaker, timing of the speech, identity of the factfinder, and the form of regulation. The Article suggests that it is preferable for the trial judge in a particular case to address prejudice problems posed by extrajudicial prosecutor speech rather than rely on the lawyer disciplinary process.

I. Restrictions on Extrajudicial Lawyer Comment

[T]rial by newspaper is a real problem in this country, especially in criminal trials. . . . I do not think that the newspapers should be blamed for this or that anything should be done to curb them from printing anything to which they can get access. . . . However, we would eliminate a large part of this prejudicial publicity if we would only enforce the canons of ethics that now exist. I do not think that any lawyer, whether defense or prosecution, should ever make a comment to the press evaluating his case or any evidence.24

Restrictions on extrajudicial lawyer comment about pending cases have taken two principal forms: (1) disciplinary or court rules governing extrajudicial lawyer speech; and (2) judicial restraining orders. There are others. For example, prosecutor speech may also be regulated by employers, possibly based on agency regulations25 or informal personnel ac-


25. Government attorney offices have promulgated rules and guidelines governing prosecutor interaction with the press. The most notable are the rules imposed by the Department of Justice. See 28 C.F.R. § 50.2 (1989). Since 1965 Justice Department regulations, known as the Katzenbach restrictions, have banned the release of certain information relating to pending proceedings. These regulations are supplemented in 2 The Department of Justice Manual 1-7.001 (1987), which sets forth several policies, including that “news conferences should not be held to announce investigations, indictments, or arrests.” Id. at 1-285. Like DR 7-107 and MR 3.6, the Katzenbach restrictions adopt both a specific list of prohibitions and a test of degree of harm. This list includes observations about a defendant's character; statements attributable to a defendant; statements concerning the identity, testimony, or credibility of prospective witnesses; opinions about the guilt of the accused; and statements concerning evidence or arguments in a case, including whether it will be used at trial. See 28 C.F.R. § 50.2(b)(6) (1989).

Furthermore, local prosecution offices typically adopt policies governing contact with the press. See, e.g., Policy #55, Salt Lake County Attorney Policy and Procedures, Public Statements and Media Releases (1983).
Alternatively, defendants have sued prosecutors to recover civil damages for deprivation of fair trial rights caused by prejudicial publicity. Most states and the federal system prohibit government attorneys from disclosing matters presented before a grand jury. Another regulatory possibility is disqualification of the prosecutor from the case. The focus of this Article, however, is on the two principal forms of restraint outside the grand jury context.

A. Disciplinary Rules

The regulation of lawyer speech by rule has developed mainly through attorney codes of ethics. Most states have adopted a form of the American Bar Association ("ABA") model ethical rules on extrajudicial lawyer


27. Extrajudicial prosecutor speech has been the target of civil claims against the prosecutor brought by former criminal defendants. The claims are for defamation or for violation of civil rights based on deprivation of a fair trial. Prosecutors generally have immunity from such claims for what they say in court. See Imbler v. Pachtman, 424 U.S. 409, 424-31 (1976) (prosecutor absolutely immune in Section 1983 actions brought for initiating prosecution); cf. Barr v. Matteo, 360 U.S. 564 (1959) (absolute immunity for press release of Office of Housing Expediter). See generally Restatement (Second) of Torts § 586 (1977) (attorney in judicial proceeding absolutely privileged to publish defamatory matter); R. Sack, Libel, Slander, and Related Problems 268-71 (1980). However, courts have determined that prosecutors are not entitled to absolute immunity against claims brought under 42 U.S.C. § 1983 based on extrajudicial statements. See, e.g., Marx v. Gumbinner, 855 F.2d 783, 791 (11th Cir. 1988) (prosecutor could be liable for fourteenth amendment due process violation by issuing a defamatory press release); Powers v. Coe, 728 F.2d 97, 103 (2d Cir. 1984) (holding "that only qualified good faith immunity is available where a prosecutor distributes extraneous statements to the press designed to gain unfair advantage at trial"); Stepanian v. Addis, 699 F.2d 1046, 1048 (11th Cir. 1983) (prosecutor not absolutely immune if statement not part of his discretionary duties). See generally Boyer, Civil Liability for Prejudicial Pre-Trial Statements by Prosecutors, 15 Am. Crim. L. Rev. 231 (1978) (prosecutor's prejudicial and improper statement affecting defendant's right to fair trial should not be absolutely immune).

Recent examples include a 1987 federal suit brought by former U.S. Labor Secretary Raymond Donovan's construction company as well as its affiliates and officials against Bronx prosecutor Mario Merola and his assistant for $500,000 plus punitive damages for statements made to the press after Donovan and seven other defendants were indicted for criminal fraud. Also in 1987, the "Twilight Zone" movie's helicopter pilot filed a claim for $300,000 in damages for remarks made by Los Angeles deputy district attorney Lea Purwin D'Agostino when she was visiting the site of a crash that resulted in manslaughter charges against the pilot and others. See Prosecutors Face Civil Suits, 73 A.B.A. J. 28 (Sept. 1987).


30. Grand jury secrecy is based on governmental interests specific to the grand jury context. See Butterworth v. Smith, 110 S. Ct. 1376, 1380 (1990); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979). This Article's analysis suggests that relatively stronger controls on extrajudicial prosecutor speech would be permissible concerning grand jury proceedings than regarding other points in the criminal prosecution process, but because of the special characteristics of the grand jury, the discussion does not include extrajudicial comment on grand jury proceedings.
Violation of the lawyer no-comment rules could subject a lawyer to disciplinary action, which can result in sanctions ranging from private reprimand to disbarment.

During the twentieth century, the ABA has promulgated three model no-comment rules. Canon 20 of the 1908 ABA Canons of Professional Ethics "generally" condemned lawyer comment to the press about pending or anticipated litigation to preserve an aura conducive to a fair trial. This standard was so vague that it was difficult to apply and did not adequately warn speakers what was permitted and what was proscribed. Canon 20 was rarely enforced.

Fair trial and free speech issues received pronounced attention as a result of press coverage of the Kennedy assassination and the Supreme Court's 1966 decision in *Sheppard v. Maxwell*, which condemned as a violation of due process the impact on a criminal trial of publicity aided and abetted by the trial participants. The Warren Commission Report kindled an ABA study and the promulgation in 1968 of fair trial and free speech standards limiting lawyer publicity which poses a reasonable likelihood of preventing a fair trial. The "reasonable likelihood" language was taken from the Court's opinion in *Sheppard.* At the same time, the

---

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


38. See Sheppard, 384 U.S. at 363.
ABA was revising the 1908 Canons, and eventually adopted the ABA Code of Professional Responsibility in 1969. The 1969 Code incorporated the 1968 fair trial and free press standards on extrajudicial lawyer comment in Disciplinary Rule 7-107 ("DR 7-107"). DR 7-107 contains various lawyer no-comment directives and is reproduced in Appendix I to this Article. Although the rule is a narrower proscription than Canon 20, the primary concern in light of Sheppard and the Warren Commission Report was curbing extrajudicial lawyer comment rather than safeguarding lawyer speech rights.

DR 7-107 contains ten subsections. The first five address four phases of criminal prosecutions. First, DR 7-107(A) lists five types of information that may be disclosed in an extrajudicial statement during a criminal investigation and proscribes elaboration of other information. Permitted topics include public record information, information that the investigation is in progress, a description of the offense, a request for help in apprehending the suspect, and any public dangers. Second, DR 7-107(B) lists six types of information that may not be disclosed following initiation of charges. These include the character or criminal record of the accused, the possibility of a guilty plea, the existence or contents of a confession, and opinion on the merits of the case. DR 7-107(C) lists eleven types of information that DR 7-107(B) does not preclude a lawyer from announcing, such as basic biographical data on the accused, the nature of the charges, and the accused's denial of the charges.

Third, DR 7-107(D) prohibits statements during jury selection or trial about the "trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial." Reference to public records is permissible. Fourth, after trial or disposition without trial but before sentencing, DR 7-107(E) proscribes statements that are "reason-

41. See Model Code of Professional Responsibility DR 7-107 (1981) reprinted in Appendix I of this Article. The Vermont Supreme Court held recently that DR 7-107(A), which applies to "[a] lawyer participating in or associated with the investigation of a criminal matter," does not apply to defense lawyers who make out-of-court statements on behalf of clients who may become criminal defendants. See In re Axelrod, 150 Vt. 136, 549 A.2d 653, 654-55 (1988). But see Disciplinary Proceedings Against Eisenberg, 144 Wis. 2d 284, 311-12, 423 N.W.2d 867, 878 (1988) (holding identical language applicable to defense counsel).
42. See Model Code of Professional Responsibility DR 7-107(B) (1981), reprinted in Appendix I of this Article.
43. See Model Code of Professional Responsibility DR 7-107(C) (1981), reprinted in Appendix I of this Article; see also National District Attorneys Association National Prosecution Standards, Standard 26.2 (1977) (listing of permitted and proscribed statements similar to those in DR 7-107(C)).
44. Model Code of Professional Responsibility DR 7-107(D) (1981), reprinted in Appendix I of this Article.
ably likely to affect the imposition of sentence." Each rule applies only to extrajudicial statements that one would reasonably expect the press to report. The no-comment rules governing investigation and pretrial periods do not expressly require any showing that the extrajudicial statement threatened to or in fact interfered with a fair trial or the administration of justice. The trial and post-trial rules adopt a reasonable likelihood of threat standard.

Fair trial and free press issues took center stage again in 1976 when the Supreme Court decided *Nebraska Press Association v. Stuart.* The Court struck down as violative of the first amendment a state trial court gag order prohibiting news reporting or commentary on public judicial proceedings in a high profile homicide case. *Nebraska Press* spurred an ABA study on fair trial and free press issues. In 1978 the ABA Standards for Criminal Justice: Fair Trial and Free Press were revised to permit more speech by incorporating a "clear and present danger" test to govern restriction of extrajudicial lawyer speech. At about the same time, the ABA appointed a committee—the Kutak Commission—to re-draft the 1969 Code of Professional Responsibility. The Model Rules of Professional Conduct, adopted by the ABA House of Delegates in 1983, relied on the 1978 ABA fair trial and free press standards in formulating Model Rule 3.6 on trial publicity.

Reproduced in Appendix II to this Article, MR 3.6 proscribes extrajudicial lawyer comment when "the lawyer knows or reasonably should

---

45. Model Code of Professional Responsibility DR 7-107(E) (1981), reprinted in Appendix I of this Article.

46. Disciplinary authorities also have relied on other rules to discipline attorneys for public statements. For example, in *Ramsey v. Board of Professional Responsibility,* 771 S.W.2d 116 (Tenn.), cert. denied, 110 S. Ct. 278 (1989), the Supreme Court of Tennessee overturned a lower court's decision that the appellant could be disciplined for comments critical of a judge. Such application of DR 8-102—"[a] lawyer shall not knowingly make false accusations against a judge"—would violate the first amendment in this case. *See id.* at 120-22 & n.5 (quoting Model Code of Professional Responsibility DR 8-102 (1981)).

47. 427 U.S. 539 (1976).


51. MR 3.6 does not expressly limit the no comment proscription to lawyers involved in the case—the rule simply states: "A lawyer shall not . . . ." Model Rules of Professional Conduct Rule 3.6(a) (1987), reprinted in Appendix II. The DR 7-107 proscriptions are limited to "a lawyer participating in or associated with" or "a lawyer or law firm associated with" the handling of a criminal case. Model Code of Professional Responsibility DR 7-107(A),(B) (1981), reprinted in Appendix I. Unless read with an implicit
know that [the comment] will have a substantial likelihood of materially prejudicing an adjudicative proceeding” and when the reasonable speaker would “expect” the comment to be publicized. Rule 3.6(b) lists six types of statements that “ordinarily” would have such an effect. The six categories are similar to those in DR 7-107(B), although the latter are prescriptive and the former are at most presumptive. Rule 3.6(c) lists seven types of statements that may be made without elaboration, and they track the list found in DR 7-107(C).

There are several major differences between the 1969 and 1983 formulations. First, the degree of potential harm in MR 3.6 is phrased as “substantial likelihood,” as opposed to the “reasonable likelihood” test that appears in portions of DR 7-107; while the “reasonable likelihood” test appears only in some portions of DR 7-107, the “substantial likelihood” test appears to apply to all stages of a criminal prosecution. Second, MR 3.6 contains a scienter element—“the lawyer knows or reasonably should know” that the statement will pose the threatened harm. Third, the prejudice standard is phrased more strongly in MR 3.6—“materially prejudicing.” Fourth, unlike DR 7-107, MR 3.6 does not specify different phases of criminal investigation and prosecution. Finally, as the comment to MR 3.6 notes, the rule “transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice.”

The Model Rules appear to confirm the generally accepted view of the limitation to lawyers commenting on their own cases, MR 3.6 plainly is overbroad. Reference in the comment to MR 3.6 to the ABA Standards Relating to Fair Trial and Free Press does not provide the basis for a narrow interpretation in that Standard 8-1.1 contains the same broad language. Professor Wolfram suggests this results from either a drafting oversight or an assumption that only a lawyer involved in a case would be able to meet the requirement that a lawyer know that the statement will have a substantial likelihood of material prejudice to the proceeding. See C. Wolfram, Modern Legal Ethics 634 n.2 (1986).

52. See Model Rules of Professional Conduct Rule 3.6 (1987), reprinted in Appendix II.


54. Model Rules of Professional Conduct Rule 3.6 (1987), reprinted in Appendix II.

55. Model Rules of Professional Conduct Rule 3.6 model code comparison (1987). Model Rule 3.6 also omits the language of DR 7-107(C)(7), which provides that a lawyer may reveal “[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.” Model Code of Professional Responsibility DR 7-107(C)(7) (1981), reprinted in Appendix I. As the comment points out, “[s]uch revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions, which, if successful, may be circumvented by prior disclosure to the press.” Model Rules of Professional Conduct Rule 3.6 model code comparison (1987). MR 3.6(b) added to the no comment list references to inadmissible information that would substantially risk causing prejudice if disclosed as well as statements that defendant has
relative potency of extrajudicial prosecutor statements. Model Rule 3.8(e) requires prosecutors to exercise reasonable care to ensure that law enforcement personnel do not make extrajudicial comments that the prosecutor is prohibited from making by MR 3.6.\footnote{56} No similar responsibility is imposed expressly on other lawyers. Neither DR 7-107 nor MR 3.6 distinguishes between extrajudicial statements by prosecutors and extrajudicial statements by defense counsel. Proscriptions in both rules concerning disclosure of the accused’s confessions or admissions and other information, however, clearly are directed at prosecutors. Neither rule draws any distinctions based on whether a case is tried to a judge rather than a jury.

**B. Court Rules**

Most federal district courts adopted rules proscribing broad categories of statements presumed to be highly prejudicial to a criminal defendant. For example, the categories include all statements about the accused’s prior criminal record or any confessions or admissions.\footnote{57} In 1980 Judge Collins J. Seitz chaired a committee to review the free press and fair trial issue; the committee issued a revised set of guidelines, including a recommended rule concerning release of information by attorneys in criminal cases ("Seitz Report").\footnote{58}

The recommended rule is similar to DR 7-107 and adopts the test of reasonable likelihood of interference with fair trial as a prerequisite to restrictions on extrajudicial lawyer speech.\footnote{59} Unlike DR 7-107, however, the rule eliminates any restraint on comment pending sentencing and strictly limits comment during the grand jury phase. Most federal district courts have adopted some form of this rule.\footnote{60}

**C. Judicial Restraints**

The other major form of regulation of extrajudicial lawyer speech is the restraining order that enjoins a lawyer from commenting publicly on a pending case. In crafting such orders, courts often have relied on pre-existing no-comment rules modeled on the ABA disciplinary rules rather

\footnote{56. See Model Rules of Professional Conduct 3.8(e) (1987).}{57. This action was taken in response to the 1969 report of a committee headed by Judge Irving Kaufman. See Kaufman Report, supra note 37, at 392.}{58. See Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the “Free Press—Fair Trial” Issue, 87 F.R.D. 519, 525-28 (1980) [hereinafter Seitz Report].}{59. See id. at 525.}{60. Courts in the Seventh Circuit, however, are bound by the decision in Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), which held that the First Amendment demands a “serious and imminent” threat to a fair trial as opposed to a “reasonable likelihood” of threat to justify regulation of lawyer comment. See id. at 257; infra text accompanying notes 199-207.}
than fashioning ad hoc no-comment rules.\textsuperscript{61} Nonetheless, the Seitz Report\textsuperscript{62} recommended that each district court adopt a rule providing for issuance of a restraining order in "a widely publicized or sensational criminal case."\textsuperscript{63} Some district courts have followed this recommendation.\textsuperscript{64}

Court orders restraining lawyer speech are prior restraints and courts have recognized that the first amendment is a significant barrier to such orders.\textsuperscript{65} Accordingly, orders restraining lawyers have been upheld only if less restrictive alternatives were not available, the order was specific and clear, and the speech posed either a reasonable likelihood of or serious and imminent threat to the fair administration of justice.\textsuperscript{66}

\section*{II. THE CONTEXT OF EXTRAJUDICIAL PROSECUTOR SPEECH}

The imparted freedoms of the first amendment share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly 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 . . . . \textsuperscript{67}

We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.\textsuperscript{68}

Context is critical to first amendment analysis of prosecutor speech restraints.\textsuperscript{69} Beyond the unique circumstances of a particular case, the pertinent common conditions of prosecutor speech are complex. Although attempting to capture basic features risks underinclusiveness, this section defines four broad categories of basic features. The first consists of interests that may be at stake when the state regulates extrajudicial prosecutor speech. The second category of features reviews the role of the prosecutor. The third category canvasses the relationships of the prosecutor with others in the criminal justice system and with the press as they bear on extrajudicial speech. The fourth category addresses various aspects of the regulatory context—the role of the judiciary, the audi-

\begin{itemize}
  \item \textsuperscript{61} See B. Gershman, Prosecutorial Misconduct § 6.3(h), at 6-10 to 6-11 (1989).
  \item \textsuperscript{62} Seitz Report, supra note 58, at 519.
  \item \textsuperscript{63} Id. at 529.
  \item \textsuperscript{64} See, e.g., United States District Court for the Middle District of Pennsylvania, Local Rule 121.
  \item \textsuperscript{65} See L. Tribe, supra note 11, § 12-34.
  \item \textsuperscript{67} Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).
  \item \textsuperscript{68} Estes v. Texas, 381 U.S. 532, 540 (1965).
  \item \textsuperscript{69} Justice Holmes wrote that "the character of every act depends upon the circumstances in which it is done." Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.).
\end{itemize}
ence of primary concern, the timing of the speech, and the problem of predicting or determining the impact of the speech.

