HIGH STAKES TRIALS

1. Preparation – Kelley Price
2. Publicity and the Media – Bob Goldman and Kelsey Hazzard
3. Social Media – Andrew Reiss and Rick Weldon
4. Jury Issues – Judge Greider and Martin Nestares
5. Demonstrative Aids – Ed Cheffy
6. Structure of the Trial – Mike Mueller (see Tab #1)

Preparing for and Structuring A High-Stakes Trial

Michael J. Mueller, Esq.
Hunton & Williams LLP

Kelley Geraghty Price, Esq.
Cohen & Grigsby

Presentation to Thomas S. Biggs American Inn of Court
March 8, 2016

Preparing For A High-Stakes Trial

"A jury consists of twelve persons chosen to decide who has the better lawyer."
– Robert Frost

Preparing for a high-stakes trial is similar to preparing for a marathon—you need to have a clear plan of preparation leading up to the big event and systematically go through each step of that plan, adjusting when necessary. If you have not put in the time and effort over the weeks and months leading up to trial, you are leaving the results to chance (or, at the least, you will be reactive to what your opponent and the court do, and you will be dependent upon "thinking" of things as they arise, often at the last moment).

General Overview On Preparing For Trial

This presentation assumes that you are preparing for a jury trial. Accordingly, the jury instructions will serve as the backbone of your case—the standard from which to structure your discovery and trial preparation.[1] Knowing what evidence you will need to win your case is the first step in preparing for trial. If you are plaintiff's counsel, the jury instructions provide every element of your prima facie case, allowing you to determine what evidence to present to meet each element. If you are defense counsel, you will need to show that the evidence does not support one or more of those elements, or show that the facts support the affirmative defenses described in the jury instructions. Regardless of whether you are representing the plaintiff or defendant, the jury instructions are the "skeletal" plan for what must be shown at trial apart from challenges to witness bias.

Your discovery requests and depositions should be focused on building up your case. As you engage in discovery, be sure to keep in mind any orders entered by the court, including any scheduling order or pretrial order. Additionally, review all relevant local, state or federal rules to ensure you are aware of any deadlines or other requirements. Finally, check to see whether the judge has a set of individual trial practices and procedures. Once you have familiarized yourself with all relevant procedures, deadlines, and rules, you can pick your litigation team, determine your discovery strategy, create your project lists, and get ready for trial!

Project Lists

Project lists are a very important part of trial preparation. They will allow you to keep track of who should be doing what and when. Divide responsibilities among your team members.

These tasks should be listed on a document of some kind (e.g., a spreadsheet) with the appropriate column headings. Some suggested headings are as follows:

[1] If you are preparing for a bench trial, determine the appropriate findings of fact and conclusions of law needed to win your case. Use that as your guidepost when planning the evidence to present at trial.

TASK	DEADLINE	ASSIGNED TO	STATUS (% TOWARD COMPLETION)	NOTES

The following checklists are suggested guidelines for tasks to complete at certain stages prior to the beginning of trial. Of course, the timing of all tasks should be modified for each specific case, in light of any court-specific rules or procedures and how much time you anticipate it will take.

180 Days before Trial Begins

- Review court practices and procedures, scheduling order, and pretrial order. Some deadlines are set by rule in the absence of a court order (e.g., Fed. R. Civ. P. 26 for pretrial disclosures and trial preparation). If the court has not yet set a deadline for filing the parties' proposed final pretrial order, think about your desired schedule in advance and reach out to your opponent. Ensure that there is a court-established deadline for all items that you want to learn from your opponent in order to prepare for trial (e.g., your opponent's witness list and exhibit list, your opponent's objections to your exhibits, deposition designations). Set your internal deadlines for your own remaining projects accordingly.

- Review the pleadings

    - Are there affirmative defenses you need to add based on discovery?

    - Are there allegations you want to move to strike or sever?

    - Are there issues raised by earlier motions (particularly class certification briefing, motions to dismiss, and motions for summary judgment) that inform what each side must prove at trial?

    - Are there orders that foreclose certain issues or proofs (or conversely make clear what facts must be proved at trial to support a claim or defense)?

- Review prior project lists. Ensure that "old" ideas and tasks that could be important to trial are appropriately prioritized or crossed off after full consideration.

- Analyze needed proof by issue and witness

    - Draft elements of proof for each claim and defense.

    - Draft witness plans. Which witnesses (both adverse and your own) will potentially be able to prove each element or other relevant fact? Which witnesses will potentially be able to sponsor each document that could prove an element or other relevant fact? Leave open the possibility that multiple witnesses could prove the same point, and then make adjustments later based on witness availability, credibility, orders of proof, etc.

- Identify all potential fact witnesses that should be listed for trial.
    - At a minimum, this will include the ones who were deposed, and perhaps additional ones who gave affidavits/declarations during motions practice. It may also include individuals who were disclosed as potential witnesses during initial disclosures or other pretrial proceedings.
    - Consider whether there is a local rule specifying whether your listing of a witness means that you are "guaranteeing" that witness's availability for trial. For example, listing ancillary witnesses for your case (i.e., witnesses that you could live without) may give your opponent to a guaranteed right to call them as hostile witnesses when they might otherwise be beyond your opponent's subpoena power for trial.
- Identify expert witnesses that actually should be called at trial.
    - Research and investigate all potential areas of expert testimony anticipated for the trial, including testimony needed to address opposing expert contentions.
    - Not all experts who were disclosed or gave opinions during discovery need to be listed for trial. Some issues are no longer important by the time of trial. If an expert was significantly damaged during discovery depositions, or else is likely to undercut your case, consider not listing that expert; there is significant case law precluding your opponent's ability to use your expert against you if you do not call your expert.
- Prepare pretrial motions or file response to pretrial motions. At a very early stage, brainstorm the kinds of motions that you may need to file, and that your opponent may file. Some of the most common motions are:
    - Motions raising jurisdictional issues
    - Venue motions
    - Motions against the pleadings
    - Motion to dismiss
    - Motion for summary judgment
    - Motion to decertify a class that was certified
    - Evidentiary motions (i.e., motions *in limine*)
- ☐ Set trial date, if it has not been set yet. Preserve those dates from incursions by other cases, other professional obligations, or personal affairs. If you are agreeing to the trial date before it is set, ensure that your key witnesses will be available at that time.