A. The Competing Values: Free Speech, Fair Trial, and Other Concerns

1. Nature of the Speech and Free Expression Values

Prosecutor speech on a pending case may address countless aspects of the criminal justice process, a subject of profound public concern. Such statements often touch upon alleged criminal activity, law enforcement, and judicial administration. Many individuals with public responsibilities in these areas—judges, prosecutors, sheriffs, police chiefs—are elected or hold office through political appointment. Their speech is inextricably tied to the self-government ideal of the first amendment, "the highest rung of the hierarchy of First Amendment values." Protecting such speech serves the first amendment's "core purpose of assuring freedom of communication on matters relating to the functioning of government." The general audience for such speech has a first amendment interest in receiving it. The speech may be exaggerated, sensational, unfair, vindictive, and only marginally relevant to the criminal justice system, but it is information about events having legal consequences, and accordingly, relates to a "matter of political, social, or other concern to the community."
In *Bridges v. California*,” the leading first amendment decision concerning out-of-court criticism of the judicial process, the Supreme Court stated, ""It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."" Prosecutor speech may serve a safety valve function through expression of grievances and perceived wrongs that, if left unexpressed, could fester and grow. Although defense counsel speech may more commonly challenge official actions, prosecutor speech also may serve what Professor Blasi identified as ""the checking value""; that is, speech ""checking the abuse of power by public officials."" Extrajudicial prosecutor statements may also support the familiar principle that speech promotes the discovery of truth.

The Court has been receptive to a range of values protected by the first amendment, and first amendment scholarship offers a rich debate about an array of free speech values. Whether one examines prosecutor speech from the perspective of the self-governance ideal, the checking or safety valve functions, the marketplace of ideas, the ""self-fulfillment"" of the speaker, or the ""autonomy of the listener,"" there is no reason based on the general nature of the speech to conclude that the first amendment interest in protecting prosecutor expression is diminished.

Prosecutors do not lose their first amendment protections because they are prosecutors or because their speech is based on information they have.

---


77. 314 U.S. 252 (1941).

78. Id. at 270 (footnote omitted).


82. The Supreme Court, in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), expressed the range of protections when it stated:

> It is no doubt true that a central purpose of the First Amendment ""was to protect the free discussion of governmental affairs."" . . . But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

Id. at 231 (citations omitted).


obtained by virtue of their public responsibilities.\textsuperscript{86} It is well settled that "litigants do not 'surrender their First Amendment rights at the courthouse door'"\textsuperscript{87} and that attorneys retain first amendment rights despite their positions as officers of the court.\textsuperscript{88} The Supreme Court has made clear that first amendment expression made possible by the government generally cannot be restricted by the government.\textsuperscript{89}

In particular circumstances, however, first amendment rights may be subordinated to dominant government interests in regulation. Therefore, while recognizing that the speech in question is entitled to undiminished first amendment protection,\textsuperscript{90} it becomes necessary to focus on the nature of the governmental interests.

2. Constitutional Protections for the Accused

First amendment issues arise from conflicts between free speech and other interests. For example, the issue in the defamation area ensues from the clash between free speech values and the state interest in protecting reputation.\textsuperscript{91} The competing interests involved in prosecutor speech differ from other speech contexts because there is potential conflict between interests based on constitutional rights. On one hand, there is the right of free speech; on the other, the "no less precious" due process right of the accused to the fair and impartial administration of justice.\textsuperscript{92} Indeed, the Supreme Court has referred to the defendant's right to fair trial as "the most fundamental of all freedoms."\textsuperscript{93} Accordingly, as the basis for regulating extrajudicial lawyer comment, the state interest in safeguarding the defendant's right to fair and impartial adjudication is especially strong. Moreover, because this constitutional right protects

\textsuperscript{86} Prosecutor speech may, of course, be based on information that is or can be made available to the public.

\textsuperscript{87} Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 n.18 (1984) (quoting \textit{In re Halkin}, 598 F.2d 176, 186 (D.C. Cir. 1979)).

\textsuperscript{88} See Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 475-76 (S.D.N.Y. 1982).

\textsuperscript{89} See, e.g., FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (government contributions to noncommercial educational stations could not be conditioned upon prohibition of stations' editorial speech, even if such were speech made possible by those contributions); Southeastern Promotions v. Conrad, 420 U.S. 546, 553 (1975) (even if local government builds municipal auditorium that makes possible the exercise of first amendment rights associated with theatrical productions, availability of auditorium must be "bounded by precise and clear standards," since "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use").

\textsuperscript{90} See American Bar Association Project on Standards for Criminal Justice Relating to Fair Trial and Free Press, Standard 8-1.1, Commentary at 8-9 (1980).


\textsuperscript{92} See \textit{Bridges v. California}, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting).

\textsuperscript{93} Estes v. Texas, 381 U.S. 532, 540 (1965). \textit{But see} Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976) ("The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.... [I]t is not for us to rewrite the Constitution by undertaking what they declined to do.").
the accused, its reconciliation with lawyer speech rights suggests that prosecutors may be subjected to more stringent restraints than defense counsel.94

Pretrial publicity can endanger other constitutional rights of the accused. For example, if a court employs a continuance to blunt any prejudicial effect of pretrial publicity, the defendant’s sixth amendment speedy trial guarantee may be compromised.95 Change of venue could prevent the accused from exercising the constitutional guarantee of being tried in the jurisdiction in which the alleged crime was committed.96 The right to a fair trial, however, is the primary competing interest based on the accused’s constitutional protections.

3. Fair and Efficient Administration of Justice

The state has interests independent of protecting defendants’ fair trial rights.97 For example, the Supreme Court has identified “disorderly and unfair administration of justice” as a basis to restrict speech about pending litigation because “trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”98 In Wood v. Georgia,99 the Supreme Court declared, “We start with the premise that the right of the courts to conduct their business in an untrammeled way lies at the foundation of our system of government.”100 In short, the state has a substantial interest in affording a fair and efficient trial to both

94. See Levine v. United States Dist. Court for C. Dist. of Cal., 764 F.2d 590, 602 (9th Cir. 1985) (Sneed, J., concurring), cert. denied, 476 U.S. 1158 (1986).

95. See Hirschkop v. Snead, 594 F.2d 356, 367 (4th Cir. 1979); see also Barker v. Wingo, 407 U.S. 514, 531-32 (1972) (“defendant’s assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether defendant is being deprived of [that] right”).

96. Indeed, in federal courts and many state jurisdictions, change of venue is limited if against the defendant’s wishes. See U.S. Const. amend. VI; Utah Const., Art. I § 12.

97. Although public justice and judicial efficiency may not be as compelling as an accused’s right to a fair trial, because “[t]he Sixth Amendment speaks only of the right of an accused and the Fifth Amendment only of the right of persons and not of the Government,” Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), the fair administration of justice is indisputably an important governmental interest. Indeed, the Bauer court concluded that “public justice is no less important than an accused’s right to a fair trial.” Id. The debate over which interest is more important should not significantly affect the constitutional protection of prosecutor speech rights because both interests are at stake.

98. Bridges v. California, 314 U.S. 252, 271 (1941). Nonetheless, it cannot be assumed that the speech actually threatens to jeopardize the proceedings. It must be determined the extent to which unfair administration of justice is “a likely consequence, and whether the degree of likelihood [is] sufficient to justify summary punishment.” Id.; see also Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (“substantive evil” state may prevent is “disorderly and unfair administration of justice”) (quoting Bridges v. California, 314 U.S. 252, 270 (1941)).


100. Id. at 383. The Wood Court recognized the state interest in measures to prevent “prejudice [that] might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding.” Id. at 389.
the prosecution and the defense."

Part of the institutional context of prosecutor speech is the adversary balance reflected in the rules of procedure and evidence. Use of extrajudicial publicity to gain advantage at trial, a possible prosecutorial motive and a likely effect, may interfere with that aspect of the criminal justice process. Protecting the integrity of the adversarial criminal litigation process from external influences is a state concern complementary to but independent of the interest in protecting the individual rights of the accused. Both prosecutor and defense counsel's speech can affect this interest, when prosecutors speak, however, the state interest in guarding fair trial rights of the accused and in the fair and efficient administration of justice overlap. The governmental interest in protecting the function of the criminal justice process is similar to the recognized interest of public employers in managing the workplace effectively by regulating the speech of their employees.

4. Public Confidence in the Judicial Process

The Court has recognized a state interest in fostering confidence in and preventing public misunderstanding of the judicial process. Lawyer disciplinary rules, including no-comment provisions, "were adopted in order to maintain absolute confidence in the integrity of the Bar." In reviewing a conviction for violation of a Louisiana statute prohibiting picketing outside a courthouse, Justice Goldberg wrote for the Court:

A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process.

This interest embodies the public's expectation that the criminal justice system will afford a fair trial with an impartial jury. In this regard, "the

102. See Swift, Restraints on Defense Publicity in Criminal Jury Cases, 1984 Utah L. Rev. 45, 66, 98-100. The Court in Nebraska Press suggested that press publicity poses this risk as well, but did not find it to be present there. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 n.4 (1976).
104. See Levine, 764 F.2d at 600-01 (approving district court order requested by government to restrict extrajudicial speech of attorneys participating in criminal case).
court should make a reasonable effort to provide precisely what the people expect." 108

As a basis for speech regulation, this interest, however important and legitimate, should not be accorded substantial weight. Secrecy regarding the administration of justice may have a detrimental effect on public confidence. Indeed, in reviewing a contempt citation based on judicial criticism, the Court gave little weight to the government’s related interest in respect for the judiciary: “The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion.” 109 In his concurring opinion in support of a constitutional right to attend a criminal trial, Justice Brennan wrote that “access is essential . . . if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.” 110

5. Reputation, Privacy, and Security Interests of the Accused, Victim, and Witnesses

Certain individuals participating in a criminal prosecution, such as victims and witnesses, would prefer not to have their involvement publicized. Indeed, many newspapers refrain from publishing the names of crime victims. 111 The wrenching experience of participating in a prosecution as a rape victim or victim of another violent crime can be exacerbated when the crime and the victim’s identity are reported to the community. The point is not limited to violent crime; the victim of investment fraud may wish to avoid publication of this information.

 Witnesses rarely have the same degree of interest in a prosecution as the victim and yet are subject to subpoena to testify. For the most part, they would prefer to avoid publicity. In addition to the sensitive and private nature of information about witnesses and victims, there also may be security concerns.

Publishing that someone has committed a crime may be devastating to that person’s reputation. 112 Moreover, the nature of the crime may also implicate the accused’s privacy interests. The presumption of innocence.


110. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J., concurring). In Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), Chief Justice Burger wrote that “injury to official reputation is an insufficient reason ‘for repressing speech that would otherwise be free.’ The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales.” Id. at 841-42 (quoting New York Times v. Sullivan, 376 U.S. 254, 272-73 (1964)).


112. See Freedman & Starwood, supra note 14, at 613. The state has “a pervasive and
does not shield the accused from reputational or invasion of privacy damage and acquittal does not necessarily repair that damage.

In spite of the foregoing reputational and privacy interests, the intricate web of defamation, privacy, privilege, and access law that has been shaped by first amendment claims and defenses as well as safeguards built into the criminal prosecution process suggests that these interests, though important, should not be primary considerations in determining the generally permissible scope of extrajudicial prosecutor speech based on no-comment rules.\textsuperscript{113} A court considering a restraining order directed at extrajudicial prosecutor speech, however, should not be foreclosed from taking victim and witness interests into account. Moreover, both no-comment rules and restraining orders could include provisions for cases in which publicity poses a threat to personal security.\textsuperscript{114}

B. Prosecutor Role

1. Unique Advocate

A lawyer "may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."\textsuperscript{115} In a legal system based on party representation, the prosecutor does not represent a victim, the police, the mayor, or the governor. He represents the community, which includes the foregoing as well as the accused. That fact has a profound impact on his duty: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."\textsuperscript{116} The prosecutor's goal is not to "win a case, but that justice

\begin{itemize}
\item \textsuperscript{113} For example, the first amendment generally protects disclosure of information about crime victims contained in public records from invasion of privacy claims. See \textit{Florida Star}, 109 S. Ct. at 2608; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975).
\item \textsuperscript{114} This interest would most often be pertinent to the safety of a victim or witness, but it may extend to the defendant's security. See, e.g., \textit{Closed-Door Arguments Continue Over Relocating Noriega}, Boston Globe, Jan. 13, 1990, at 4, col. 1 (prosecutors and defense counsel ordered not to disclose details of arguments given on change of venue motion).
\item \textsuperscript{115} Model Rules of Professional Conduct Rule 1.3 comment (1987).
\item \textsuperscript{116} Model Rules of Professional Conduct Rule 3.8 comment (1987); see American Bar Association, Standards for Criminal Justice, Standards Relating to the Prosecution Function 19-20 (1971). The function of the prosecutor was clearly enunciated in the following manner:

\begin{quote}
[T]he office demands and, on sober thought the public expects, that the prosecutor will respect the rights of persons accused of crime . . . . [O]ur traditions, embodied in the national and state constitutions, demand that the prosecutor accord basic fairness to all persons. Because of the power he wields, we impose on him a special duty to protect the innocent and to safeguard the rights guaranteed to all, including those who may be guilty.
\end{quote}
\end{itemize}
shall be done."117 By contrast, defense counsel's loyalty is to the individual defendant: he must "defend his client whether he is innocent or guilty," and "we countenance or require conduct which in many instances has little, if any, relation to the search for truth."118

The prosecutor represents the state, which is attempting to deprive the accused of life, liberty, or property, and the state is limited in doing so by the requirements of due process of law.119 The prosecutor, in short, is subject to broader duties,120 and the Supreme Court has declared that one of those duties is to ensure that guilt be based on the evidence presented in court and that the defendant receive a fair trial.121 When the prosecutor speaks publicly about a pending case, he cannot separate his representational role from his speech, and he thereby involves the state in the extrajudicial comment.122 Indeed, a prosecutor, because he is a state actor, could be sued for violation of the accused's constitutional fair trial right as a result of prejudicial extrajudicial comment.123

2. Officer of the Court

Lawyers are "officers of the court" because their duty to clients must be fused with their duty as participants in the governmental function of protecting the judicial process from extraneous influences that impair its fairness.124 The lawyer's responsibilities as an officer of the court vary depending on whether the attorney is immediately engaged in litigation. Courts have distinguished the constitutional scope of restrictions on law-

119. See Freedman & Starwood, supra note 14, at 617.
121. See Sheppard v. Maxwell, 384 U.S. 333, 350-52 (1966); see also Owens v. State, 613 P.2d 259, 263 (Alaska 1980) (noting "prosecutor's duty as an officer of the court to guarantee all criminal defendants their constitutional rights to a fair trial").
122. See Stroble v. California, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting).

To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice. Id.; see also State v. Wixon, 30 Wash. App. 63, 69, 631 P.2d 1033, 1038 (1981) ("state's association with trial related publicity is factor to be considered" when determining whether a defendant has been prejudiced).

123. See, e.g., Powers v. Coe, 728 F.2d 97, 105 (2d Cir. 1984) (plaintiff entitled to attempt to show that his constitutional right to fair trial in criminal prosecution was violated by alleged news leaks from prosecutors).

yers who are actively participating in criminal trials and those who are not.\textsuperscript{125} When the prosecutor secures access to information by virtue of his participation as counsel for the state in a criminal prosecution, he accepts a powerful responsibility to facilitate a governmental process that has as its primary objective fair procedure and a fair decision.\textsuperscript{126} The prosecutor's access to sensitive information makes him a good press source for information about a case and creates an obligation to exercise care in disseminating information.

3. Executive Branch Employee

Although prosecutors are deemed officers of the court and have responsibilities to the judiciary as lawyers and prosecutors, they are also executive branch officials at the federal, state and local levels. Most are merit or career service employees and subject to the protections and sanctions of the grievance and disciplinary systems. As in any hierarchy that is accountable to the public and therefore concerned about how and what information is disseminated, subordinate attorneys are subject to discipline from their superiors for statements they make to the press. Regulation of government employee speech has received substantial attention recently from courts\textsuperscript{127} and commentators.\textsuperscript{128} Part of the context of prosecutor speech is potential discipline by the prosecutor's employer,\textsuperscript{129} who has an interest in curbing speech that is disruptive to the workplace. The impetus for such regulation may stem from the need to ensure a fair trial to the accused and the fair administration of justice generally, but it may be derived as much or more from management or political considerations. The primary focus of this Article is on judicial regulation of prosecutor speech by rule or restraining order. For this source of speech restraint, the prosecutor is in a different position from the court clerk, bailiff and other court personnel. The regulator is not the prosecutor's employer and, in fact, constitutes a separate branch of government.


\textsuperscript{126} See \textit{People v. Dupree}, 88 Misc. 2d 780, 785, 388 N.Y.S.2d 203, 207 (Sup. Ct. 1976) (lawyers "stand on a different footing" than the press or public because "they acquire information not as general members of the public, but by virtue of their status and employment").


\textsuperscript{128} See, e.g., Note, supra note 76 at 1135-46 (traditional judicial test for public employee speech should be reformulated to increase employee's first amendment rights).

\textsuperscript{129} See, e.g., \textit{Rankin}, 107 S. Ct. at 2897 (context of statement must be considered in determining whether it relates to matter of public concern).
4. Political Actor

United States Attorneys are political appointees and many move from that position into partisan elective politics. State attorneys general, county attorneys, and district attorneys generally are elected and many seek re-election or election to another office. Notable examples include Thomas E. Dewey, Rudolph W. Giuliani, Elizabeth Holtzman, and Richard Thornburgh. Even though the assistant attorneys who work as prosecutors may be merit or career service employees, they work in political offices and have pursued political careers as well. Prosecutors are publicly accountable; their accountability is measured in part through public information about the prosecutor's office, and about particular cases. Indeed, it is generally accepted that elected prosecutors have an obligation to inform the community about the functioning of their offices.

5. Prosecutor Role and Motives

Because of their multifaceted role in the criminal justice system, prosecutors may have a variety of motives—some legitimate, some arguably not—to comment outside the courtroom about their cases. The motive may be informational—to advise the press and the public about the nature and status of the case and the activities of a public law office. This motive may be difficult to distinguish or separate from political motivations, especially when the prosecutor or his boss is facing re-election. The political motive may be to enhance the prosecutor's image or to promote the institutional standing of the prosecutor's office. Another related motive is economic. Publicity may help the prosecutor secure private sector legal employment and clients sometime in the...
future. Finally, lawyers generally may seek press attention to enhance their community status.

Attorneys may also be motivated by a desire to establish and foster a satisfactory working relationship with the press. Giving information to a tenacious reporter may make life easier for the prosecutor by keeping the press at bay and by producing a favorable account of his actions. Prosecutors also may speak out to curry favor with other constituencies, such as the law enforcement community, victims' rights groups, or the state legislature.

Another possible motive is tactical and completely at odds with the prosecutor's role. Defense lawyers especially may suspect that an overzealous prosecutor comments publicly to increase the probability of conviction by influencing prospective jurors, examples of which can be cited. Bad faith extrajudicial prosecutor speech may also be directed at gaining advantage over or cooperation from defendants in plea bargaining negotiations.

C. Working Relationships and Prosecutor Speech

1. Prosecutor and Press

Strong pressures bring prosecutors and journalists together. Pulitzer Prize winning journalist and lawyer Clark R. Mollenhoff posits that the prosecutor cannot ignore the press: "The public's perception of how he is doing his job can have a significant impact on crime and criminals and on public support of law enforcement." By limiting public statements to the courtroom, a prosecutor risks being misunderstood, ignored or unfairly portrayed by defense counsel. Another commentator who has served as both a journalist and prosecutor observed that "whether we [prosecutors] like it or not, the news media is the conduit through which we must communicate with the public." Because the public's knowledge of the criminal justice system comes almost exclusively through the press, television programs, and motion pictures, prosecutors must "take every opportunity to communicate their position on important issues af-

---


139. See Protess, Did the Press Play Prosecutor in Covering an FBI Sting?, Colum. Journalism Rev. 37, 40 (July/August 1989).


141. See id. at 4-5.
fecting the criminal justice system to the public.  

For the press, the prosecutor can be the best source of information concerning a criminal investigation and prosecution. He has access to the government's evidence, including witnesses. He is trained and experienced in explaining the steps in the process and putting issues in context. Especially during the investigation and pretrial phases, a journalist might find it difficult to obtain information about a case from other sources. The prosecutor interacts with law enforcement personnel, judges, court employees, defense counsel, corrections officials, social service agencies, and interested citizens. These contacts put the prosecutor in a unique position to comment on the case. Indeed, reporters have argued successfully that they have a first amendment news-gathering interest in having a prosecutor source unencumbered by speech restraints.

The prosecutor-press relationship can range from friendly to antagonistic, arm's length to social, trusting to suspicious, and can involve other features that render the interaction subtle and complex. Press-prosecutor communication can occur in a press conference, chance meeting, office interview, or telephone conversation. Prosecutors and journalists can, but do not necessarily, have one-case encounters. The working relationship can extend for a long period on one case or involve numerous cases and other issues. Prosecutors and journalists know the prosecutor's office is a political one and that press coverage can affect the credibility of the office and the attorneys. With recurring contact, mutual understanding can develop about the manner in which information is provided and used. Nonetheless, the fact that prosecutors are under legal and ethical restrictions not to release certain information about ongoing investigations and untried charges is not well understood by the press and can place prosecutors and reporters at odds.

Though a prime source, the prosecutor is rarely the reporter's only source regarding a case and may at times serve only to confirm information obtained from others. Prosecutor speech, therefore, often becomes mixed in with information from many other sources that is disseminated to the public, which compounds the difficulty of assessing the impact of the prosecutor speech. Moreover, what a prosecutor says and what is reported may be different. As in other areas of press interest, prosecu-
tors often serve as confidential or "off the record" sources, which naturally hampers enforcement of lawyer no-comment rules. A prosecutor could also evade no-comment rules by putting information intended for press dissemination in a court document—a motion or pretrial brief—and filing it with the court. Unless the defense can secure an order sealing the document, it is fair game for press review.

Finally, the information can flow in both directions. Investigative reporting has led to prosecution, as the Watergate scandal dramatically illustrated. This may be the result of collaboration between reporters and law enforcement officials, or published stories alone may stimulate criminal investigations. Collaboration can take many forms. For example, to protect confidential sources, the reporter may resist supplying information that would aid a criminal prosecution. But even when a reporter is trying to protect a confidential source, that reporter may be working in association with the prosecutor's office in supplying information.

2. Relations with Victims, Witnesses, Law Enforcement Officials, and Defense Counsel

The prosecutor normally has direct contact with all participants in a criminal prosecution, which makes him an excellent press source. His working relationship with the other participants can render them conduits of information to the press. For example, a law enforcement official who has investigated criminal activity and who will be a prospective witness may be an attractive press source. He also works with the prosecutor at various stages of the prosecution. He could divulge, with or without the prosecutor's blessing, information that includes statements by the prosecutor. Moreover, the prosecutor knows that the law enforcement officer is or may be a prime target for press inquiry. For this rea-
son, MR 3.8 imposes upon the prosecutor the responsibility to prevent law enforcement officials and others associated with a prosecution from making public comments that are proscribed for the prosecutor under MR 3.6.

Similar points can be made about victims, witnesses, and defense counsel, although the working relationship with the prosecutor varies in each instance, including the prosecutor's ability to manage press contact. Through each of these participants the prosecutor could end up serving as an indirect source for press coverage.

From the standpoint of publicity, the relationship between prosecutor and defense counsel can be dynamic and volatile. Defense counsel justify press statements about the case on the grounds that something must be done to counter coverage of the arrest or filing of charges or that prosecutors or law enforcement officials have leaked information damaging to the accused. Statements from one side may prompt press pressure on the other side for a response. The publicity can escalate based on an opponent's perceived attempts to manipulate the press. Conversely, a restrained response to press inquiries may quiet the other side.

D. Regulatory Context: The Role of the Court, the Audience of Primary Concern, the Timing of the Speech, and the Problem of Assessing Prejudice

1. Role of the Trial Judge

In Sheppard v. Maxwell, the Supreme Court placed on the trial judge the burden of ensuring that press coverage does not compromise the fairness of the proceeding: "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." To meet this duty, trial judges should consider contin-

156. See In re Dow Jones & Co., 842 F.2d 603, 605 (2d Cir.) ("prosecutors, defendants, and defense counsel participated in the escalating publicity duels"), cert. denied, 109 S. Ct. 377 (1988). "Although not a new technique, attempts to influence the outcome of criminal trials through favorable media coverage have been utilized to an unprecedented degree in recent years." Hugel, supra note 132, at 38. Professor Arthur Miller of Harvard Law School recently commented that both prosecution and defense attempt to manipulate the press. See Nightline: The Media and Fair Trials (ABC Television Broadcast, Jan. 23, 1990) (transcript produced by Journal Graphics, Inc.).


158. Id. at 363. Indeed, the prevailing view long before Sheppard was that control of prejudicial publicity must be the responsibility of a vigilant trial judge and other public officers subject to the control of the court. This was the consensus following the pervasive publicity attendant to the trial of Bruno Hauptmann for the abduction and murder of the Lindbergh infant. See Hallam, Some Object Lessons on Publicity in Criminal Trials, 24 Minn. L. Rev. 453 (1940); Hudon, Freedom of the Press Versus Fair Trial: The Remedy Lies with the Courts, 1 Val. U.L. Rev. 8, 12-14 (1966); Lippmann, The Lindbergh Case in Its Relation to American Newspapers, in Problems of Journalism 154-56 (1936); see also Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 549 (1976) (noting that atmosphere at Hauptmann trial "could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court"). The Court reaffirmed this view in Chandler v. Florida, 449 U.S. 560, 574 (1981). “Trial courts must be especially vigilant
uance, change of venue, jury sequestration, or granting a new trial. The Sheppard Court stated that the trial court “should have made some effort to control the release of leads, information, and gossip to the press by . . . counsel for both sides,” and recommended the gagging of trial participants “where there is a reasonable likelihood that prejudicial news . . . will prevent a fair trial.” The Court declared that new trials should be ordered when publicity has prejudiced the fairness of a trial, but it stressed that “reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.”

A decade later, the Court again emphasized the trial judge’s “major responsibility” for acting “to mitigate the effects of pretrial publicity.” If judges take their cue from Sheppard, they should understand their role is to be the guardians against the taint of prejudicial publicity. The cases indicate that judges take this function seriously.

2. Prospective and Actual Factfinders as the Audience of Primary Concern

The primary aim of limiting lawyer speech about pending cases is to insulate the factfinder from influences other than evidence and argument presented in the courtroom. Lawyers cannot communicate with jurors outside the courtroom before or during trial and advocate the case. Why should they be able to advocate a case publicly when jurors or prospective jurors might hear them?

The circumstances of lawyer speech change significantly once jury selection begins. Before that point, the factfinder is either the trial judge or a collection of unknown individuals who are citizens of the court’s jurisdiction, who will be selected for jury duty and to serve on the trial jury, and who may pay attention to and remember press reports about the case. Because the pool of potential jurors is large, restrictions on lawyer comment cannot be tailored to avoid the ultimate factfinder and yet
to guard against any impairment of the defendant’s right to a verdict based solely upon the evidence and the relevant law.”

159. Sheppard, 384 U.S. at 359. “[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters . . .” Id. at 361. The Court said that “[e]ffective control of these sources” is “concededly within the court’s power.” Id.


161. Sheppard, 384 U.S. at 363.


164. It is axiomatic that a criminal defendant’s right to a fair jury trial requires that he be tried before a jury panel not tainted by prejudice. See Irvin v. Dowd, 366 U.S. 717, 722 (1961).
reach everyone else. Experienced criminal trial attorneys have reported that many prospective jurors do not pay attention to pretrial publicity and otherwise do not recall the content of the publicity by the time of trial. This anecdotal information no doubt varies with the type of case, the size and nature of the community, and the efficacy of voir dire. Once jury selection has begun, the audience of primary concern is very small. Consequently, the risks of prejudicial publicity change and different safeguards against jury taint from publicity are available.

The factfinder might be a judge rather than a jury. Because waiver of the jury may not occur until the eve of trial, the publicity concern about prospective jurors may apply during the preliminary phase of judge-tried cases. Once it is clear that there will be a bench trial, however, the concern about publicity is different and diminished. Information commonly thought highly prejudicial to impartial jury consideration—a suppressed confession, prior criminal convictions, the possibility of a plea bargain—is often already known to the judge. Moreover, whatever biases may exist based on position and experience, trial judges generally are considered resistant to the influence of prejudicial publicity, though not completely immune. This may vary depending on how judges are selected and retained; the judge may be appointed or elected, subject to contested or retention re-election, or enjoy life tenure. The judicial role in assessing publicity is different in a bench trial because the factfinder must decide the potential impact of publicity on himself.

3. The Timing of the Statements

DR 7-107 divides the criminal proceeding into four stages. MR 3.6 does not. The audience of primary concern and the practicality of narrowly tailored regulation of speech to avoid prejudicial publicity change depending on the stage of the proceeding. At the investigatory stage, the audience of primary concern is the potential factfinder, including any judge who may be assigned the case and the individuals in the jury pool who may be selected for the petit jury. At this point it is unlikely that

165. Cf. FCC v. Pacifica Found., 438 U.S. 726, 758 (1978) (Powell, J., concurring) ("The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media.").

166. See Ad Hoc Report on Publicity, supra note 4, at 5 (reporting comments from former U.S. Attorney Rudolph Giuliani and Harvard Law Professor Alan Dershowitz).

167. See generally Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 15 (1986) ("Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.").

168. "It is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary . . ." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

169. See Ad Hoc Report on Publicity, supra note 4, at 11.

the putative defendant, if known, could seek court assistance in restraining prosecutor or law enforcement statements about the case because the individual may not have the assistance of counsel or because no case has been filed. Accordingly, the prospect of court-ordered restrictions on speech narrowly tailored for the circumstances is impractical and points to the need for general rules if some restraint is necessary. On the other hand, there will be ample opportunity to bar from the jury venire those individuals who learned of the case. A change of venue or continuance may also be used. Publicity immediately before or during trial generally is considered to have greater potential for prejudice than publicity months in advance of trial. Moreover, the chances of any given case reaching trial at this point are remote.

The second stage of a prosecution begins at the initiation of formal charges and ends with the commencement of trial. The defendant and the court are then in a better posture to consider whether any restrictions on extrajudicial lawyer comment are necessary. There is less need for broad restrictive rules. Moreover, there continues to be opportunity to screen out jurors arguably influenced by publicity during jury selection or to grant a change of venue or continuance.

The third stage is jury selection and trial. At this point, the court not only is in a position to tailor any speech restrictions; it also has some control over the jury itself. The court may instruct the jury not to receive any news accounts of the case and, if necessary, may sequester the jury. On the other hand, once the jury has been selected, there is limited opportunity to eliminate those jurors who receive publicity about the case, though the selection of alternate jurors provides some flexibility.

The fourth stage is the period between disposition or trial and sentencing. The concern is the influence of publicity on the sentencer, most often the judge.

The investigative stage provides the greatest justification for general rules on publicity. After that, when the court has jurisdiction, there is less need for generally applicable rules. The practical justification for speech restrictions by rule seems to be especially weak in the pretrial phase, when all of the antidotes to publicity are at the court’s disposal. The justifications are stronger at the third stage, however, in part because the factfinder will hear the evidence and should not be distracted by information from extrinsic sources, no matter how relevant. In addition, there is limited opportunity to screen out jurors without starting over.


This discussion suggests that narrow restraining orders, when practicable, are preferable to rules because they are more effective and can be narrowly drawn even though they may have more difficulty passing first amendment muster.

4. The Problem of Determining Potential and Actual Prejudice

Unlike defamation law, which focuses on redressing actual harm, the challenge in the area of prosecutor speech is to prevent harm from occurring. That involves an inherently speculative prediction by the speaker or by the courts as to whether a particular communication will prevent a fair trial. For example, pretrial prosecutor statements revealing prior convictions of a person charged with crime may come at a time when it is unknown whether there will be a trial, whether the defendant would remain silent at trial, whether the prior convictions could or would be used to impeach the defendant if he does testify, or whether procedural techniques such as change of venue and continuance would prevent prejudice. Finally, it is unknown whether individuals who would serve on the jury would know of this extrajudicial comment and, if they know, whether they could be fair and impartial factfinders based on evidence presented in court.173

Apart from specific information such as a criminal record or an unconstitutionally coerced confession, in a highly publicized case the saturation of the community with news about the case can be a factor in making the prediction of whether the publicity might prevent a fair trial.174 Moreover, the variety of information sources for the press as well as the many ways information about a case can be disseminated compound the problem of evaluating the potential impact of publicity and render even more difficult the task of assessing the potential impact of prosecutor statements.