- ☐ Prepare jury instructions and verdict form. Perhaps the most important thing you can do before trial is consider how the jury will be instructed, and what the jury will be asked to do on the verdict form and/or special interrogatories. This is your opportunity to ask the court to tell the jury your view of the law and what they should conclude in a light most favorable to you.

90 Days before Trial Begins

- ☐ Develop trial plan (see below section on structuring the trial)

- ☐ Complete any remaining discovery. Make sure that you have deposed all potential witnesses identified by your opponent. In addition, some types of already-completed discovery may need to be updated by the time of trial (e.g., damages calculations where damages continue to accrue, or some claims have been dismissed by the court, or class composition has changed).

- ☐ Review all discovery requests and responses, including all documents and evidence produced

    - o Supplement discovery responses as needed and/or required. Consider whether you will be barred from offering certain types of evidence if you did not comply with your disclosure obligations.

    - o Send request for follow-up discovery or deficient responses.

- ☐ Review depositions. Start identifying which ones you may need to offer (e.g., because of witness unavailability) or may want to offer despite the availability of the witness (e.g., good deposition testimony from an opposing party that anticipate will "improve" their testimony if they are allowed to answer the same questions live at trial).

- ☐ Propound pretrial discovery to ensure answers have not changed and to obtain updated information

- ☐ Consider seeking Requests for Admissions

- ☐ Coordinate submission of pretrial order, if not already done

- ☐ Compile fact and expert witness lists

- ☐ Compile exhibit lists of key evidence to present at trial

- ☐ Compile expert's resume, publications, and any other materials to qualify expert

- ☐ Compile and review expert's materials relied upon in preparation of the report

- ☐ Prepare any demonstrative aids to be used at trial (including graphs, maps, charts, models, and illustrations). These should be developed continuously as you keep thinking about your opening statement, complicated witness exams, and closing argument.

- ☐ Meet with experts and clients to prepare them for trial. Consider whether you should engage the services of a non-testifying "witness expert" to improve the ability of your key witnesses to present well before a jury. Also research to ensure that any such sessions are properly protected by the attorney-client privilege and/or litigation work product doctrine.

- ☐ Analyze and identify key trial issues

- ☐ Identify and analyze trial presentation and technology needs in trial

- ☐ Identify and secure trial witnesses

    - Make sure witnesses will be available to testify at trial (government witnesses, out of area witnesses, elderly witnesses)

    - If problems are anticipated (e.g., witnesses who are seriously ill, planning to leave the country, or who may be facing commitment proceedings or prison time), take their deposition and possibly video tape their testimony.

- ☐ If you are a representing an organization as a party, consider your potential "corporate representative" to attend trial (whether or not they will testify). Your corporate representative will likely become the "face" of your client in the eyes of the jury. Select someone who will likely make the best impression over a potentially lengthy trial, combined with knowledge of the organization's procedures and the other side's witnesses to best assist you at trial, such as by pointing out when the opposing testimony is not accurate.

- ☐ If you anticipate media coverage of the trial, consider retaining a P.R. expert, or else identify an in-house point person at your client who has experience with press relations. Notify all potential stakeholders early of the upcoming trial so that they may properly prepare (e.g., local management being ready to answer or demur to questions from employees or media in their locale, or local SME's within the organization being ready to respond to inquiries from government regulatory bodies with an interest in the issues).

- ☐ If jury selection will be potentially complex, consider retaining a jury consultant who can work with you to develop a potential written juror questionnaire that the court might adopt for screening, or else to help you develop the key criteria in your jurisdiction for identifying your "best" and "worst" jurors (and the characteristics that are the best proxies for identifying such persons). Having an early discussion on such issues might also allow you to adopt a plan for voir dire.

- ☐ If your case is related to other pending litigation, coordinate all of the above with the other attorneys and client representatives responsible for such other matters. It may be

advisable to form a "crisis response team" that frequently communicates about all issues relating to the upcoming trial. Consider whether all such communications are privileged and, if not, exclude certain participants from direct discussions if they would jeopardize the privilege.

60 Days before Trial Begins

- ☐ Prepare and serve all trial subpoenas on all witnesses, including any necessary testimonial and travel expenses that must be tendered. Consider negotiating an arrangement with your opponent to accept such subpoenas without otherwise waiving any objections beyond service.

- ☐ Prepare and serve all trial subpoenas on parties to produce original relevant documents at trial, or alternatively reach agreements as to the authenticity of all potential trial exhibits. Be as specific as possible.

- ☐ Consider whether it is advisable to negotiate for stipulations as to certain facts, to avoid or reduce the cost of proving uncontested facts that must still be presented to the jury. Consider whether stipulated facts may make the case easier for the jury to understand, or else simplify the issues in such a way that other issues you would like to highlight become the focus of the remaining proofs. At the same time, consider whether stipulating to certain facts could be used against you through "over reading" the stipulations or by suggesting that you have given up a key element or an entire claim/defense.

- ☐ Negotiate with counsel for stipulations regarding trial exhibits, discovery designations and deposition designations.

- ☐ Confirm all discovery has been reviewed and supplemented as necessary.

- ☐ Examine all exhibits listed by opposing party. If either side's objections will be contested, research and prepare "pocket briefs" to show the court on short notice that the case law supports your view of the evidentiary rules.

- ☐ Prepare a trial brief. This is your opportunity to streamline your thinking, but also to educate the court about what you really expect to prove at trial.

- ☐ Prepare motions in limine to narrow trial issues, preclude improper evidence, ensure critical evidence is allowed.

- ☐ Obtain demonstrative aids. This is particularly important if the items are "one of a kind" and their availability must be secured in advance (e.g., specific model of equipment). Consider how you will get the evidence into the courtroom; some items (e.g., knives, guns) will be barred from the courtroom or will require special permission, and other items (e.g., heavy machinery, experiments) may require special arrangements.

- ☐ Confer with client regarding settlement options. If appropriate, conduct settlement negotiations. Consider assigning a separate team to negotiate so as not to distract the principal trial team.

- ☐ Prepare for pretrial conference. Know in advance what the court will expect you to address, what concessions your client will allow you to make, and what strategic objectives you want to achieve (e.g., securing an order barring certain opposing witnesses or documents before trial, or specifying the length of voir dire or opening statements, or obtaining permission to use a written jury questionnaire as part of jury selection).