Determining possible prejudicial impact remains just as challenging after the speech has occurred. This is reflected in the practical difficulty of measuring impact by looking at the sources and scope of the publicity, the voir dire record, the trial record, and post-trial interviews with jurors.175

173. See Frasca, supra note 3, at 169 (estimating that 2 percent of jurors are prejudiced about criminal case as result of news coverage and retain that prejudice after passing through trial safeguards designed to weed out potentially biased jurors).

174. See Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (showing of actual unfairness unnecessary when record shows saturation publicity of the accused's pretrial confession).

175. Nonetheless, appellate courts are called upon to perform this function and necessarily render decisions. In Stroble v. California, 343 U.S. 181 (1952), the Supreme Court affirmed a conviction and death sentence challenged on the ground that pretrial news accounts, including the prosecutor's release of defendant's recorded confession, were allegedly so inflammatory as to amount to a denial of due process. The Court disapproved of the prosecutor's conduct, but noted that the publicity had receded some six weeks before trial, that the defendant had not moved for a change of venue, and that the confession had been found voluntary and admitted in evidence at trial. See id. at 191-93. The Court also noted the thorough examination of jurors on voir dire and the careful review
III. Constitutional Analysis

In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases.\textsuperscript{176}

In \textit{Sheppard v. Maxwell},\textsuperscript{177} the Supreme Court noted that "[t]he prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible."\textsuperscript{178} Although the Court encouraged use of rules to regulate extrajudicial lawyer comment about criminal cases tried before a jury, neither \textit{Sheppard}\textsuperscript{179} nor succeeding cases\textsuperscript{180} decided what degree of regulation would be compatible with the first amendment.\textsuperscript{181} The preceding discussion attempted to identify competing interests as well as particular features of prosecutor speech and the regulatory context that may be relevant to the constitutional analysis. The following section suggests how the competing interests in prosecutor speech could be balanced without unnecessary compromise. The suggestions are not meant to be rigid calibrations but attempt to develop a more refined framework to address prosecutor speech.

A. Introduction: Content Regulation of Extrajudicial Lawyer Speech

Regulation of lawyer speech about a pending case is inescapably con-

\textsuperscript{176} Pennekamp v. Florida, 328 U.S. 331, 347 (1946).
\textsuperscript{177} 384 U.S. 333 (1966).
\textsuperscript{178} Id. at 360.
\textsuperscript{179} The \textit{Sheppard} Court said that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." \textit{Id.} at 363. This reference to remedial action, however, does not specify restrictions on speech. The Court said earlier that the trial judge in \textit{Sheppard} "might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters . . . ." \textit{Id.} at 361. The Court's reference to gagging goes beyond the holding in \textit{Sheppard} that the deluge of publicity had deprived the defendant of due process and does not address the competing concerns involved in restraining lawyer speech.

\textsuperscript{180} One reason the Supreme Court has not addressed the merits of this issue may be found in Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982), in which the Court held that a federal court should abstain from deciding an attorney's first amendment challenge to a New Jersey no comment rule pursuant to which he was being disciplined for extrajudicial statements made during a criminal trial. \textit{See id.} 429-30, 437. The Supreme Court held that the federal courts should abstain from interfering with New Jersey's ongoing disciplinary proceeding. \textit{See id.} at 437.

\textsuperscript{181} Two leading first amendment commentators recently stated that whether Model Rule 3.6 "sufficiently respects the speech rights of attorneys remains to be seen." M. Franklin & D. Anderson, Mass Media Law 702 (4th ed. 1990).
tent-based because the speech’s message may produce harm that the government seeks to prevent. Such content regulation aimed at communicative impact conflicts with orthodox first amendment doctrine that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Accordingly, the Supreme Court normally applies the “most exacting scrutiny” to restrictions aimed at the communicative impact of expression. Such regulation violates the first amendment unless it is “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.”

When the government attempts to control speech to avert harm to an important state interest, the issue is what degree of threatened harm jus-

182. The Oregon Supreme Court, commenting on DR 7-107, declared: “Unquestionably any rule that in terms directs persons not to make particular kinds of statements is difficult to square with constitutional guarantees of freedom of expression . . . .” In re Conduct of Lasswell, 296 Or. 121, 124, 673 P.2d 855, 857 (1983).


184. Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (invalidating law which exempted labor picketing from general ban on picketing near schools) (citations omitted). This stands in contrast to government actions aimed at noncommunicative impact but nonetheless having adverse effects on communicative opportunity—for example, government restrictions against loudspeakers in residential areas. Such actions are judged by balancing competing interests and are allowed if they do not unduly constrict the flow of information and ideas. See Cox v. New Hampshire, 312 U.S. 569, 574-76 (1941) (upholding ordinance requiring parade permits where official discretion was limited exclusively to considerations of time, place, and manner).

A rule or gag order banning out-of-court statements about a case may at first glance appear to be a time, place, and manner restriction: “Say what you have to say, but say it only in the courtroom.” It is not a time, place, and manner restriction. There are facts that cannot be disclosed inside the courtroom that could be stated outside, and the speaker is permitted to speak about information unrelated to the case outside the courtroom. Such a regulation is, in short, a content restriction. Cf. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (rejecting government argument that regulation forbidding the wearing of armbands in school as a protest against the war was a “place” regulation based on the reaction it engendered). The Rules of Professional Conduct are explicit content restrictions. The no comment provisions refer to the “criminal record of a party,” “the possibility of a plea of guilty,” “the identity or nature of physical evidence,” and “any opinion as to the guilt or innocence.” Model Rules of Professional Conduct 3.6 (1987), reprinted in Appendix II.


186. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983); see Consolidated Edison Co. v. Public Service Comm’n, 447 U.S. 530, 540 (1980). The Court has recognized several narrow categories of expression, such as “fighting words” and obscenity, that are not entitled to first amendment protection from content regulation. These are categories of expression not representing speech within the meaning of the first amendment because they are “no essential part of any exposition of ideas [and are] of . . . slight social value as a step to truth,” or because their “very utterance inflicts injury.” Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); see Roth v. United States, 354 U.S. 476, 492 (1957) If the speech falls within one of the exceptions or if the compelling state interest/least restrictive alternative test is met, the government may regulate subject only to the barest due process scrutiny.
How much peril must prosecutor speech pose to governmental interests to justify the restraint or sanction of expression? How should the burden of proving the risk of danger be allocated? Do the answers differ depending on the timing of the speech and whether a rule or a restraining order is involved? The answers to these questions must take into account considerations of overbreadth and vagueness, the role of the speaker, the audience of primary concern, the type of factfinder, and the institutional setting of the speech.

B. Overbreadth and Vagueness

Traditionally courts have determined the constitutionality of a law as it is applied to facts on a case-by-case basis. The first amendment overbreadth doctrine, on the other hand, tests the constitutionality of a law in terms of its potential applications. To be invalid, a law must pose a significant likelihood of deterring protected speech. A law is void if it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of protected first amendment rights. The problem with such a law is that it "'hangs over [people's] heads like a Sword of Damocles.' That judges will ultimately rescue those whose conduct in retrospect is held protected is not enough, 'for the value of a sword of Damocles is that it hangs—not that it drops,'" thereby deterring protected speech. Although courts use the overbreadth doctrine "sparingly and only as a last resort," overbreadth problems should be a primary concern in formulating rules and restraining orders to regulate extrajudicial lawyer speech.

Vagueness is separate from but related to overbreadth. As a matter of due process, a law is void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." The vagueness doctrine has special bite in the first amendment area because uncertain rules induce self-censorship of protected speech.
and precise rules give assurance that the lawmaker has focused on reconciling speech and governmental interests supporting regulation. As a result, the Supreme Court has required more specificity for rules potentially applicable to first amendment speech than to other areas. The rule should be voided unless it "conveys sufficiently definite warning as to the proscribed conduct." 

Overbreadth and vagueness, though primarily doctrinal tools used by courts in assessing the constitutionality of statutes, are useful in the analysis of regulating extrajudicial lawyer speech, in particular to determine whether no-comment rules or restraining orders are "narrowly drawn." A rule that a lawyer shall not comment on a pending case when that comment threatens to prejudice a fair trial or the administration of justice is vague because it does not provide notice about what may or may not be said. A rule that a lawyer may not comment about the character of a witness is overbroad because it includes speech that in many cases does not threaten fair trial or judicial administration. By combining a threat of harm standard with specific statements, a rule offers guidance about what should not be said and limits its application to statements that would produce the threatened harm.

Overbreadth and vagueness concerns were central to the Seventh Circuit's analysis in Chicago Council of Lawyers v. Bauer. In Bauer, the Seventh Circuit reviewed a first amendment attack on a district court's local criminal rule governing extrajudicial lawyer speech and on DR 7-107 (which the district court had assumed was incorporated in the court's local rules). The local rule closely resembled the criminal proceeding portions of DR 7-107, including the "reasonable likelihood of interference with a fair trial" standard and the division of the criminal process into several stages. The plaintiffs contended that the "reasonable likelihood" test was too restrictive and that the rules were vague and overbroad.

The Seventh Circuit in Bauer went further than any court has gone in

195. See, e.g., Smith v. Goguen, 415 U.S. 566, 573 (1974) (flag desecration statute that subjects to criminal liability anyone who "treats contemptuously" the United States flag is void for vagueness; the doctrine "demands a greater degree of specificity" in first amendment as opposed to other contexts).
197. See Hirschkop v. Snead, 594 F.2d 356, 371 (4th Cir. 1979) (en banc) (holding that "other matters that are reasonably likely to interfere with a fair trial" is too vague) (quoting Rule 7-107(D) of the Virginia Code of Professional Responsibility).
198. See, e.g., Model Rules of Professional Conduct Rule 3.6(b)(1) (1987), reprinted in Appendix II.
199. See supra text accompanying notes 99-107.
201. See id. at 247.
202. See id. at 261-63 (Appendix A).
attempting to protect the extrajudicial free speech interests of lawyers.\textsuperscript{203} The court found that the test of “reasonable likelihood that such comment will interfere with a fair trial” was too broad to meet the requirement of \textit{Procunier v. Martinez}\textsuperscript{204} that “the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.”\textsuperscript{205} Although there was little explanation why “reasonable likelihood” is more restrictive of speech than is necessary or essential to protect the government interest in a fair trial, the court preferred a test that limits only those comments which pose a “‘serious and imminent threat’ of interference with a [fair trial]” as more in keeping with “objectives of clearness, precision, and narrowness.”\textsuperscript{206} The “serious and imminent threat” test must be combined with “specific rules . . . to avoid vagueness.”\textsuperscript{207} The court proceeded to evaluate specific no-comment rules to determine whether they posed overbreadth and vagueness problems.\textsuperscript{208}

\textsuperscript{203} The Seventh Circuit reasoned that the local court rule was not a prior restraint because anyone charged with violating it could challenge its constitutional validity. \textit{See id.} at 248. The court further observed, however, that the rule had features of prior restraints in that a violation could be punished by contempt and the full criminal procedural safeguards would not necessarily be available. \textit{See id.} at 248-49. Accordingly, the court decided that the rule must receive “closer scrutiny than a legislative restriction.” \textit{Id.} at 249. In \textit{Hirschkop v. Snead}, 594 F.2d 356 (4th Cir. 1979), the Fourth Circuit agreed with \textit{Bauer} that DR 7-107 is not a prior restraint. The rules are not a “judicial decree, a violation of which is summarily punishable as a contempt,” and “sanctions may be imposed upon a lawyer only after charges have been filed against him, he has been given a due process hearing and has been found guilty.” \textit{Id.} at 368. \textit{But see} \textit{Shadid v. Jackson}, 521 F. Supp. 85, 86 (E.D. Tex. 1981) (DR 7-107(G) is an unconstitutional prior restraint).

\textsuperscript{204} 416 U.S. 396 (1974).

\textsuperscript{205} \textit{Id.} at 413.

\textsuperscript{206} \textit{Bauer}, 522 F.2d at 249 (quoting \textit{Chase v. Robson}, 435 F.2d 1059, 1061-62 (7th Cir. 1970)).

\textsuperscript{207} \textit{Id.} at 250.

\textsuperscript{208} For example, the rules governing the investigatory stage—the district court’s rule and DR-107(A)—were held vague and overbroad for lawyers other than prosecutors and therefore were valid for prosecutors as a presumption of a serious and imminent threat. \textit{See id.} at 252-53. The reference to “participating in or associated with the investigation” was too ambiguous for non-government lawyers and the no comment rules too broad because no one knows if there will be a trial and any prejudice to the government is too remote. \textit{Id.} at 252. Moreover, non-government lawyers can act as a check on government abuse of the investigatory process. \textit{See id.} at 253.

The court generally upheld the six types of comments prohibited in DR 7-107(B) and (C) concerning the time from arrest or the filing of charges to commencement of trial or disposition without trial. The prohibition on communication concerning “character, reputation, or prior criminal record,” DR 7-107(B)(1), was thought more appropriate for prosecutors than defense counsel but was upheld for both on the ground that the “public’s conclusion should be based on the trier of fact’s conclusion.” \textit{Bauer}, 522 F.2d at 254.

The DR 7-107(D) provision covering jury selection and trial prohibits comment “that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial.” Model Code of Professional Responsibility DR 7-107(D) (1981), \textit{reprinted} in Appendix I. The “other matters” language was found unconstitutionally vague, but the rule might survive scrutiny if coupled with the “serious or immi-
Four years later, in *Hirschkop v. Snead*,\(^\text{209}\) the Fourth Circuit reviewed the constitutionality of DR 7-107 as adopted by the Virginia Supreme Court and relied on vagueness and overbreadth to hold certain no-comment provisions of the rule unconstitutional.\(^\text{210}\)

Model Rule 3.6 attempts to meet the vagueness and overbreadth problems by “adopt[ing] the general criteria of ‘substantial likelihood of materially prejudicing an adjudicative proceeding’ to describe impermissible conduct” and by including “an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice.”\(^\text{211}\) For the trial and sentencing phases of a prosecution, DR 7-107 applies when the speech is “reasonably likely to interfere with a fair trial” or “to affect the imposition of sentence.”\(^\text{212}\)

Courts have found such a “reasonable likelihood” limitation implicit in other provisions of the rule\(^\text{213}\) because otherwise “one may imagine some situations which ought not to result in the filing of [disciplinary] charges.”\(^\text{214}\) In reviewing DR 7-107(B), for example, the New Jersey Supreme Court observed that “[a]s a blanket prohibition, these restraints would be unconstitutionally overbroad.” It was necessary to construe the no-comment rules as “imposing the reasonable likelihood test.”\(^\text{215}\) The model no-comment rules have been drafted accordingly and interpreted with overbreadth and vagueness considerations in mind. However, provisions remain in Model Rule 3.6 that are open to vagueness and overbreadth questions, such as the blanket proscription on “any opinion...
as to the guilt or innocence of a defendant.”

The same overbreadth and vagueness considerations apply to court orders restricting lawyer speech. Indeed, a well-settled prerequisite for such an order is that it be clearly and narrowly drawn. The *Nebraska Press* Court found that the part of the final gag order prohibiting the publication of “information strongly implicative” of the accused’s guilt was both too vague and too broad to survive the scrutiny required of restraints on first amendment rights. The Ninth Circuit more recently held that an order proscribing attorney statements bearing “upon the merits to be resolved by the jury” was overbroad because it encompassed speech that presented no danger to the administration of justice.

The enforcement context of disciplinary and court rules proscribing categories of statements is pertinent to the overbreadth analysis. Prohibiting statements about the accused’s prior criminal record or any confessions or admissions, all of which may be highly prejudicial, can be grossly overinclusive because the risk that such publicity will taint a trial outcome is slight. Only a small percentage of criminal cases ever go to jury trial, most jury trials generate no publicity, and much crime news goes unnoticed. In addition, exposure to prejudicial information about a case does not automatically prevent a jury from rendering an impartial verdict, particularly if the prejudicial information is later admitted as evi-

---

216. Model Rules of Professional Conduct Rule 3.6(b)(4) (1987), *reprinted in Appendix II*. Would this provision apply to the Attorney General’s comment that the government’s case against General Manuel Noriega is strong? See supra note 2. Another example is the ban on a statement “that a defendant has been charged with a crime” unless the charge is explained as an accusation and the presumption of innocence is mentioned. Model Rules of Professional Conduct Rule 3.6(b)(6) (1987). The fact that a defendant has been charged is a matter of public record. Incorporating a high degree of threatened harm standard may not be sufficient to overcome overbreadth and vagueness problems.


218. See *Levine v. United States Dist. Ct.*, 764 F.2d 590, 599 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). Other cases have also found gag orders on trial participants to be unconstitutionally overbroad. See, e.g., CBS v. Young, 522 F.2d 234, 236 (6th Cir. 1975) (trial participants prohibited “from discussing in any manner whatsoever these cases with members of the news media or the public” by court order); *Chase v. Robson*, 435 F.2d 1059, 1060-61 (7th Cir. 1970) (trial participants prohibited from making public statements concerning jury, witnesses, evidence, merits, and court rulings); *Younger v. Smith*, 30 Cal. App. 3d 138, 150-51, 106 Cal. Rptr. 225, 233-34 (1973) (gag order overbroad in proscribing nonprejudicial statements); *People v. Dupree*, 88 Misc. 2d 780, 789, 388 N.Y.S.2d 203, 209-10 (N.Y. Sup. Ct. 1976) (order narrowed because it covered facts already part of trial record).

219. See *Frasca*, supra note 3, at 164 (reviewing studies and concluding that only 10 percent of criminal cases involve jury trials).