30 Days before Trial Begins

- ☐ Draft direct examination outlines
    - o Reference exhibits needed
    - o Update any background searches (e.g., criminal records, civil litigation, bankruptcies, press and social media coverage) for hostile witnesses.
- ☐ Prepare friendly witnesses for trial testimony. (For especially complicated trials, such as ones involving examinations of lengthy financial transactions or accounts, consider starting to prepare the witness 60-90 days before trial.)
- ☐ Draft cross-examination outlines for adverse witnesses
- ☐ Summarize all depositions so as to be prepared for improper use by the other side (e.g., reading of a passage on certain pages when other pages in the deposition are contradictory or should be considered in fairness to render the passages read complete).
- ☐ Prepare first draft of opening statement, keeping in mind all of the above-listed tasks. Be prepared to revise the opening statement in light of new or modified information from witnesses, court rulings, or perceptions about what "story" must be told to persuade the jury of your position.
- ☐ Determine how to stage witnesses at trial. For example, some courts will require you to rest if you do not have another witness ready to testify when one witness concludes; this may require you to work with your witnesses to "stack" them, having multiple witnesses ready to call on short notice. But in doing so, you must also consider whether calling witnesses out of order for their convenience disrupts your ability to tell a coherent and logically unfolding story to the jury.
- ☐ Create a checklist for how to get in all the proofs (both evidentiary and testimonial)
    - o Include common objections and anticipated responses to those objections
    - o Note all relevant evidentiary rules and case law
- ☐ Prepare a trial notebook

- This should contain things you will want to have easily accessible at trial. Make sure it contains a detailed table of contents. The following are things you may want to include in the trial notebook:
    - Trial themes to develop
    - Trial Brief
    - Opening and closing statement outlines
    - Annotations to evidence referenced in the opening statement
    - Cases/statutes/regulations that will cover issues likely to arise during trial
    - Notes on anticipated legal issues
    - Voir dire questions and characteristics of persons you want on your jury
    - Juror questionnaire and/or key voir dire questions, along with research from your jurisdiction on grounds to exclude for cause.
    - Direct and cross exam outlines
    - List of all the exhibits you intend to use at trial
    - Copies of the most important exhibits

☐ Meet with clients and other stakeholders to discuss trial

☐ Provide clients with all their previous discovery responses and deposition to review and be familiar with before intensive witness preparation.

☐ Prepare witness deposition testimony/video testimony for presentation at trial. This may depend, of course, upon court rulings as to objected passages.

☐ Prepare Pretrial Stipulation

☐ Prepare and serve all Requests for Judicial Notice

☐ Prepare for final pretrial conference/calendar call

15 Days before Trial Begins

☐ Prepare for jury

- Draft voir dire questions
- Draft juror questionnaire

        - Discuss with opposing counsel
        - Procure court's approval for use
    - Finalize jury instructions and verdict form if they have not yet been submitted to the court.

- ☐ Pre-mark exhibits; prepare copies of depositions and documentary exhibits
- ☐ Prepare relevant excerpts of depositions, interrogatories and/or admissions for stipulation and/or submission to the trial court
- ☐ Order court reporter, if necessary. Make any special arrangements for "live" feed, daily copy, ASCII or other electronic copies of the transcript.
- ☐ Arrange for any witness translators, if necessary. Keep in mind that most courts will require proposed translators to be certified, although an agreement by the parties as to the translator's qualifications may dispense with the need for certification. Make sure that the arrangements are clear for who will bear the cost of translation where both sides use the same translator (e.g., for both direct and cross-examinations).

7 Days before Trial Begins

- ☐ Conduct final preparation of individual witnesses
    - Make sure that each witness is comfortable with the anticipated Q&A's. Revise as necessary in light of the witnesses' recollections and documentary evidence. Rehearse as appropriate to ensure that the witness can communicate effectively (e.g., speaking clearly and loudly, confident and persuasive body posture), looking at the jury as appropriate, etc.). Review exhibits need to be addressed by each witness.
    - Schedule witnesses to arrive in sufficient time for any final preparation and/or to "stand by" to testify.
- ☐ Prepare for argument on Motions in Limine
- ☐ If you know the names of members of the venire, engage in ethically appropriate research to assist in voir dire and otherwise fine-tune your trial strategy. This includes searches of social media (public Facebook pages, LinkedIn, Twitter, etc.), as well as general media coverage of the veniremen, property records, civil and bankruptcy records, etc.
- ☐ Make a final check of your adversary's (and adversary's counsel's) social media posts to see if they have taken any recent positions on the facts and theories. These could be useful during cross-examinations at trial.
- ☐ Make sure that you understand the court's procedure for voir dire (e.g., the questions that the clerk's office asks the panel, the length and types of voir dire that the court will ask

before turning questioning over to the lawyers, any impermissible lines of questioning by the attorneys, the allotted time for the attorneys to ask questions, and the process for challenging for cause and exercising peremptory strikes).

- ☐ Prepare a summary of the claims/defenses/parties' positions for the court (or you) to read to the jury at the start of jury selection.

- ☐ Test out technology in courtroom. Understand what equipment the court can provide and what alternative equipment is desirable/allowable/technically feasible. Make sure you understand the court's rules for using such equipment (e.g., are court orders required to bring in computers? Can your technical assistant sit in front of the bar?).

- ☐ Determine courtroom availability

- ☐ Determine whether you will have access to an attorney-witness prep room and/or other "war room" inside the courthouse.

- ☐ Make final arrangements for lodging and transportation of client, witnesses, staff as needed

- ☐ Arrange for transportation of files/documents and audio/visual equipment

- ☐ Prepare first draft of closing argument, in light of what is already known or anticipated about the trial.

Trial Day

- ☐ Submit trial brief, witness list, juror questionnaire and jury instructions to judge (unless the pretrial order imposed earlier submission dates).

- ☐ Provide pre-marked exhibits to clerk

- ☐ Submit stipulations on exhibits, depositions, interrogatories and admissions to court

- ☐ Ask the Court to give your requested Statement of the Case at the start of voir dire.

- ☐ Coordinate with your client about any remarks to the media (e.g., press statements about the case generally, or daily developments). Make sure that any public comments about the trial are consistent with the court's expectations as to the permissibility of public comments (e.g., be careful not to influence the jury pool).

Trial Materials

Make sure you have everything you need in the courtroom. The following checklist provides a general overview of items you will want to bring to the trial:

- ☐ Trial Notebook
- ☐ Hard copies of all deposition transcripts with the exhibits
- ☐ All your trial exhibits and your opponent's listed trial exhibits, with both sides' listed objections.
- ☐ Demonstratives
- ☐ Key Pleadings Binder
- ☐ CD or USB drive containing copies of all depositions, exhibits, key pleadings, outstanding motions and relevant orders
- ☐ A list of names of the client, corporate representatives, witnesses, the members of the trial team, and other important persons with their office and cell numbers
- ☐ The rules of procedure, evidence and all relevant local rules
- ☐ Office supplies – post-it notes, highlighters, pens, legal pads, etc.
- ☐ Index showing what is in each box
- ☐ Audio/visual equipment, as needed

Stress Management

Remember, trial preparation is a marathon, not a sprint! Be sure to give yourself time to rest and recharge as needed.

Structuring The High-Stakes Trial

Now that you understand how to prepare for trial, let us briefly discuss the structure of the typical civil jury trial. The major components of a civil trial are opening statements, the presentation of evidence, and closing arguments. The presentation of evidence is divided into at least two phases, and potentially three phases: the case-in-chief of the Plaintiff, the Defendant's case-in-chief, and the rebuttal case. Voir dire, jury instructions and verdict forms, answering jury questions during deliberations, and rendering of the verdict are also components of a trial but are not covered here.

Opening Statements

Setting aside remarks made during voir dire, an opening statement is the attorney's first opportunity to speak to the jury about the particulars of the case. It is the first time you will be able to explain the reasons why your client should win. But it is predictive in nature, given that the attorneys are only permitted to explain what they think the evidence will show, and not the legal, policy and other reasons why they will later argue their clients should prevail. Despite the limits of opening statements, some jurors will have formed a view of the case—and who should win—by the conclusion of opening statements, subject to hearing the evidence. Therefore, your opening statement must be persuasive, clear and coherent, all while remaining concise.

The party with the burden of proof (generally the plaintiff) gives the first opening statement. The defendant may give his or her opening statement at the conclusion of the plaintiff's statement or at the close of the plaintiff's case-in-chief—i.e., before the defendant presents his or her case. A party may also waive opening statement, though it is seldom, if ever, wise to do so. The length of an opening statement will vary depending on the complexity of case and the amount of evidence to be presented. Some opening statements may last as little as 5-10 minutes, while others may take several hours. Of course, the length is also subject to the discretion of the presiding judge.

An opening statement is just that, a statement. Accordingly, you must refrain from making legal arguments during an opening statement. Rather, you should preview for the jury the evidence and witnesses that you believe will be presented at trial. Although this is not a lesson in how to prepare and deliver an effective opening statement, it is important to point out certain tactics that are not permitted during opening statements:

- Making "Golden Rule" statements—i.e., asking the jurors to put themselves in the position of the plaintiff or defendant
- Expressing personal views or opinions or discussing the lawyer's experiences
- Remarking as to the credibility (or lack thereof) of witnesses
- Misstating or mischaracterizing the evidence to be presented
- Asking the jury to "send a message"

- Making remarks intended to inflame the passions or prejudices of the jury
- Asking the jury to consider the financial positions of the parties

Despite these commonly understood limitations, an opening statement must paint your client (and his or her case) in the best possible light given what you believe will transpire during the trial. Although the opening statement is supposed to merely summarize the expected evidence, the reality is that opening statements have become more than that over recent decades (something that older judges may openly lament if they hear a more "modern" opening statement). A good opening statement will give the jurors a "theme" or "theory of the case" around which to evaluate the evidence. Often that theme is a disguised morality play. For example, a plaintiff's attorney may attempt to portray the defendant as motivated by greed in order to "cut corners" on legal compliance. Conversely, a defendant's attorney may attempt to convince the jury from the earliest opportunity that the defendant was "fair" and made its best attempt to, and actually did, comply with the law.

Depending on the judge's discretion, you may be able to use certain evidence during opening statements. For example, if the parties have previously stipulated to the admissibility of certain exhibits, then either side might be allowed to show them to the jury during the opening. This can be particularly useful for one or two "key" documents that are expected to be a focus of the trial, such as the contract at issue in a breach of contract case or a purchase order in a commercial transactions case. If there are multiple issues, or if the issues are complex, it may also be advisable to use some demonstrative aids during the opening statements, such as writing key dates on an easel in chronological order, or else summarizing the key points that an expert witness is expected to opine about. In long trials, especially ones with a lot of money at stake, the parties will often develop PowerPoint slides or animations to keep the jury's attention and give them a visual way of thinking about the upcoming proofs.

Finally, keep in mind that the jury will be assessing you. They will be taking a measure of whether you seem to be polite to the court, fair to the other side, respectful of the jury's time, and in general whether you are the type of person who should command their respect and attention. If you make a promise during your opening statement—such as a representation that a certain witness will appear and testify a certain way, or that a certain piece of evidence will be admitted—be certain that you can keep that promise. The jurors may hold it against you if you do not deliver during the trial, and you can be certain that your opponent will remind the jury during closing arguments of any failed "promises" you made at the outset of the case. While jurors do not tend to vote against clients merely because of the performance of their attorneys, it is best to not give the other side any unnecessary ammunition to shoot down your arguments.

Presentation of Evidence

The second major component of a trial is the presentation of evidence. Think of your case as a movie and each piece of evidence as a frame of film. If you want the jurors to decide in your client's favor, you have to present them with a complete movie, free of gaps and conflicting story lines. Jurors will fill in any gaps in your story with their own imaginations or with evidence offered by the opposing party. Conflicting story lines will lead to doubt in the minds of

jurors and undermine your theory of the case. Therefore, it is important that the evidence you present fits within your theory of the case, and that the evidence answers any and all questions jurors may have as to what took place.

Evidence is presented in the following order: The plaintiff (or the defendant, if the defendant has the sole burden of proof by the time of trial) presents his or her case-in-chief. During this phase of the trial, the plaintiff's attorney will question witnesses by "direct examination," often through open-ended questions. Ordinarily, a lawyer may not ask leading questions during direct examination. There is an exception for adverse witness, however. An adverse witness is someone who is either affiliated with the opposing party or who is likely to testify favorably for the opposing party. Such witness may generally be led during direct examination. Witnesses for either party are characterized as either lay or experts, and generally speaking, only expert witnesses may give opinions or state conclusions.