220. See American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press 8-33 commentary (1980); see also authorities cited supra note 3.
dence at trial.\textsuperscript{221} For the small portion of remaining cases, less restrictive alternatives such as change of venue, continuance, jury voir dire, admonitions to the jury, and jury sequestration are available to mitigate the adverse impact of prejudicial publicity. These points should be considered in assessing what degree of threatened harm is sufficient to overcome overbreadth concerns about a no-comment rule.

C. The Speaker, the Audience, and the Institutional Setting

1. Speaker

Should it make any difference to the scope of first amendment protection that a prosecutor rather than the press or someone else disseminates information about a criminal prosecution? For several reasons, the presumptive first amendment shelter against content regulation ordinarily does not vary with the identity of the speaker. First, the first amendment attempts to secure “the widest possible dissemination of information from diverse and antagonistic sources,”\textsuperscript{222} thereby achieving “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”\textsuperscript{223} Second, because the first amendment protects the free flow of ideas and information, its guarantees apply to the speech involved, not just to the source. In \textit{First National Bank of Boston v. Bellotti},\textsuperscript{224} for example, which struck down a state ban on corporate advocacy, the Court decided that protected speech does not lose its constitutional shield simply because its source is a corporation.\textsuperscript{225} The Court emphasized that the first amendment interests of the potential audience are independent of the identity of the speaker.\textsuperscript{226} Third, one danger of restrictions based on the status of a speaker\textsuperscript{227} is that they bear

\begin{itemize}
\item \textsuperscript{221} See \textit{Nebraska Press Ass'n v. Stuart}, 427 U.S. 539, 565, 568-69 (1976).
\item \textsuperscript{222} \textit{Associated Press v. United States}, 326 U.S. 1, 20 (1945).
\item \textsuperscript{224} 435 U.S. 765 (1978).
\item \textsuperscript{225} See \textit{id. at 777, 784. But see Stanley v. Georgia}, 394 U.S. 557, 565 (1969) (possession in home protected; source was vendor of obscene material and hence unprotected); \textit{Lamont v. Postmaster General}, 381 U.S. 301, 307-10 (1965) (Brennan, J., concurring) (receipt of mail protected; source was outside U.S. and hence unprotected).
\item \textsuperscript{226} “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.” \textit{Bellotti}, 435 U.S. at 777; \textit{see also Bates v. State Bar of Ariz.}, 433 U.S. 350, 364 (1977) (“The listener’s interest is substantial: the consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.”); \textit{Young v. American Mini Theatres, Inc.}, 427 U.S. 50, 76 (1976) (Powell, J., concurring) (“Vital to this concern [of the free speech guarantee] is the corollary that there be full opportunity for everyone to receive the message.”); \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council}, 425 U.S. 748, 756 (1976) (first amendment “protection . . . is to the communication, to its source and to its recipients both”); \textit{Garrison v. Louisiana}, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).
\item \textsuperscript{227} See, \textit{e.g.}, \textit{Cornelius v. NAACP Legal Defense & Educ. Fund}, 473 U.S. 788, 806-07 (1985) (upholding rule limiting participation in federal charity drive to those organizations that did not “attempt to influence the outcome of political elections or the determination of public policy”).
\end{itemize}
a disturbing resemblance to viewpoint discrimination, which "is censorship in its purest form" and traditionally has been subjected to the highest level of scrutiny.

The first amendment aversion to speaker-based restrictions is premised on the same free speech values served by prosecutor expression. Nonetheless, the speaker's identity is relevant to the prosecutor's speech rights because such rights cannot be defined apart from the context in which they are asserted. The prosecutor's role in the criminal justice system and considerations of less restrictive alternatives to blunt prejudicial publicity point to a distinction between the prosecutor and the press or the public.

The prosecutor's role as representative of the state is to discharge the prosecutorial function without violating due process rights of the accused. Although Sheppard placed upon the trial judge primary responsibility for securing those rights against prejudicial publicity, the prosecutor and other state officials share that duty with the court because they carry out the government action that threatens the liberty of the accused. Publicity can affect the fair administration of justice regardless of source, but the press is not liable for this constitutional obligation. Thus, when the prosecutor speaks publicly about a pending criminal case, he does so with a due process limitation that does not constrain the press or the public.

A second consideration is that restriction of prosecutor speech to limit prejudicial publicity ordinarily impinges less on first amendment interests

228. See L. Tribe, supra note 11, § 12-3, at 803.
231. The Court has upheld some speaker-based restrictions. See, e.g., NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 611 (1980) (upholding NLRB order prohibiting union from engaging in secondary boycott which threatened economic viability of third parties); International Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 294-95 (1957) (upholding injunction against picketing because under state law union's strategy of coercion amounted to an "unlawful purpose"); see also NLRB v. Fissel Packing Co., 395 U.S. 575, 616 (1969) (upholding NLRB finding of unfair labor practice where management communications were cast as threat of retaliatory action and not as prediction of "demonstrable economic consequences"); NLRB v. Exchange Parts Co., 375 U.S. 405, 409-10 (1964) (upholding NLRB decision to set aside election where several weeks before election company sent employees letter mentioning several new benefits; "the danger inherent in well-timed increases is the suggestion of a fist inside the velvet glove").
232. See L. Tribe, supra note 11, § 12-26, at 1018.
233. Prosecutors should not be restrained simply because they are prosecutors but because of their official function in the criminal justice process. See In re Lasswell, 296 Or. 121, 126, 673 P.2d 855, 857 (1983) (en bane).
234. See supra text accompanying notes 115-23.
235. Some of these considerations pertain to defense counsel, though not to the same degree. See supra text accompanying notes 115-26.
than restraining the press or the public. Courts and committees that have examined this issue have endorsed a focus on the source of potentially prejudicial statements rather than on the publisher of those statements. A rule or order attempting to restrict the press from reporting certain information about a criminal prosecution would constitute a more pervasive restraint on expression than rules limiting only the extra-judicial speech of trial participants. The Supreme Court appeared to embrace this view through the opinions of both Chief Justice Burger and Justice Brennan in *Nebraska Press Association v. Stuart*, which overturned a trial court's publication restraint imposed on the press.

Chief Justice Burger's opinion for the Court stressed the trial court's duty to use measures short of restraints on the press to mitigate prejudicial publicity, and cited limits on what contending lawyers may say as one of the alternatives. In his concurring opinion, Justice Brennan concluded that "there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system," but he also declared that "judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press." He said that "attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice" and doubted that courts lack power to control lawyer speech in "appropriate cases."

2. Audience

The same concern about speaker restrictions turning on viewpoint discrimination also applies when the nature or reaction of the audience is the basis for speech regulation. To consider the audience irrelevant in
the prosecutor speech context, however, would be to ignore the tension at the root of the fair trial and free press conundrum. Prosecutors contacting actual or prospective jurors outside the courtroom and speaking about the case is unethical, may constitute jury tampering, and certainly is not protected first amendment speech. Prosecutors speaking through press intermediaries to a public that includes actual or prospective jurors serve a first amendment informing function, but also risk causing the taint that direct contact could produce. To preserve the informing function and avoid that taint, the Supreme Court has urged the use of change of venue, continuance, voir dire, instructions to the jury, and jury sequestration. These techniques are employed to shield the factfinder from prejudicial impact regardless of the speech source.

There is a parallel to the "heckler's veto" problem, which concerns whether authorities may silence a provocative speaker or instead must control a hostile audience when an expressive act seems likely to touch off a violent response. A recurring theme in court decisions is that the speaker cannot be silenced if his identity is the primary factor offered to justify the conclusion that audience violence is imminent. Also, the government may not suppress otherwise protected speech if imminent spectator violence can be prevented or curbed with reasonable crowd control techniques. Finally, if reasonable crowd control is not satis-

with the Commission's finding that the language was potentially degrading and harmful to children. See id. at 749-50. Society has an interest in the "well-being of its youth," and this permits government to assist parents, who have primary responsibility for rearing and educating children. Id. at 749. For example, in Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), the Court rejected a civil rights claim by a student who was disciplined after he delivered a sexually suggestive speech at a high school assembly.

As applied in the extrajudicial speech context, potential jurors would be considered the vulnerable audience in need of some government shielding from prejudicial publicity. 245. See Model Code of Professional Responsibility DR 7-108(A), (B) (1981), reprinted in Appendix I; Model Rules of Professional Conduct Rule 3.5 (1987), reprinted in Appendix II.

246. Indeed, contact between the press and jurors is limited. See In re Stone, 703 P.2d 1319, 1322 (Colo. App. 1985). At least one court has held that the first amendment does not protect reporters' communications with prospective jurors who had been admonished not to discuss a pending case. See id. at 1321-22. 247. Compare Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978) (upholding disciplinary action against attorney who violated state's ethical rules by soliciting client face-to-face) with In re Primus, 436 U.S. 412, 433-39 (1978) (invalidating disciplinary action based on public communication to organize plaintiffs for civil rights suit as violative of first amendment).


250. See, e.g., Collin v. Smith, 578 F.2d 1197, 1199 (7th Cir.) (striking down Skokie, Illinois, village ordinance which prohibited granting of permit for all public demonstrations that "incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation"), cert. denied, 439 U.S. 916 (1978).

251. See, e.g., Cox v. Louisiana, 379 U.S. 536, 550 (1965) (1500 demonstrators across the street from the county courthouse and jail were separated by 75 to 80 armed policemen from a crowd of 100 to 300 "muttering" spectators); Edwards v. South Carolina, 372 U.S. 229, 229-31 (1963) (187 demonstrators at the state house drew a crowd of 200 to 300
factory, the state can suppress the speech if it is the apparent cause of the impending disorder. The problem with prosecutor speech is not incitement of violence from a hostile audience, but rather the prejudicial publicity influencing the factfinder. The "heckler's veto" authority counsels that the prosecutor should not be silenced without efforts to shield the factfinder from the speech or to remedy the prejudicial impact of any publicity. Further, speech restrictions must be based on a finding that the speech is the likely cause of incurable jury taint.

Does the audience of primary concern point to different first amendment protection for prosecutor speech? A prosecutor's extrajudicial statements may receive more dissemination and attention and may have greater influence over the audience of primary concern—the factfinder—than comments by a mere observer of the case. Standing alone, however, the scope of dissemination and impact of the speech are relevant to assessing potential harm in a given case but not in formulating the first amendment standard. The interactive roles of prosecutor and jury, however, should be relevant. The latter is to decide guilt or innocence based only on evidence presented and admitted in the courtroom. Because prosecutors, not other out-of-court speakers, are responsible for presenting this evidence, there is reason for heightened concern about out-of-court prosecutor speech concerning the case.

When the factfinder in a criminal case is the judge rather than a jury, the fair trial and free press balance shifts. The judge rules on admissibility of evidence and therefore is aware of information that is not to be considered in deciding guilt or innocence, regardless of whether such information is published outside the courtroom. Judges are trained and experienced in courtroom procedure and aware that factfinding must be based on admitted evidence. The disciplinary rules do not distinguish between bench and jury trials, and courts have reacted differently to this distinction. The Bauer court rejected a distinction between bench and jury trials on the ground that the no-comment rules could prevent certain prejudicial information from ever coming to the attention of a judge. In Hirschkop, by contrast, the court held that "when it be-

252. See, e.g., Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam) (overturning conviction of spectator at an anti-war demonstration prosecuted for his disorderly conduct while being cleared from college campus: "at worst [the statement] amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish [his] speech."); Feiner v. New York, 340 U.S. 315, 316, 319-20 (1951) (affirming conviction of speaker who urged blacks to rise up in arms to fight for equal rights while crowd of 75-80 whites and blacks began to issue threats of violence).

253. See supra notes 14-15, 140-55 and accompanying text.


255. See Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 256-57 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). However, the no comment rule for the period between completion of trial and sentencing was struck down because a judge can consider such a
comes apparent that the case is to be tried by a judge alone, we see no compelling reason for restricting lawyers' comments in order to assure a fair trial. Hirschkop cited lack of evidence that pretrial publicity has interfered with the fairness of bench trials and noted that judges routinely become aware of evidence that is inadmissible or has no direct bearing on guilt or innocence. The court upheld the no-comment rule for the sentencing phase only when a jury has responsibility for sentencing.

The need for general no-comment rules is diminished under these circumstances, but not absent. Judges are not necessarily immune from the influence of publicity, especially when publicity has saturated the community and the judge is subject to the elective process. Moreover, the Sheppard publicity management function is complicated by the judge trying to determine whether he needs to protect himself from publicity. Under these circumstances, the no-comment rules have a constitutional basis, but the balance should more strongly favor speech. This could be done by rejecting any presumption that prosecutor speech poses the threatened harm and by a rule requiring a showing that the prosecutor speech did, in fact, prejudice the judicial proceeding. The scope of protection should extend as far as those decisions holding that extrajudicial comment cannot be punished as contempt absent a clear and present danger that it would cause a judge to yield to public pressure.

3. Institutional Setting

Institutional context has been important in court decisions upholding speech limits in the military, prisons, schools, and government employment, but "the Court has not developed a systematic approach
for the application of First Amendment standards to the management of
government institutions. The difficulty in identifying unifying prin-
ciples is rooted in the diverse features of the institutions and different con-
texts of the speech at issue. Moreover, the danger in seeking rules for
each "special context" risks failing to identify and assess the competing
interests at stake in particular cases and abandoning established first
amendment principles. Although this Article eschews that approach
in favor of analysis that accounts for the competing values and the com-
plexity of context, the Court's decisions in some of these cases can be
instructive, especially those involving speech regulation in government
employment and civil litigation discovery.

Supreme Court decisions have attempted to balance the right of free
speech of the public employee and his listeners against the danger that
the employee's speech poses to the institutional efficiency of the govern-
mental agency that employs him. The Court has established that the first
amendment rights of government employees are not coextensive with
those of private individuals. The closest analogy from these cases is
when government agencies attempt to regulate employee speech that oc-
curs outside the workplace.

In Pickering v. Board of Education, a teacher had been fired for crit-
icizing the school board in a letter to the editor. Because the teacher's
speech neither "impeded [his] proper performance of his daily duties in
the classroom" nor "interfered with the regular operation of the schools
generally," the Court concluded that "the interests of the school admin-
istration in controlling the speech were "not significantly greater than
its interest in limiting a similar contribution by any member of the gen-
eral public."
Like the teacher, the prosecutor is participating in an institutional process. Like the school board, the trial judge or the lawyer disciplinary authority has an interest in protecting the judicial process from adverse interference, whether the speech threatens the constitutional rights of the accused or the administration of justice generally. Unlike the government employee cases, however, the prosecutor is not a court employee but is part of the executive branch. Although the prosecutor has responsibilities to the court as an advocate for the community and officer of the court, he is accountable as well to his office or the political process that employed him.

When the Justice Department or a district attorney’s office regulates or disciplines its attorneys for speech related to employment and about a matter of public concern, the employee’s interest in free speech must be balanced with the government employer’s interest in managing the workplace. The Court’s cases on employer regulation of public employee speech, though fluctuating between deference to the state as an employer and recognition of the public employee’s right to speak on public issues, serve as the starting point in the analysis.

Judicial regulation of prosecutor speech, either through discipline for violation of no-comment rules or restraining orders, shares with these cases the management interest in ensuring that the criminal justice process operates fairly and efficiently. Moreover, the prosecutor is an officer of the court and subject to a trial court’s jurisdiction during the case. The government interest in effective performance of an institution in which the prosecutor is a participant is analogous to the interest of government employers in the public employee speech cases.

The judge-prosecutor relationship is not one of employer-employee, however, and the prosecutor serves in a different branch of the government than does the judge. He can, through his speech, serve a checking function on the judicial branch and on some executive branch agencies, such as the police. He has an employment loyalty and is subject to the public employees’ first amendment freedoms.” Developments in the Law—Public Employment, 97 Harv. L. Rev. 1611, 1757 (1984).

272. See, e.g., Connick v. Myers, 461 U.S. 138, 151-52 (1983) (“When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”).
273. See, e.g., Rankin v. McPherson, 483 U.S. 378, 392 (1987) (“Given the function of the agency, McPherson’s position in the office, and the nature of her statement, we are not persuaded that Rankin’s interest in discharging [McPherson] outweighed her rights under the First Amendment.”).
274. See Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521, 634. Professor Blasi’s comment about public employee speech takes on an even stronger checking function in this context: “Since under the checking value information about the conduct of government is accorded the highest possible valuation, speech critical of public officials by those persons in the best position to know what they are talking about—namely, government employees—would seem to deserve special protection.” id.
management authority of his office. At the same time, the prosecutor is a participant in the criminal justice process and is subject to the direction of a trial court with a responsibility for managing a fair and efficient proceeding. He consequently stands in different shoes for commenting on a pending case than do the press or the public.