The defendant's attorney may cross examine the plaintiff's witness following direct examination. A lawyer may ask leading questions during cross examination, and the questions must be within the scope of direct examination. At the conclusion of cross examination, the plaintiff's lawyer may ask the witness follow-up questions on re-direct; however, the questions must be within the scope of the questions asked during cross examination.

Once the plaintiff has called all of his or her witnesses, it is time for the defendant to presents his or her case-in-chief. The process and order of questioning is the same during this phase of the trial as it is during the plaintiff's case-in-chief. As noted above, however, if the defendant deferred his or her opening statement, the attorney will make the statement prior to presenting evidence.

At the conclusion of the defendant's case-in-chief, the plaintiff may present rebuttal witnesses or evidence to refute the evidence presented by the defendant. Rebuttal testimony is limited, however, and witnesses may not testify to bolster the evidence presented in the plaintiff's case-in-chief. Rather, rebuttal witnesses or evidence is permitted only to contradict or undermine unanticipated evidence presented by the defendant. If the court concludes that the plaintiff should have anticipated certain testimony or documents offered by the defendant, then it is likely that the plaintiff will not be allowed to respond to such evidence in a "rebuttal case" because it is not true rebuttal.

Nearly every aspect of the trial will require strategy calls by the attorneys. In advance of trial, the attorneys for both sides should contemplate all the different ways that the other side may attempt to present their case, and consider how to respond accordingly (both by cross-examination and by structuring the proofs to be offered in your own case). Of course, not everything can be perfectly anticipated; some have said that it is not a real trial unless you have taken a few unanticipated body blows. With that in mind, here are some strategic issues to consider when structuring a high-stakes trial:

- Consider the length of proofs. While you must put on enough evidence to make out your case, be conscious of the demands you are placing on the juror's time and attention. A jury that thinks you are being repetitive, or unnecessarily drawing out the proofs, may

hold it against you. Also, a long trial may test the jury's patience or make it difficult to remember the proofs that were introduced early in the case.

- Tell a logical story. If at all possible, call your witnesses, and introduce your exhibits, in some manner that seems to fit together in a memorable way. Often this is done chronologically, but other methods may be appropriate in light of the issues. For example, it may be necessary to start with the plaintiff's "overview" of the entire story, followed by a mix of adverse witnesses and third-party witnesses to provide corroboration or other details.

- Consider which, if any expert witnesses, to call. Just because you listed an expert witness for trial, it does not mean you are compelled to call that witness. For example, as a defense attorney, you may believe that your withering cross-examination of the plaintiff's expert witness was sufficient to destroy his/her credibility. By not calling your own defense expert, you avoid creating a "battle of the experts" and you may be able to simply argue that the plaintiff's expert did not prove the plaintiff's claim. Similarly, many defendants forego calling a damages expert, on the presumption that it is better to argue that the plaintiff failed to prove liability than to create competing choices for "how much" to award the plaintiff.

- Consider when to call expert witnesses. It is probably true that, in most cases, a party calls the expert(s) near the end of his/her case-in-chief. There are multiple reasons for this. Expert opinions often are based on the assumptions that must be proved through other evidence, such as the testimony of the fact witnesses or documents that must be sponsored by other witnesses. In addition, it may be hard to establish a rapport with the jury if the first witness is an expert; the jury may want to first hear from the key "players" before hearing what they may assume is the opinion of a "hired gun." Having said that, in some trials, the testimony of the expert may relate to the critical disputed issue or may be necessary to provide an overview for the jury, after which the fact witnesses can be used to bolster that expert's assumptions and other bases for testifying.

- Consider when to call adverse witnesses. A plaintiff's attorney might believe that his/her own client (perhaps a foreign-speaking worker with an employment claim) does not make a strong witness. In such instances, it may be best to open with a direct attack on the defendant's owner or manager, whose prior deposition testimony allows the plaintiff to be assured of getting certain answers that constitute key admissions. In other cases, a plaintiff's attorney may lead with the plaintiff to garner an early empathetic reaction from the jury, followed by the calling of adverse witnesses to corroborate the plaintiff's tale. Concomitantly, a defendant's attorney may want to recall a plaintiff early in the defense case-in-chief to pursue questions outside the scope of the plaintiff's original examination to demonstrate large "holes" in the plaintiffs' case. In other instances, defense counsel might relegate calling hostile plaintiff-side witnesses to the end of the defendant's case-in-chief in order to merely round out the proofs and remind the jury that the plaintiffs have some things to say to corroborate the defense viewpoint.

- When examining an adverse witness, less is generally more. Cross-examination should be limited to eliciting testimony that you already know you will get. A good cross-

examination makes as few points as necessary to convince the jury that the witness should be rejected or viewed with skepticism. A prolonged cross-examination may convince the jury that you are merely fishing or, worse, wasting the jury's time.

- ☐ Consider how many documents you really need to introduce. Although parties typically "overlist" exhibits for trial, relatively few of those exhibits will actually offered at trial, much less admitted. In a long, complex trial, it may be the case that only a dozen exhibits really make a difference to the outcome. Consider which exhibits are "background noise" that corroborate your theme throughout the trial, while other exhibits are the ones that your will actually emphasize in your closing argument.

- ☐ Consider when to use demonstrative aids throughout the trial. Demonstrative charts and the like are not truly "exhibits" that will be sent back to the jury room for their consideration during deliberations. But they can greatly assist the jury's comprehension of the facts during trial. For example, a running chronological list of key dates may facilitate an understanding of the big picture. Similarly, a list of all the contracts or purchase orders at issue, with associated names or other relevant facts, may be necessary to keep everything straight. Finally, it is almost always the case that demonstrative aids are important for a jury to comprehend an expert's key conclusions.

- ☐ Consider when to object to the other side's evidence. During depositions, there are many reasons to object (for example, the rules may require you to do so to preserve your concerns about the form of the question or the lack of foundation by the witness) and few punishments for doing so. Not so during trial. If you object too much, you risk losing capital with the presiding judge and jury. Be strategic in your objections.

- ☐ Be prepared to defend all objections. If you are going to object to a witness or a document, have a good ground to do so. For key pieces of evidence, be prepared to cite a rule of evidence or, better yet, case authority to support exclusion. For especially difficult issues, bring copies of "pocket briefs" to trial, in which you set forth your arguments and authorities in the same way you would argue a motion *in limine*.