This conclusion receives support and further direction from a 1984 Supreme Court decision that analyzed the constitutional rules governing protective orders that prohibit the disclosure of information received in civil discovery. *Seattle Times v. Rhinehart*275 involved the tension between free speech and management of pretrial discovery. The Court, speaking through Justice Powell, held that although litigants had first amendment interests in the dissemination of information gained through discovery, the State's "substantial interest in preventing . . . abuse of its processes" justified delegation of "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." There was to be "no heightened First Amendment scrutiny."276

A criminal trial court's *Sheppard* responsibility to foster fair adjudication through a variety of management tools, including restraints on extrajudicial lawyer speech, is similar to a civil trial judge's duty to manage pretrial discovery, which may involve, as it did in *Seattle Times*, protective orders barring disclosure of discovery information. Extrajudicial prosecutor speech may be based on information derived outside any discovery process, and the interests in preventing disclosure of civil discovery are based more on protecting the parties from harassment, embarrassment, or commercial appropriation than on the fairness of the litigation.277 Nonetheless, the lawyers in both instances are not employed by but are officers of the court,278 the trial court's action is taken to facilitate the judicial process, and the restraints curb speech outside the courtroom.

Justice Powell announced early in his *Seattle Times* opinion that the constitutionality of the rule authorizing the protective order would turn on the same test quoted in *Bauer* and *Hirschkop* and taken from *Procunier v. Martinez*,279 a case dealing with the censorship of prisoners' mail:

276. *Id.* at 35-36. Although Justice Brennan joined Justice Powell's opinion, he also wrote two brief concurring paragraphs in which he was joined by Justice Marshall. In his concurrence, Justice Brennan said that he would affirm because plaintiffs' "interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment." *Id.* at 38 (Brennan, J., concurring).
277. *See* Fed. R. Civ. P. 26(c) advisory committee notes.
278. If the government is a party to the civil case, an executive branch attorney is involved. *Seattle Times* did not, however, suggest that the presence of a government party or attorney would affect its analysis. *See* Seattle Times v. Rhinehart, 467 U.S. 20 (1984).
whether the "practice in question ... [furthers] an important or sub-
stantial governmental interest unrelated to the suppression of expres-
sion," and whether the limitation of First Amendment freedoms [is] no
greater than is necessary or essential to the protection of the particular
governmental interest involved.\textsuperscript{280}

Although the Court focused on the need to prevent discovery abuse as an
"interest unrelated to suppression of expression,"\textsuperscript{281} the interests sup-
porting a protective order there—protection of the privacy interests of
the litigants and third parties\textsuperscript{282}—were not so unrelated because the
threatened harm turned precisely on the fact that the dispute was over
the impact of disseminating discovery information.\textsuperscript{283} The first element
of \textit{Procunier} similarly is not met when the state attempts to regulate pros-
ecutor speech because the governmental interest, while important and
substantial, is not unrelated to the suppression of expression.\textsuperscript{284} The \textit{Se-
tattle Times} Court further concluded, with little explanation, that sub-
stantial trial court discretion is "necessary" to protect the interest in
preventing discovery abuse.\textsuperscript{285}

Despite these conclusory affirmations of the \textit{Procunier} tests and the
Court's deference to speech restraints based on the "good cause" stan-
dard of the civil discovery rules,\textsuperscript{286} the need for effective management of
the judicial process formed the basis for imposing speech limits more
readily in this than in other contexts.\textsuperscript{287} The Court found support from
references in decisions limiting trial participant speech to protect the ac-
cused's fair trial rights.\textsuperscript{288} Because the information at issue was obtained
through the use of the discovery process, the Court did not consider the
protective orders the "kind of classic prior restraint that requires exact-
ing First Amendment scrutiny."\textsuperscript{289} The prosecutor's sources of informa-
tion for extrajudicial speech may not derive exclusively from legal

\textsuperscript{280} \textit{Seattle Times}, 467 U.S. at 32 (quoting \textit{Procunier v. Martinez}, 416 U.S. 396, 413
(1974)).

\textsuperscript{281} Id. at 34.

\textsuperscript{282} See \textit{id}.

\textsuperscript{283} See \textit{id.} 33-34; \textit{Post}, supra note 266, at 180-81 (arguing that first element of
\textit{Procunier} test not met in \textit{Seattle Times}).

\textsuperscript{284} \textit{See Texas v. Johnson}, 109 S. Ct. 2533, 2542 (1989) (finding state interest in pre-
serving flag as symbol of nationhood related to expression in prosecution for flag
burning).

\textsuperscript{285} \textit{See Seattle Times}, 467 U.S. at 36.

\textsuperscript{286} See \textit{id}. at 37.

\textsuperscript{287} See \textit{Post}, supra note 266, at 201-06.

\textsuperscript{288} \textit{See Seattle Times}, 467 U.S. at 32 n.18. The \textit{Seattle Times} Court stated that:

Although litigants do not "surrender their First Amendment rights at the
courthouse door," those rights may be subordinated to other interests that arise
in this setting. For instance, on several occasions this Court has approved re-
striction on the communications of trial participants where necessary to ensure
a fair trial for a criminal defendant.

\textit{Id}. (quoting \textit{In re Halkin}, 598 F.2d 176, 186 (D.C. Cir. 1979)).

\textsuperscript{289} \textit{Id}. at 33.
process, but he does have much of his information about a case because he is a participant in that process.

4. Distinguishing the Prosecutor from the Press

The prosecutor's role as representative of the state and officer of the court and the limits the criminal justice process prescribes for the prosecutor to communicate information to a jury point to a stronger justification for limiting prosecutor speech than speech of the press and the public. In addition, the cases about public employee speech and restraints on dissemination of civil discovery information illustrate a stronger management justification to limit extrajudicial prosecutor speech than speech of those observing and reporting on the criminal justice process.

The Court foreshadowed such a conclusion in *Landmark Communications, Inc. v. Virginia*. In *Landmark*, the Court held that prosecution of a newspaper owner for publishing an article about judicial conduct commission proceedings that were confidential under state law was a violation of the first amendment. The Court was careful to point out that it was not addressing a constitutional challenge to a state's power to punish participants for breach of confidentiality. Moreover, the *Sheppard* Court, which suggested limits on extrajudicial comments by trial participants, was careful to avoid suggesting that a court could take action directed against publication of whatever information the press did obtain or whatever comments the press might choose to publish.

D. Probability of Harm Standard

The "clear and present danger" doctrine is concerned with distinguishing protected advocacy from unprotected incitement of violent or illegal conduct. Its development through landmark Supreme Court decisions from *Schenck v. United States* in 1919 to *Brandenburg v. Ohio* in

---

290. The *Hirschkop* court stated that "courts must consider the 'special characteristics of the . . . environment' in which the speech is uttered." *Hirschkop v. Snead*, 594 F.2d 356, 363 (4th Cir. 1979) (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)). The court did not elaborate on these "special characteristics," but did say that lawyer speech could prejudice the right to a fair criminal trial, that it is especially difficult for a trial judge to protect this right during the investigatory stages of a case, and that lawyers are "officers of the court" subject to special responsibilities. *Id.* at 364-66.


292. *See id.* at 837. In his concurring opinion, Justice Stewart drew a sharp distinction between a state's power to punish the participants and its power to punish the press for a breach of confidentiality. *See id.* at 848-49 (Stewart, J., concurring).

293. 249 U.S. 47 (1919).

1969 "lies close to the heart of the American free speech tradition." Although developed in the context of subversive advocacy, the clear and present danger doctrine has served as authority to test government regulation of speech in other circumstances. The Supreme Court has relied on it to determine the constitutionality of contempt citations, in the absence of a prior court order, based on out-of-court statements critical of the administration of justice in ongoing judicial proceedings.

The leading case that defines when an extrajudicial statement becomes a punishable attempt to interfere with the administration of justice is Bridges v. California. In Bridges, the Court overturned a contempt citation based on union leader Harry Bridges' public release of a telegram he had sent the Secretary of Labor "predicting" a massive strike if a California state court attempted to enforce its decision against Bridges' union in a jurisdictional dispute over representation of West Coast dock workers. A motion for new trial was pending at the time Bridges made his telegram public. In a companion case, Times-Mirror Co. v. Superior Court, the Court reversed a contempt conviction where The Los Angeles Times had editorially warned a judge, while sentence was pending, against making a "serious mistake" if he granted probation to two convictions of a Teamster's Union "goon squad." Writing for the majority in both cases, Justice Black stated that, before the state could abridge freedom of expression, the danger of prejudice to the disposition of the pending adjudication must be "extremely serious and the degree of imminence extremely high." Applying this test, the Court found that the release of Bridges' telegram and publication of the editorial did not present "a clear and present danger" of interference with the administration of justice.

The Court uniformly has reversed contempt convictions for out-of-court statements. In Wood v. Georgia, a sheriff's open letter to the press and grand jury criticizing the jury's investigation into charges of
electoral corruption against his county involving bloc voting by blacks was held to be protected speech. In Craig v. Harney,\textsuperscript{304} the Court overturned a newspaper’s contempt conviction for criticizing an elected county judge’s mishandling of a civil case involving a veteran. In Pennekamp v. Florida,\textsuperscript{305} a conviction was overturned for articles critical of local judges’ reliance on “legal technicalities” to turn criminals loose. Commenting on these cases in his opinion for the Court in New York Times v. Sullivan,\textsuperscript{306} Justice Brennan wrote that “[s]uch repression [(criminal contempt of criticism of the judge or his decision)] can be justified, if at all, only by a clear and present danger of the obstruction of justice.”\textsuperscript{307} The right to engage in out-of-court publicity concerning a pending criminal proceeding was not absolute, but a restriction could be justified only on a showing of a clear and present danger of actual interference with the fair administration of justice.

Four formulations of threatened harm have been advanced to determine whether extrajudicial lawyer speech can be regulated under non-comment rules. First, the Seventh Circuit in Bauer held that serious and imminent threat to the fair administration of justice is needed to accommodate speech interests.\textsuperscript{308} Second, Hirschkop, relying on general references to fair trial rights and “officer of the court” status of lawyers, held that the “more appropriate standard is that the publication present a reasonable likelihood that it will be prejudicial to the fair administration of justice,”\textsuperscript{309} and that limitation is appropriate only to account for “extraordinary circumstances [when] there is no likelihood of a prejudicial effect.”\textsuperscript{310} In 1982 the New Jersey Supreme Court ruled on the constitutional scope of DR 7-107(D), which restricts attorney extrajudicial speech in the criminal trial setting. In re Hinds\textsuperscript{311} arose from a disciplinary proceeding against a lawyer who was cooperating with a defense of a criminal prosecution and who publicly criticized the trial judge’s conduct of the trial. Applying the Procunier test, the court upheld the constitutionality of the “reasonable likelihood” standard, citing defendant’s fair trial right and the state’s interest in protecting the integrity of the judicial process, while also stressing the “officer of the court” role of lawyers.\textsuperscript{312}

Third, one month before the Seventh Circuit’s decision in Bauer, a New York appellate court in Markfield v. Association of the Bar of the

\textsuperscript{304} 331 U.S. 367 (1947).
\textsuperscript{305} 328 U.S. 331 (1946).
\textsuperscript{306} 376 U.S. 254 (1964).
\textsuperscript{307} Id. at 273.
\textsuperscript{309} Hirschkop v. Snead, 594 F.2d 356, 362 (4th Cir. 1979).
\textsuperscript{310} Id. at 368.
\textsuperscript{311} 90 N.J. 604, 449 A.2d 483 (1982).
City of New York\textsuperscript{313} reviewed a disciplinary action taken against an attorney who had participated on a radio panel discussion concerning prison rebellions at the same time he was counsel in a criminal trial. The court held that use of DR 7-107(D) should be restricted to those situations in which it is found that the extrajudicial statements presented a clear and present danger to the administration of justice.\textsuperscript{314} Finally, MR 3.6 adopts the standard of substantial likelihood of materially prejudicing an adjudicative proceeding.\textsuperscript{315}

The "clear and present danger" and "serious and imminent threat" standards have been viewed as "substantively indistinguishable."\textsuperscript{316} Both were articulated in Bridges and represent the first amendment standard protecting out-of-court speech from contempt sanctions. MR 3.6's "substantial likelihood of material prejudice" is meant to approximate the clear and present danger formulation.\textsuperscript{317} Accordingly, the competing standards are reasonable likelihood versus a stronger and more immediate threat.

The Supreme Court has not considered a case in which a lawyer was cited for contempt or disciplined under a no-comment rule for extrajudicial statements about a pending case.\textsuperscript{318} The Seventh Circuit in Chicago Council of Lawyers \textit{v.} Bauer\textsuperscript{319} found the "reasonable likelihood" test overbroad and incompatible with the "objectives of clearness, precision, and narrowness."\textsuperscript{320} Because no-comment rules apply generally to extrajudicial lawyer speech, their enforcement is at least a step removed from the Sheppard trial court's fair trial management function. The rules' general applicability calls for a high threat of harm standard to guard against punishment of speech that otherwise should be protected in the circumstances of a particular case. Although some courts\textsuperscript{321} and com-

\begin{itemize}
\item \textsuperscript{313} 49 A.D.2d 516, 370 N.Y.S.2d 82 (1975).
\item \textsuperscript{314} \textit{Id.} at 517, 370 N.Y.S.2d at 85. This was the standard adopted by the ABA. \textit{See} ABA Standards for Criminal Justice 8-1.1(a) (1980).
\item \textsuperscript{315} Model Rules of Professional Conduct Rule 3.6 (1987), \textit{reprinted in} Appendix II.
\item \textsuperscript{316} ABA Standards for Criminal Justice: Fair Trial and Free Press 8-11 (1980). The Hinds court doubted that the clear and present danger standard provided any greater precision or clarity than reasonable likelihood, \textit{see In re} Hinds, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982), and although that test may be more narrow in its reach, the nature of the governmental interest involved and the status and role of the attorney in effectuating that interest justified the "reasonable likelihood" test. \textit{See id.} at 623-24, 449 A.2d at 494.
\item \textsuperscript{317} \textit{See} G. Hazard \& W. Hodes, \textit{ supra} note 50, at 395.
\item \textsuperscript{318} The Supreme Court recently declined to review a Tennessee Supreme Court decision upholding discipline of a prosecutor for two out-of-court statements in violation of DR 7-107(B) and finding a "reasonably likely" test of threatened harm constitutionally permissible. \textit{See} Zimmerman \textit{v.} Board of Professional Responsibility, 764 S.W.2d 757, 763 (Tenn.), \textit{cert. denied}, 109 S. Ct. 3160 (1989).
\item \textsuperscript{319} 522 F.2d 242 (7th Cir. 1975), \textit{cert. denied}, 427 U.S. 912 (1976).
\item \textsuperscript{320} \textit{Id.} at 249.
\item \textsuperscript{321} \textit{See} Zimmermann, 764 S.W.2d at 763. \textit{But see} Press-Enterprise Co. \textit{v.} Superior Court, 478 U.S. 1, 14 (1986) ("the 'reasonable likelihood' test places a lesser burden on the defendant than the 'substantial probability' test").
\end{itemize}
mentators have argued that the competing formulations may in practice be distinguishable only in terms of semantic emphasis, the narrower and arguably more protective "serious and imminent threat" or "substantial likelihood" test is the more sound constitutional starting point. The latter appears in Model Rule 3.6.

Model Rule 3.6 needs revision or clarification, however. Instead of calling for proof that an extrajudicial statement posed a substantial likelihood of prejudice, it proscribes comment that the "lawyer knows or reasonably should know ... will have a substantial likelihood" of prejudice. The rule should address both speaker knowledge and actual threat. The comment to Model Rule 3.6 appears to assume that some showing of threatened harm is required.

E. Proving Probability of Harm

When difficulties inherent in proof reach an impasse, the law often resorts to the procedural escape of recognizing a presumption. For example, proof of fact A (that a prosecutor spoke publicly about a subject proscribed by a no-comment rule) is sufficient to find fact B (that the statement actually threatened a fair trial), and the party denying the existence of fact B (the prosecutor) must then attempt to prove its nonexistence. In Bauer, the court thought it "proper to formulate rules which would declare that comment concerning certain matters will presumptively be deemed a serious and imminent threat to the fair administration of justice," even though such a "presumption is itself a serious limitation of free speech." In In re Rachmiel, the New Jersey Supreme Court reviewed disciplinary action taken against a former prosecutor for public comments about whether a fourth prosecution should be instituted against a defendant whose conviction for murder, which Rachmiel prosecuted, had been overturned for the third time. The court regarded the no-comment rules of DR 7-107(B)(6) as creating a rebuttable presumption that statements on the proscribed topics are reasonably likely to interfere with a fair trial, but the state would still bear the ultimate burden of proving by clear and convincing evidence that the speech

322. See Note, supra note 53, at 1118-19.
323. Only one of MR 3.6's illustrative no comment rules contains this feature. See Model Rules of Professional Conduct Rule 3.6(b)(5), reprinted in Appendix II (1987). MR 3.6(b)(5) proscribes comment on inadmissible information that "would if disclosed create a substantial risk of prejudicing an impartial trial." Id.
326. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). The balance of the opinion was devoted to deciding whether specific rules justified a presumption requiring the speaker to show no imminent threat to fair trial to avoid discipline. See id. at 252-59.
was reasonably likely to affect trial fairness. Unlike Bauer and Rachmiel, there was no mention in Hirschkop, Markfield, or other cases about implicit presumptions that speech violating the rules is reasonably likely to interfere with a fair trial.

Allocating burdens of proof in this manner can be dispositive when fact-finding cannot resolve the issue of threat of harm. The creation of a presumption is critical because of the proof problems in ascertaining potential or actual harm. As a result, the presumption may be more significant in assessing the accommodation of competing values than in the verbal formulation of the degree of potential harm required to find a violation—"reasonable likelihood" as opposed to "clear and present danger" or "serious and imminent threat."

If a prosecutor speaks in violation of one of the Rule 3.6 no-comment proscriptions, should a court presume that such speech posed a serious threat to a fair trial? That is precisely how Rule 3.6 is framed, and the reporter for the rules has described the list of specific no-comment rules as "presumptions." How could the presumption of prejudicial publicity be rebutted—before, during, or after trial? The speculative nature of the determination, whether by the speaker or by the courts, that a particular communication will or did prevent a fair trial can render the determination uncertain for the speaker or the court, but the presumption will produce a result. Nonetheless, the "power to create presumptions is not a means of escape from constitutional restrictions."

Reliance on impasse alone to create a presumption is arbitrary. Presumptions are created and designed based on various factors, such as the probability of the presumed fact, one party's superior access to proof, and policy considerations that favor the contention receiving the benefit of the presumption. The probability and policy factors apply to pre-

328. Id. at 658, 449 A.2d at 512.
331. G. Hazard & W. Hodes, supra note 50, at 395 (emphasis in original). It is not clear how the authors were using the term "presumptions" in a technical evidentiary sense.
332. Bailey v. Alabama, 219 U.S. 219, 239 (1911). In Landmark Communications v. Virginia, 435 U.S. 829 (1978), the Court reversed the conviction of a newspaper that had violated a Virginia statute which imposed criminal sanctions on persons who breached the confidentiality of proceedings before a commission responsible for inquiries into complaints of judicial disability or misconduct. The Court declined to defer to the finding of the Virginia legislature that the divulgence of confidential proceedings of the commission automatically created a clear and present danger to the orderly administration of justice. See id. at 842-45.
sumptions about the impact of lawyer speech.\textsuperscript{334}

The probability of the fact—prejudicial impact—is difficult to gauge for the very reason that the presumption may be needed in the first place—difficulty of proof in a particular case. Nonetheless, probability considerations generally counsel against the presumption. In the vast majority of criminal cases, pretrial publicity and extrajudicial statements by trial attorneys have no impact.\textsuperscript{335} In large part because most cases do not reach trial. Moreover, even when there is publicity and a trial, there are measures short of restricting speech to prevent or ameliorate prejudicial impact. As the Court observed in \textit{Nebraska Press}, "[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right."\textsuperscript{336}

The policy considerations can be framed as follows: Assigning to the disciplinary authority the burden of showing a threat to fair trial may result in erroneous denial of a valid claim of trial unfairness arising from improper prosecutor speech. Placing on the speaker the burden to show lack of threat, however, may mistakenly sanction speech that should be protected. The Supreme Court generally has refused to accept a presumption that speech causes harm. In \textit{Landmark Communications, Inc. v. Virginia},\textsuperscript{337} it declined to defer to the finding of the Virginia legislature that the divulgence of confidential proceedings of a judicial conduct commission automatically created a clear and present danger to the orderly administration of justice.\textsuperscript{338} Even if a prosecutor knows that his comments to the press will have no effect on the prospective factfinder, he

\textsuperscript{334} Justice Stewart's comments made in \textit{Braznburg v. Hayes}, 408 U.S. 665 (1972), are pertinent here:

We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values. 

\textit{Id.} at 736 n.19 (Stewart, J., dissenting). The competing state interests were those of effective law enforcement and ensuring effective grand jury proceedings as opposed to the burden on news gathering said to result from insisting that reporters respond to relevant questions during a grand jury investigation or criminal trial. \textit{See id.} at 682.

\textsuperscript{335} \textit{See A. Howard \& S. Newman, Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, Fair Trial and Free Expression: A Background Report, 94th Cong., 2d Sess. 75 (Comm. Print 1976); Frasca, supra note 3, at 169 (estimating that press-induced bias would occur in only one of every 10,000 cases); Pember, Does Pretrial Publicity Really Hurt?, Colum. Journ. Rev. 16, 20 (Sept.-Oct. 1984). One study found publicity is an issue in very few cases. During 1976 to 1980, only 368 of the 63,000 appeals in criminal cases to highest state appellate courts claimed that news coverage prejudiced the trial outcome. Reversals based on publicity were ordered in only 18 cases. \textit{See Spencer, The So-Called Problem of Prejudicial Publicity Is a Red Herring, 2 Comm. Law. 11, 11-12 (Spring 1984). In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the Supreme Court recognized that reversal of a conviction on the ground that publicity had prevented a fair trial is rare. \textit{See id.} at 552-54.}

\textsuperscript{336} \textit{Nebraska Press}, 427 U.S. at 551.

\textsuperscript{337} 435 U.S. 829 (1978).

\textsuperscript{338} \textit{See id.} at 845. \textit{But see Rideau v. Louisiana}, 373 U.S. 723, 726 (1963) (showing of
may be deterred from speaking because of "doubt whether [(no threat to fair trial)] can be proved in court or fear of the expense of having to do so." Presuming that speech is protected unless the state proves otherwise limits the tendency to self-censor otherwise protected expression. However, the prosecutor's role is an important consideration in limited circumstances.

The prosecutor has a duty to secure fair trial interests because he is representing the state, and protecting the constitutional guarantees of fair trial and due process are the state's obligation. The prosecutor does not sacrifice first amendment rights and can play an important informing function in furtherance of first amendment values, but his roles as officer of the court and representative of the state in a criminal prosecution point to imposing part of the risk of uncertainty upon the prosecutor when statements are made that violate narrowly framed no-comment rules.

If such out-of-court statements are made, under certain circumstances the prosecutor should bear the burden of production to show that the statements did not pose a serious and imminent threat to fair judicial administration. First, the presumption would apply only to statements made before the trial court has effective jurisdiction to perform its Sheppard management functions. After that point, general rules pose larger overbreadth concerns. Second, the presumption would apply only if the prosecution proceeded to jury selection, or if there is evidence that extrajudicial prosecutor speech influenced a plea disposition or selection of the factfinder. Each of those circumstances should supply a source of evidence to fulfill the burden of production. Absent those two conditions, imposing the obligation to prove a negative undercuts the degree of harm showing deemed essential by courts for first amendment protection. The disciplinary complainant would in all instances bear the ultimate burden of persuasion that the speech in fact posed a serious and imminent threat. This allocation is consistent with the general practice of placing the burden of proof on the party charging a violation to establish each element of the claim.

Policy considerations inform not only the allocation of proof but also

actual unfairness unnecessary when record shows saturation publicity of the accused's pretrial confession).


340. The principle that the burden of showing that speech is unprotected should not be placed on the speaker has been followed in First Amendment cases involving obscenity, see Blount v. Rizzi, 400 U.S. 410, 417 (1971), defamation, see Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986), and invasion of privacy, see Diaz v. Oakland Tribune, 139 Cal. App. 3d 118, 126, 188 Cal. Rptr 762, 778 (1983).

341. This condition is included because a few criminal trials may be conducted without a jury due to the defendants' personal concerns about the effects of pretrial press coverage.

342. This approach was adopted by the New Jersey Supreme Court in In re Rachmiel, 90 N.J. 646, 449 A.2d 505 (1982), and In re Hinds, 90 N.J. 604, 449 A.2d 483 (1982).

the degree of proof required. For example, in *New York Times Co. v. Sullivan*, the Supreme Court held that a public official defamation plaintiff must prove with the "convincing clarity which the constitutional standard demands" that the defendant published false and defamatory statements with actual malice. In *Gertz v. Robert Welch, Inc.*, the Court reaffirmed the view that public officials and public figures must prove actual malice by "clear and convincing" evidence. The "clear and convincing proof" burden reflected a judgment that reducing the risk of invading free expression rights justified departure from the preponderance of evidence norm. Comparable use of this procedural device may be employed in the extrajudicial lawyer speech area. For example, when the case is tried to the bench, requiring that threat to trial fairness be proved by clear and convincing evidence comports with the shift in free speech and fair trial balance that occurs when a case is tried to a judge rather than a jury.

**F. Scienter**

Model Rule 3.6 contains two scienter elements. First, the no-comment rules apply to statements "that a reasonable person would expect to be disseminated by means of public communication," an objective standard. Second, the rule proscribes statements that the lawyer "knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding," a standard with objective and subjective alternatives. Rule DR 7-107 contains the first requirement only, and is in this respect constitutionally vulnerable in not expressly requiring a showing that the speaker knew or should have known the speech was threatening to fair judicial process.

Model Rule 3.6 arguably goes further than the first amendment may require in a situation in which the prosecutor intends to influence the

345. *Id.* at 285-86.
347. *Id.* at 342.
349. Although it upheld a less stringent First Amendment standard than in *Bauer*, the *Hinds* court held that the "reasonable likelihood standard requires a showing by clear and convincing evidence that an attorney's extrajudicial speech truly jeopardized trial fairness." *In re Hinds*, 90 N.J. 604, 626, 449 A.2d 483, 495 (1982).
350. See * supra* text accompanying notes 167-173.
351. See Model Rule of Professional Conduct 3.6 (1987), reprinted in Appendix II.
352. See *Osborne v. Ohio*, 110 S. Ct. 1691, 1699 (1990) (finding existence of scienter requirement in child pornography statute to be factor in rejecting first amendment overbreadth attack on that statute); *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2612 (1989) (finding lack of a scienter requirement a constitutional infirmity in Florida statute that makes it unlawful to disclose through media the name of a sexual offense victim); *Smith v. California*, 361 U.S. 147, 152-53 (1959) (holding unconstitutional an obscenity ordinance because its lack of a scienter requirement posed undue threat to stifle protected expression).
outcome of the trial through extrajudicial publicity. This would violate the prosecutor's duty as representative of the state to safeguard the fairness of the criminal justice process. When proof of intent to prejudice the factfinder through extrajudicial publicity is available, a lesser standard of threatened prejudice, such as reasonable likelihood, should be compatible with free speech values. Requiring proof of threatened harm would respond to the first amendment self-censorship and informing function concerns, but the state's interest in safeguarding fair judicial administration should afford it some leeway in preventing a state representative from employing speech directed to undermining that goal.

Self-censorship may arise when a prosecutor wishes to speak, is not attempting to taint the process, but fears a disciplinary process will reach an erroneous finding on intent or potential harm. Nonetheless, in light of the interest in fair adjudication and the prosecutor's duty to secure it, striking the balance of competing values by requiring proof of reasonable likelihood of harm accommodates speech interests in a manner similar to the balance struck in the public person defamation area, which ensures the speaker that only awareness of falsity will expose him to liability.

Chief Justice Rehnquist wrote for the Court in Hustler Magazine v. Falwell that "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." However, when the representative of the state who has a constitutional obligation to respect fair trial rights acts with intent to undermine those rights, and has a reasonable likelihood of succeeding, such a combination should overcome the prosecutor's and public's first amendment right.

353. In In re Lasswell, 296 Or. 121, 673 P.2d 855 (1983), the Oregon Supreme Court decided that DR 7-107(B) is compatible with free speech protections if (1) the prosecutor spoke with intent to influence the factfinding process or (2) knew his statements posed a serious and imminent threat to a fair trial and acted with indifference to that effect. See id. at 126-27, 673 P.2d at 858. The court did not indicate whether there must be some showing of likelihood of harm if the intent test were met, and the opinion was ambiguous as to whether a likelihood of harm showing is necessary when the knowledge and indifference test is satisfied. See id.; see also In re Burrows, 290 Or. 131, 135, 618 P.2d 1283, 1285 (1980) (dismissing disciplinary action against district attorney for reading to high school class a letter from defendant to mother, because of no likelihood of any prejudicial effect).

354. The Court's decision in Brandenburg v. Ohio, 395 U.S. 444 (1969), underscored the precept that speaker intent to incite or cause harm could not alone justify a speech abridgement. The speech must be "likely to incite or produce such action." Id. at 447 (footnote omitted). Both danger and intent are required. For that reason, even the most brazen publicity attempt to prejudice a jury must pose some realistic threat before discipline could be imposed. Because no criminal sanction is involved and because the prosecutor assumes a duty to ensure a fair trial, a reasonable likelihood of threat coupled with a showing of bad faith speech is an appropriate balance of speech and fair trial concerns. Because intent may be inferred from the creation of danger, see Schenck v. United States, 249 U.S. 47, 52 (1919), a clear and convincing proof standard on the intent issue may be necessary.

357. Id. at 48.
amendment interests.\textsuperscript{358}

G. Timing of the Speech

A natural reaction to extrajudicial prosecutor speech is the following: "Wait and say it after the trial" or "Let someone else make those statements." The Court's answer has been that government may not justify content-based regulations by claiming that other speakers have expressed the information or ideas or that the expression may be voiced in another place, at another time, or in another manner.\textsuperscript{359} The "after the trial" suggestion, whether embodied in a rule imposing subsequent punishment for speech or in a judicial prior restraint, would allow the government to destroy the immediacy of the intended speech.\textsuperscript{360} Limitations on "utterances made during the pendency of a case... produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height."\textsuperscript{361}

Nonetheless, the point at which the speech occurs has implications for analysis of the competing interests. A court does not have jurisdiction during the initial investigative phase, and the defendant may not have counsel who is aware of the investigation. Under these circumstances, it


\textsuperscript{359} See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541 n.10 (1980) ("we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 n.15 (1976) (invalidating state ban on advertising of prices of prescription drugs; held irrelevant that consumers might be able to obtain the same information in some other ways); Spence v. Washington, 418 U.S. 405, 411 & n.4 (1974) (reversing conviction for taping removable peace symbol onto flag displayed in apartment window, and "summarily" rejecting the state court's argument that the inhibition on speech was "miniscule and trifling" because of "other means" that could have been used to express the same views; the availability of other means are irrelevant when government prosecutes "for the expression of an idea through activity"). In contrast, when dealing with what it considers to be content-neutral restrictions on speech, the Court has often inquired into the availability of alternative avenues of communication. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (upholding National Park Service anti-camping regulations as applied to protesters attempting to call attention to the plight of homeless).


\textsuperscript{361} Bridges, 314 U.S. at 268; see also Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249-50 (7th Cir. 1975) (only comments that pose a serious and imminent threat of interference with fair administration of justice can be constitutionally proscribed), cert. denied, 427 U.S. 912 (1976).
prevent prejudice from publicity.\textsuperscript{366} The judge is in the best position to assess and implement what the Sheppard Court called "remedial measures that will prevent the prejudice at its inception."\textsuperscript{367} Relying on appellate review is disfavored because "reversals are but palliatives."\textsuperscript{368} By implication, discipline of lawyers for violation of no-comment rules is also disfavored.

Balanced against the remedial preference for restraining orders over rules is the first amendment tradition disfavoring prior restraints. The Supreme Court consistently has viewed prior restraints as especially burdensome on free expression, as reflected in its striking a statute authorizing newspaper nuisance prior restraints in \textit{Near v. Minnesota ex rel. Olson}\textsuperscript{369} and rejecting judicial restraints in \textit{New York Times Co. v. United States}\textsuperscript{370} and \textit{Nebraska Press Association v. Stuart}.\textsuperscript{371} Although the doctrine has been used to "invalidate such a variety of restrictions on speech"\textsuperscript{372} that some have questioned the conceptual clarity of the term prior restraint,\textsuperscript{373} an order restricting extrajudicial lawyer speech manifests the central feature of prior restraints: government suppression of speech prior to publication.

The Supreme Court has declared repeatedly that "[a]ny system of prior restraints . . . comes to this Court bearing a heavy presumption against its constitutional validity."\textsuperscript{374} One reason is that prior restraints can effectively destroy the immediacy of the intended speech,\textsuperscript{375} in part because ignoring an injunction against speech may forfeit the right to assert a first amendment constitutional defense in a subsequent prosecution for contempt under the collateral bar rule.\textsuperscript{376} The rule, applicable to injunctions generally, is that an injunction "must be obeyed until it is set aside, and that persons subject to the [injunction] who disobey it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional."\textsuperscript{377}


\textsuperscript{367} Sheppard, 384 U.S. at 363.

\textsuperscript{368} Id.

\textsuperscript{369} 283 U.S. 697 (1931).

\textsuperscript{370} 403 U.S. 713 (1971) (per curiam).

\textsuperscript{371} 427 U.S. 539 (1976).

\textsuperscript{372} L. Tribe, \textit{supra} note 11, § 12-34, at 1040.


\textsuperscript{375} See Carroll v. President of Princess Anne, 393 U.S. 175, 181-82 (1968).


\textsuperscript{377} Barnett, \textit{The Puzzle of Prior Restraint}, 29 Stan. L. Rev. 539, 552 (1977). But see \textit{In re Providence Journal Co.}, 820 F.2d 1342, 1353 (1st Cir. 1986) (TRO against newspaper transparently unconstitutional; collateral bar rule does not preclude reversal of criminal contempt conviction), \textit{modified in part}, 820 F.2d 1354, 1355 (1st Cir. 1987) (per
is unlikely that the eventual trial court can perform the Sheppard management function to ensure a fair proceeding.\textsuperscript{362} It is therefore at this stage that the general no-comment rules play their most important role. Once the case has been charged and a trial court has jurisdiction, the trial court can take steps to deal with publicity problems.\textsuperscript{363}

Because the Sheppard Court expected the trial judge to take primary responsibility for this task, and because the judge can tailor limits on public comment more narrowly than the no-comment rules, some reasons for reliance on no-comment rules to preserve fair judicial administration disappear once the trial judge has jurisdiction over the case. The rules are still needed when the trial judge is unwilling or unable to restrain counsel intent on and effective at influencing judicial proceedings with out-of-court statements. Once the court has jurisdiction, however, concern about the breadth of no-comment rules should be higher; accordingly, when the prosecutor makes a statement falling within one of the proscribed areas of comment, there should be no presumption of a threatened prejudicial impact.