Closing Arguments

Closing argument is the attorney's "opportunity to [1] distill the evidence and issues in the lawsuit, [2] draw[ ] inferences from the proof presented in the evidentiary portion of the trial[,] and [3] mak[e] an argument to the jury that it should accept [his or her] client's position." Practicing Law Institute, Trial Handbook, Ch. 5, §5.1 (Fall 2015 ed.). It is the last chance you will have to address the jurors before their deliberations. Closing argument also provides the lawyer with an opportunity to poke holes in the opposing party's case. Like opening statements, the plaintiff delivers the first closing argument. Closing arguments can last a few minutes, or an entire day (or more), depending on the complexity of the case and the amount of evidence presented.

As the title suggests, lawyers may make legal arguments during closing. A lawyer may discuss any theory reasonably supported by the evidence and may ask the jurors to draw

conclusions based on the evidence. Unlike opening statements, a lawyer may attack the credibility of witnesses during closing and may ask jurors to resolve conflicting evidence in favor of his or her client. But closing arguments are not a free-for-all, and lawyers may not:

- Make improper statements of the law
- Vouch for the credibility of witnesses
- Argue facts not in evidence
- Make "Golden Rule" statements
- State personal beliefs or opinions
- Make remarks intended to inflame the passions or prejudices of the jury
- Misstate the facts presented
- Accuse opposing counsel of lying

A good closing argument gives the jury a roadmap to agree with your client's position. It is a review of the evidence, viewed most favorably to your client and in light of the instructions of law that you believe the court will instruct the jury to follow. You do not need to summarize very piece of evidence in trial; rather, focus on the key evidence and explain why your adversary's differing views of the evidence are either incorrect or do not matter to the outcome. In order to be effective, you should be thinking about the structure and contents of your closing argument from before the trial commences, adding bits and pieces to your "ideas" for closing as the evidence comes in throughout the trial. By the time of closing, give some thought to what arguments will the most compelling to your jurors and, if you think the jury may be split, which arguments will be most likely to win over those jurors who might be tending to side with your adversary.

Finally, keep in mind that the jurors are human. Thank them for their time and service. Be honest with them about the evidence, and be fair about any bias or other arguments you make about why certain witnesses should not be fully credited. Give the jury something to work with in the jury room, and avoid giving them any reason to dislike you or your client. While they may not agree with everything you say, it is your job to give them something to think about when they compare all of the conflicting evidence to the law and your theory of the case. Ideally, you will make a compelling case that the elements of your client's claim/defense have been established, and the other side has failed to do the same.

Suggested Resources

Preparing for Trial

PREPARING FOR TRIAL: 60 DAYS AND COUNTING (ABA 2015)

PRETRIAL PRACTICE (PLI 2015)

PREPARING FOR TRIAL IN FEDERAL COURT (James Publishing 2013)

Opening Statements

TRIAL BY JURY 2015: Chapter 6, *The Opening Statement: Charting a Path to Victory*; Chapter 7, *Opening Statement*; and Chapter 9, *Opening Statement: Ten Points in Making an Effective Opening Statement* (PLI 2015)

From My Side of the Bench: The Opening Statement , 67 ADVOCATE (Texas) 83 (2014)

Opening Statements: Tips for Effectiveness in 15 Minutes or Less (ABA Section of Litigation Young Advocates 2013), available at http://apps.americanbar.org/litigation/committees/youngadvocate/articles/fall2013-0913-opening-statements-tips-effectiveness-15-minutes-less.html

7 Tips for Winning Opening Statements; Among Them: Tell a Story, Focused on Key Facts (ABA Journal 2011), available at http://www.abajournal.com/news/article/7_tips_for_winning_opening_statements_among_them_tell_a_story_focused_on_ke/

Persuasion in Opening Statement, 90 Mich. B. J. 42 (2011)

Is It Opening Statement or Opening Argument? (ABA Section of Litigation 2007), available at https://apps.americanbar.org/litigation/litigationnews/2007/november/1107_article_opening.html

Direct/Cross/General Trial Techniques

Practice Points for Trial Lawyers: A View from Both Sides of the Bench (ABA 2015)

TRIAL BY JURY 2015: Chapter 11, *Direct to Success: How to Conduct an Effective Direct Examination*; Chapter 12, *Direct Examination: Making the Facts Understandable*; Chapter 22, *Cross Examination: Nine Suggestions for Success*; Chapter 23, *The Impressive Cross-Examination*; Chapter 24, *Cross-Examination of Expert Witness* (PLI 2015)

ANATOMY OF A TRIAL, 2ND ED. (ABA 2014)

TRIAL TECHNIQUES, 8TH ED. (Aspen 2010)

TRIALBOOK, 3RD (NITA 2010)

MCELHANEY'S TRIAL NOTEBOOK 4TH (ABA 2006)

Closing Arguments

Closing Arguments: 10 Keys to a Powerful Summation (ABA Section of Litigation Young Advocates 2013), available at http://apps.americanbar.org/litigation/committees/youngadvocate/articles/fall2013-0913-closing-arguments-10-keys-powerful-summation.html

THE ART OF CLOSING ARGUMENT (ABA Section of Litigation 2012), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/35-1_the_art_of_closing_argument.authcheckdam.pdf

PROPER AND IMPROPER CLOSING ARGUMENT (ABA Trial Tactics 2011), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsu11_trialtactics.authcheckdam.pdf

Re-order from Bushnell Company
(215) 842-9520
www.BushnellCo.com

RECYCLED PAPER
RECYCLABLE

PRESS RELEASE FROM
ROBERT W. GOLDMAN, ESQUIRE
OF GOLDMAN & FELCOSKI, P.A.
COUNSEL TO JOHN-HENRY AND CLAUDIA WILLIAMS

JULY 16, 2002

Mrs. Farrell has argued her case to the press quite forcefully for days. My clients lament her unfortunate decision to make a public spectacle of her father's solemn and private decisions regarding the treatment of his person upon his legal death. Mrs. Farrell's personal attack's on her brother, John-Henry Williams, for privately carrying out his father's non-traditional wishes were mean-spirited fabrications that are no doubt part of her grieving process.

My clients do not welcome this public dispute regarding the dad they love so much; but they have been offered no reasonable choice in the matter.

I do not wish to comment on the case. The petition filed by the personal representative and our response to the petition are of record and available to you.