Finally, the justification for no-comment rules is weakest during the post-trial or post-disposition sentencing phase when the judge is the sentencer. The sentencing inquiry is ordinarily very broad, both as to the kind of information considered and its source.\textsuperscript{364} Both Bauer and Hirschkop held that restrictions on comment could not be imposed pending sentencing because the sentencing judge is entitled to conduct a broad inquiry and consider almost any factor in exercising his sentencing discretion.\textsuperscript{365}

H. Restraining Orders

Sheppard and Nebraska Press stressed the trial court's responsibility to use various techniques, including curbs on extrajudicial lawyer speech, to

\textsuperscript{362} The Sheppard Court seemed to recognize this when it observed that control of trial participant speech might have prevented prejudicial publicity "at least after Sheppard's indictment." Sheppard v. Maxwell, 384 U.S. 333, 361 (1966). As the Bauer court observed, "since there are no formal court proceedings pending there is no opportunity to obtain a specific pre-trial order limiting out-of-court statements." Bauer, 522 F.2d at 252. The Hirschkop court pointed out that during the investigatory stage "it is difficult for a court to protect the accused by entering orders restricting comments on an ad hoc basis." Hirschkop v. Snead, 594 F.2d 356, 365 (4th Cir. 1979) (per curiam) (en banc).

\textsuperscript{363} As previously noted, this Article does not address prosecutor leaks of matters that occur before the grand jury. The traditional secrecy of grand jury proceedings has been viewed as serving mainly the grand jury's screening and investigatory functions rather than protecting the accused's fair trial. See United States v. Proctor & Gamble Co., 356 U.S. 677, 682-83 (1958).


\textsuperscript{365} See Hirschkop, 594 F.2d at 366; Bauer, 522 F.2d at 251; see also Seitz Report, supra note 58, at 527-28 (eliminating recommended court no comment rule prohibiting lawyer comment pending sentencing).
Nebraska Press reviewed a court order prohibiting the reporting of the existence or nature of any confessions, admissions, or other information "strongly implicative" of an accused murderer's guilt. The case involved the brutal slaying of six members of a family in a small Nebraska town; the autopsies contained evidence of necrophilia. Immediate widespread publicity included reports of incriminating statements by the accused.378

Chief Justice Burger, joined by four other members of the Court, wrote that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."379 To determine whether such an order can be justified, a court must consider (1) the nature and extent of news coverage, (2) alternative measures to mitigate prejudicial publicity, and (3) the effectiveness of a restraining order.380 Although the Nebraska trial judge could reasonably have predicted that a large portion of the venire would be exposed to the publicity, he could only speculate that jurors exposed to such information would be unable to render a fair and impartial verdict.381 The gag order was therefore defective because the state courts had failed to find that measures short of an order restraining all publication—change of venue, postponement of the trial, voir dire of the jury panel for bias, instructions to the jury to consider only the evidence presented in court, and jury sequestration—would not effectively mitigate any adverse impact of publicity.382 Indeed, because it would be speculative to conclude that any such measure would have failed, the Court must have meant that the alternatives should be tried before any restraint is imposed.383

curiam) (en banc) (collateral bar rule not applicable if publisher made good faith timely effort to appeal constitutionality of order), cert. dismissed, 485 U.S. 693 (1988).
379. Id. at 559.
380. See id. at 562.
381. See id. at 568-69.
382. See id. at 563-64. The Court also doubted the efficacy of the order in protecting the defendant's right to a fair trial. See id. at 565-67.

Chief Justice Burger's opinion for the Court contained a doctrinal aberration. He wrote that to judge the prior restraint, the Court should be guided by a test Chief Judge Learned Hand formulated in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951), which asked whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger," Nebraska Press, 427 U.S. at 562 (quoting Dennis, 183 F.2d at 212). Dennis, however, did not involve a prior restraint. The Dennis test to judge subversive speech was made considerably more stringent in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), which permits government regulation of subversive advocacy only if (1) "directed to inciting or producing imminent lawless action" and (2) "likely to incite or produce such action." Id. at 447. The anomaly of Nebraska Press is that it endorsed a standard less protective of speech than Brandenburg when conventional prior restraint theory would call for a test more protective than Brandenburg. See Schmidt, Nebraska Press Association: An Expansion of Freedom and Contraction of Theory, 29 Stan. L. Rev. 431, 458-66 (1977).

Restraining prosecutor speech would leave the press free to report on the criminal proceedings. Although courts have recognized that such orders raise free press issues by impeding the ability to gather news and therefore have granted the press standing to challenge them, there is little support for the notion that a press or lawyer challenge to such restraints should be judged as strictly as the prior restraints in *Near* or *Nebraska Press*. Courts recognize a material difference between restraining orders against the press and restraining orders against trial participants. In *Nebraska Press*, both Chief Justice Burger’s opinion for the Court and Justice Brennan’s concurrence recognized limits on lawyer comment as a preferable alternative to gagging the press.

In view of the trial court’s responsibility under *Sheppard* to foster and safeguard a fair trial, the prosecutor’s role as an advocate for the community, and the much narrower scope of a restraint on trial participants than one on the press, the cases properly regard a restraint on the prosecutor as less threatening to first amendment values than one on the press. There must be, of course, a finding that extrajudicial prosecutor statements are likely to be made and that such statements may prejudice the proceedings. The test of reasonable likelihood of serious threat should be compatible with the prosecutor’s and the court’s roles. In accord


385. There is a split in the circuits over what the standard of review should be when the press challenges a restraining order imposed on trial participants. See *Dow Jones & Co. v. Simon*, 109 S. Ct. 377, 378 (1988) (White, J., joined by Brennan and Marshall, J.J., dissenting from denial of certiorari). *Compare* *Radio & Television News Ass’n v. United States Dist. Ct.*, 781 F.2d 1443, 1446 (9th Cir. 1986) (standard used was “reasonable likelihood” that pretrial publicity would prejudice defendant’s right to fair trial) *with* *CBS v. Young*, 522 F.2d 234, 239 (6th Cir. 1975) (employing a “clear and present danger” standard).


387. *See* *Nebraska Press*, 427 U.S. at 564, 601 (Brennan, J., concurring); *supra* text accompanying notes 203-221.

388. *See, e.g., In re New York Times*, 16 Media L. Rptr. (BNA) 1877, 1878 (2d Cir. 1989) (vacating gag order on counsel in criminal case because there was no showing of either a willing speaker or likely prejudice).

with *Nebraska Press* and the first amendment sensitivity to prior restraints, the trial court must examine the following three factors: the nature and extent of publicity, alternative measures to mitigate the prejudicial effects of publicity, and the effectiveness of a restraining order in preventing the threatened danger. The *Nebraska Press* directive that alternatives to restraint be exhausted would, as applied here, create a hierarchy. If restraint on the press is the last resort (assuming that it continues to be an alternative at all), restraints on the trial participants should be a second-to-last resort. Such consideration of less restrictive alternatives has been the required course in lawyer speech restraint cases since *Nebraska Press*. One possible exception to lawyer restraint as a second-to-last resort may be jury sequestration, with its attendant inconvenience, expense, and potential for skewing the jury, especially if there is evidence that the prosecutor's out-of-court statements are being made with the intent to bias the proceeding.

I. Judicial Review

In many jurisdictions, enforcement of the no-comment rules originates in bar administrative proceedings and is subject to judicial review. Because the factual questions concerning degree of harm and knowledge or intent of the speaker can be exceptionally difficult to resolve and because free speech is at stake, it is important that application of the no-comment rules shows "the necessary sensitivity to freedom of expression." One lesson of the obscenity cases is that a judicial body, following an adver-

---


391. In *In re Dow Jones & Co.*, 842 F.2d 603, 611 (2d Cir.), cert denied, 109 S. Ct. 377 (1988), the Second Circuit approved of the trial court's exploring available alternatives to a gag order: "The precautions share one thing in common: each must be explored and ultimately rejected as inadequate—individually and in combination—as a remedy for prejudicial pretrial publicity before a restraining order is entered." *Id.;* see Connecticut Magazine v. Moraghan, 676 F. Supp. 38, 43 (D. Conn. 1987) (finding state court's imposition of gag order on criminal trial counsel improper for failure to make findings on effectiveness of alternatives).

Although disfavored relative to other techniques, a restraining order on counsel may be necessary in conjunction with other measures to ameliorate or prevent prejudice from publicity. See, e.g., State v. Biegenwald, 106 N.J. 13, 35, 524 A.2d 130, 141 (1987) (continuance and restraint on counsel employed).

392. See *Dow Jones*, 842 F.2d at 611.


394. See supra text accompanying notes 355-360.

sary hearing, must decide the protected character of speech. This principle rests on differences between courts and administrative agencies in their capacity to protect constitutional rights. A related principle of review in cases involving first amendment interests is that appellate courts should independently examine the record to ensure that government action "does not constitute a forbidden intrusion on the field of free expression." Courts reviewing administrative findings of no-comment rule violations accordingly should conduct independent reviews of the record, as should courts reviewing a trial court's determination of the need for restraining extrajudicial lawyer comment.

CONCLUSION

This discussion leads to several general conclusions: (1) prosecutor speech is entitled to first amendment protection because the prosecutor retains a constitutional right to self-expression and because the speech informs the public about matters of public concern; (2) such speech may not be subject to regulation unless it threatens to undermine the accused's fair trial rights or the fair and efficient administration of justice; and (3) the first amendment precludes sanctions or restraints on the press or public that may be imposed on the prosecutor because the prosecutor performs a unique role in the criminal justice system.

Accommodation of the competing values in the complex and changing context of prosecutor speech calls for adjustments in the manner and scope of regulation that is applicable to prosecutors. This is necessary to avoid unnecessary compromise of either free speech or fair trial values. This Article has suggested how these adjustments could be structured within the prevailing system of disciplinary or court rules and restraining orders. The complex and changing context also suggests that fair trial

397. See id. at 520-24.
399. An example of a court failing to do this and thereby affirming a decision that arguably was insensitive to first amendment interests was In re Hansen, 584 P.2d 805 (Utah 1978). Hansen involved an appeal to the Utah Supreme Court from a determination by the Utah State Bar Commission that the Attorney General, when serving as Deputy Attorney General, made statements on television about a pending prosecution in violation of DR 7-107(B)(6). See id. at 806. The court held that the Commission's decision would be affirmed "unless it appears that the Commission has acted arbitrarily or unreasonably." Id. at 807. The court reduced the Commission's recommended sanction from one-year suspension to censure and a reprimand, but did not address the first amendment and degree of potential harm issues. See id.
and administration of justice concerns are not the exclusive interests that may justify limits. For example, if they are narrowly drafted and if a sufficient showing of threat and the absence of alternative protective measures can be made, a rule or restraining order may properly be enforced to protect personal security interests of witnesses and victims.

Rules and restraints must be assessed on overbreadth and vagueness grounds. The disciplinary and court rules have evolved in response to both concerns, combining specific categories of potentially threatening statements with a requirement of a specific degree of threatened harm. Courts properly have found the need for the latter to avoid overbreadth and have ruled the former vague and overbroad in particular cases. Indeed, provisions remain in Model Rule 3.6 that are open to vagueness and overbreadth questions. The specific categories should serve both the notice-giving and least restrictive limit functions. Overbreadth concerns can vary depending on the timing of the speech and the identity of the factfinder. Accordingly, the suggestions summarized below are based in part on sensitivity to overbreadth.

Disciplinary or court rules controlling prosecutor speech should address the degree of harm, burden of proof, knowledge and intent of the speaker, timing of the speech, and identity of the factfinder. It is virtually impossible to discuss one of these factors without reference to another, and the following summary reflects this overlap.

**Degree of harm:** In general, prosecutor speech should not be subject to regulation unless it poses a serious and imminent threat of prejudice to a judicial proceeding. Factors relating to intent of the speaker, type of factfinder, and timing of the speech would allow for adjustment of the degree of harm showing to account for a shifting balance in the speech and fair trial interests.

**Knowledge or intent:** Prosecutor speech should not be subject to discipline unless the prosecutor knows or reasonably should know that his extrajudicial comments will be reported publicly and will pose a substantial threat of prejudice to the judicial process. In light of the prosecutor's obligation to secure due process, if there is proof that the prosecutor knew or intended that the speech would prejudice the judicial proceeding, the reasonable likelihood standard should apply.

**Burden of proof:** If the prosecutor reveals information proscribed by a narrowly drawn no-comment rule before a court has jurisdiction to address publicity problems, and if the case proceeds to jury selection or his public comment influences a plea disposition or choice of factfinder, he will need to produce evidence to rebut a presumption that the speech posed the requisite degree of harm to justify discipline. The burden of persuasion on whether the statement was made and on the degree of harm would rest in all instances on the complainant. To avoid self-cen-

---

400. See supra text accompanying notes 216, 331-352.
sorship, the burden of proving a no-comment rule violation should be clear and convincing evidence.

**Identity of factfinder:** The balance of interests shifts when it is known there will be no jury. Violation of a no-comment rule would not create a presumption about the threat of potential harm unless there is evidence that a jury was waived as a result of prosecutor publicity. Absent such evidence, clear and convincing proof should be required to establish a violation, as should a showing of actual prejudice. Because a sentencing judge can receive and take into consideration a wide range of information, the justification for no-comment rules is weakest during the sentencing phase and only a clear and convincing showing of actual prejudice would justify discipline.

**Timing of speech:** To blunt the impact of prejudicial publicity without using speech restraints, all burdens of production and proof to justify discipline should shift toward the disciplinary authority if the speech occurred when the court has jurisdiction. The period between guilt determination and sentencing should be governed by the standards applicable to the trial and should vary depending on whether the judge or jury is responsible for sentencing.

**Restraining orders:** Restraining extrajudicial speech in a particular case, although a disfavored remedy, can and should be more narrowly restrictive than general disciplinary rules and can also better safeguard the fair trial interests. Lawyer discipline under the no-comment rules, like reversals, are palliatives in terms of reaching a practical and effective accommodation of interests. Unlike free speech issues that focus on redressing consummated harm, such as defamation, the challenge here is to prevent harm from occurring. The fair trial cases accordingly tend "to concentrate on highly individualized factual" considerations. Whether reasonable or serious and imminent likelihood of prejudice is the standard for such a restraint, the critical protection for prosecutor free speech interests is the court’s obligation to consider alternatives to speech restraints and whether restraints would be effective under the circumstances. Factual findings on these issues must be made to support any limits.

The foregoing analysis of prosecutor speech points to emphasis and refinement in accommodating free speech interests of the prosecutor and the public, fair trial for the accused, and fair and efficient judicial administration. The emphasis should be on the responsibility of the trial judge to address problems with prosecutor speech in the least restrictive and most effective manner. The refinement should occur in the framing and application of restraining orders and rules with sensitivity to overbreadth and vagueness and the other factors mentioned above. The approach presented here implies that defense counsel should have broad, though not unlimited, first amendment protection for their extrajudicial

It also leaves ample constitutional latitude for prosecutor speech, more latitude than many, including myself, think is wise or prudent.

The substantial first amendment protection for prosecutor speech suggests the importance of inculcating fair trial values in legal education and journalism training, of dispensing professional disapproval short of formal discipline in appropriate circumstances, and perhaps the even greater importance of developing and enforcing policies within prosecutors’ offices regarding public comment on pending cases. The last measure is subject to first amendment scrutiny and may not always be effective, especially as applied to the top elected or appointed prosecutor. But addressing the issue as an office policy matter, as many have attempted to do, may be the most practical way of dealing with the prosecutor speech phenomenon. Accordingly, the law and journalism classrooms, the newsrooms, the bar associations’ continuing legal education programs, and the prosecutors’ offices are places where the constitutional and prudential concerns are more often likely to be reconciled than in the trial courts and in attorney disciplinary proceedings. By developing in these settings a deeper understanding of the competing interests and the context of the speech, the first amendment values served by prosecutor speech can be fostered, and the impact of the speech on competing values tempered.

402. Defense counsel have been the focus of much of the writing on this topic. This Article’s analysis indicates that it would be compatible with the first amendment to regulate prosecutor speech to a greater degree than defense counsel extrajudicial speech. However, the scope of this distinction needs further analysis than is presented here. See Swift, supra note 13, at 83-84.


APPENDIX I

DR 7-107 TRIAL PUBLICITY

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, if any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.
(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

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

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

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

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

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

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extra-judicial statement, other than a quotation from a reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a
statement, other than quotations from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal records of a party, witness, or prospective witness.
(3) Physical evidence or the performance or results of any examinations or tests or the refusal of a party to submit to such.
(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
(5) Any other matter reasonably likely to interfere with a fair hearing.

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

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

RULE 3.6 TRIAL PUBLICITY

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

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

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

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

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

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

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

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

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

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

(2) the information contained in a public record;

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

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

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

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

(7) in a criminal case:
   (i) the identity, residence, occupation and family status of the accused;
   (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
   (iii) the fact, time and place of arrest; and
   (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.