I will say, however, that John-Henry Williams and Claudia Williams have never considered selling and would never sell their father's DNA or any part of his body. Your horrific stories to the contrary are completely false and hurtful to the family.

I. "HIGH STAKES"?
   a. Liberty?
   b. Money? It's the principal of the thing?

II. Overall Concepts:
   a. Controlling goal-driven message
      i. What is goal? How to communicate message? Staying on Message.
         1. Protecting image? Diminishing potential litigation fund?
            a. Privacy issue for Ted and his younger kids (John Henry and Claudia). Read Press Release.
         2. PR firm?
      ii. Controlling staff
      iii. Controlling client/yourself
         1. Press release with client quotes?
      iv. Controlling client and opposition in a non-trusting environment?
         1. Mediation?
         2. Private arbitration?

III. Mediator in "High Stakes" civil or family case
   a. Same protections, plus some

IV. Show the Love
   a. No comment versus "Gosh, I wish I could…"
   b. Breaks in Trial:
      i. Frenzy for info
         1. Controlling team member?
         2. Save for end of day?

111 S.Ct. 2720
Supreme Court of the United States

Dominic P. GENTILE, Petitioner
v.
STATE BAR OF NEVADA.

No. 89-1836.
|
Argued April 15, 1991.
|
Decided June 27, 1991.

In disciplinary proceeding, the Nevada Supreme Court, 106 Nev. 60, 787 P.2d 386, found that attorney who held press conference after client was indicted on criminal charges violated Nevada Supreme Court rule prohibiting lawyer from making extrajudicial statements to press that he knows or reasonably should know have "substantial likelihood of materially prejudicing" adjudicative proceeding. Certiorari was granted. The Supreme Court, per Justice Kennedy, held that: (1) as interpreted by Nevada Supreme Court, rule was void for vagueness, and per Chief Justice Rehnquist, that (2) "substantial likelihood of material prejudice" test applied by Nevada satisfied First Amendment.

Reversed.

Justices Marshall, Blackmun and Stevens joined in Justice Kennedy's opinion.

Chief Justice Rehnquist delivered opinion dissenting in part in which Justices White, Scalia and Souter joined.

Justice O'Connor filed opinion concurring in Justice Kennedy's opinion in part and in Chief Justice Rehnquist's opinion in part.

****2721 *1030** *Syllabus* *

Petitioner Gentile, an attorney, held a press conference the day after his client, Sanders, was indicted on criminal charges under Nevada law. Six months later, a jury acquitted Sanders. Subsequently, respondent State Bar of Nevada filed a complaint against Gentile, alleging that statements he made during the press conference violated Nevada Supreme Court Rule 177, which prohibits a lawyer from making extrajudicial statements to the press that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding, 177(1), which lists a number of statements that are "ordinarily ... likely" to result in material prejudice, 177(2), and which provides that a lawyer "may state without elaboration ... the general nature of the ... defense" "[n]otwithstanding subsection 1 and 2(a-f)," 177(3). The Disciplinary Board found that Gentile violated the Rule and recommended that he be privately reprimanded. The State Supreme Court affirmed, rejecting his contention that the Rule violated his right to free speech.

Held: The judgment is reversed.

****2722** 106 Nev. 60, 787 P.2d 386 (1990), reversed.

Justice KENNEDY delivered the opinion of the Court with respect to Parts III and VI, concluding that, as interpreted by the Nevada Supreme Court, Rule 177 is void for vagueness. Its safe harbor provision, Rule 177(3), misled Gentile into thinking that he could give his press conference without fear of discipline. Given the Rule's grammatical structure and the absence of a clarifying interpretation by the state court, the Rule fails to provide fair notice to those to whom it is directed and is so imprecise that discriminatory enforcement is a real possibility. By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general" nature of the defense without "elaboration" need fear no discipline even if he knows or reasonably should know that his statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Both "general" and "elaboration" are classic terms of degree which, in this context, have no settled usage or tradition of interpretation in law, and thus a lawyer has no principle for determining when his remarks pass from the permissible to the forbidden. A review of the press conference-where Gentile made only a brief opening statement and declined to answer reporters' ***1031** questions seeking more detailed comments-supports his claim that he thought his statements were protected. That he was found in violation of the Rules after studying them and making a conscious effort at compliance shows that Rule 177 creates a trap for the wary as well as the unwary. Pp. 2731-2732.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding that the "substantial likelihood of material prejudice" test applied by Nevada and most other States satisfies the First Amendment. Pp. 2740-2745.

(a) The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the "clear and present danger" of actual prejudice or imminent threat standard established for regulation of the press during pending proceedings. See, *e.g.*, *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683. A lawyer's right to free speech is extremely circumscribed in the courtroom, see, *e.g.*, *Sacher v. United States,* 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717, and, in a pending case, is limited outside the courtroom as well, see, *e.g.*, *Sheppard v. Maxwell,* 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600. Cf. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17. Moreover, this Court's decisions dealing with a lawyer's First Amendment right to solicit business and advertise have not suggested that lawyers are protected to the same extent as those engaged in other businesses, but have balanced the State's interest in regulating a specialized profession against a lawyer's First Amendment interest in the kind of speech at issue. See, *e.g.*, *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810. Pp. 2740-2745.

(b) The "substantial likelihood of material prejudice" standard is a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials. Lawyers in such cases are key participants in the criminal justice system, and the State may demand some adherence to that system's precepts in regulating their speech and conduct. Their extrajudicial statements pose a threat to a pending proceeding's fairness, since they have special access to information through discovery and client communication, and since their statements are likely to be received as especially authoritative. The standard is designed to protect the integrity and fairness of a State's judicial system and imposes only narrow and necessary limitations on lawyers' speech. Those limitations are aimed at comments that are likely to influence a trial's outcome or prejudice the jury venire, even if an untainted panel is ****2723** ultimately found. Few interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and the State has a substantial interest in preventing officers of the court from imposing costs on the judicial system and litigants arising from measures, such as a change of venue, to ensure ***1032** a fair trial. The restraint on speech is narrowly tailored to achieve these objectives, since it applies only to speech that is substantially likely to have a materially prejudicial effect, is neutral to points of view, and merely postpones the lawyer's comments until after the trial. Pp. 2745.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III and VI, in which MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Parts I, II, IV, and V, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, C.J., delivered the opinion of the Court with respect to Parts I and II, in which WHITE, O'CONNOR, SCALIA, and SOUTER, JJ., joined, and a dissenting opinion with respect to Part III, in which WHITE, SCALIA, and SOUTER, JJ., joined, *post,* p. 2738. O'CONNOR, J., filed a concurring opinion, *post,* p. 2748.

Attorneys and Law Firms

Michael E. Tigar argued the cause for petitioner. With him on the briefs were *Samuel J. Buffone, Terrance G. Reed,* and *Neil G. Galatz.*

Robert H. Klonoff argued the cause for respondent. With him on the brief were *Donald B. Ayer* and *John E. Howe.**

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Leon Friedman, Steven R. Shapiro, John A. Powell,* and *Elliot Mincberg;* and for the American Newspaper Publishers Association et al. by *Alice Neff Lucan, Harold W. Fuson, Jr., Jane E. Kirtley, David M. Olive, Deborah R. Linfield, W. Terry Maguire, René P. Milam, Bruce W. Sanford, J. Laurent Scharff, Richard M. Schmidt, Jr.,* and *Barbara Wartelle Wall.*

Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson, and *Stephen J. Marzen* filed a brief for the United States as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Bar Association by *John J. Curtin, Jr.,* and *George A. Kuhlman;* for the National Association of Criminal Defense Lawyers by *William J. Genego;* and for Nevada Attorneys for Criminal Justice by *Kevin M. Kelly.*

Opinion

Justice KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III and VI, and an opinion with respect to Parts I, II, IV, and V in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join.

***1033** Hours after his client was indicted on criminal charges, petitioner Gentile, who is a member of the Bar of the State of Nevada, held a press conference. He made a prepared statement, which we set forth in Appendix A to this opinion, and then he responded to questions. We refer to most of those questions and responses in the course of our opinion.

Some six months later, the criminal case was tried to a jury and the client was acquitted on all counts. The State Bar of Nevada then filed a complaint against petitioner, alleging a violation of Nevada Supreme Court Rule 177, a rule governing pretrial publicity almost identical to ABA Model Rule of Professional Conduct 3.6. We set forth the full text of Rule 177 in Appendix B. Rule 177(1) prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 177(2) lists a number of statements that are "ordinarily ... likely" to result in material prejudice. Rule 177(3) provides a safe harbor for the attorney, listing a number of statements that can be made without fear of discipline notwithstanding the other parts of the Rule.

Following a hearing, the Southern Nevada Disciplinary Board of the State Bar found that Gentile had made the statements in question and concluded that he violated Rule 177. The board recommended a private reprimand. Petitioner appealed to the Nevada Supreme Court, waiving the confidentiality of the disciplinary proceeding, and the Nevada court affirmed the decision of the board.

Nevada's application of Rule 177 in this case violates the First Amendment. Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws. Furthermore, the Rule's safe harbor provision, Rule 177(3), appears ***1034** to permit the speech in question, and Nevada's decision to discipline petitioner ****2724** in spite of that provision raises concerns of vagueness and selective enforcement.

I

The matter before us does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding," but is limited to Nevada's interpretation of that standard. On the other hand, one central point must dominate the analysis: this case involves classic political speech. The State Bar of Nevada reprimanded petitioner for his assertion, supported by a brief sketch of his client's defense, that the State sought the indictment and conviction of an innocent man as a "scapegoat" and had not "been honest enough to indict the people who did it; the police department, crooked cops." See *infra,* Appendix A. At issue here is the constitutionality of a ban on political speech critical of the government and its officials.

A

Unlike other First Amendment cases this Term in which speech is not the direct target of the regulation or statute in question, see, *e.g., Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (ban on nude barroom dancing); *Leathers v. Medlock,* 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991) (sales tax on cable and satellite television), this case involves punishment of pure speech in the political forum. Petitioner engaged not in solicitation of clients or advertising for his practice, as in our precedents from which some of our colleagues would discern a standard of diminished First Amendment protection. His words were directed at public officials and their conduct in office.

There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information ***1035** relating to alleged governmental misconduct, which only last Term we described as "speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith,* 494 U.S. 624, 632, 110 S.Ct. 1376, 1381, 108 L.Ed.2d 572 (1990).

The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. See, *e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-839, 98 S.Ct. 1535, 1541-1542, 56 L.Ed.2d 1 (1978). "[I]t 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." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S.Ct. 2814, 2826, 65 L.Ed.2d 973 (1980). Public vigilance serves us well, for "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.... Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. 257, 270-271, 68 S.Ct. 499, 506-507, 92 L.Ed. 682 (1948). As we said in *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), limits upon public comment about pending cases are

> "likely to fall not only at a crucial time but upon the most important topics of discussion....
>
> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Id.*, at 268-269, 62 S.Ct., at 196-197.

In *Sheppard v. Maxwell*, 384 U.S. 333, 350, 86 S.Ct. 1507, 1515, 16 L.Ed.2d 600 (1966), we reminded that "[t]he press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes ****2725** to extensive public scrutiny and criticism."

Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption, see *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 606, 96 S.Ct. 2791, 2825, 49 L.Ed.2d 683 (1976) (Brennan, J., concurring in judgment) ("[C]ommentary ***1036** on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern"), or where, as is also the present circumstance, the criticism questions the judgment of an elected public prosecutor. Our system grants prosecutors vast discretion at all stages of the criminal process, see *Morrison v. Olson*, 487 U.S. 654, 727-728, 108 S.Ct. 2597, 2637-2638, 101 L.Ed.2d 569 (1988) (SCALIA, J., dissenting). The public has an interest in its responsible exercise.

B

We are not called upon to determine the constitutionality of the ABA Model Rule of Professional Conduct 3.6 (1981), but only Rule 177 as it has been interpreted and applied by the State of Nevada. Model Rule 3.6's requirement of substantial likelihood of material prejudice is not necessarily flawed. Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm. A rule governing speech, even speech entitled to full constitutional protection, need not use the words "clear and present danger" in order to pass constitutional muster.

> "Mr. Justice Holmes' test was never intended 'to express a technical legal doctrine or to convey a formula for adjudicating cases.' *Pennekamp v. Florida*, 328 U.S. 331, 353 [66 S.Ct. 1029, 1040, 90 L.Ed. 1295] (1946) (Frankfurter, J., concurring). Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed." *Landmark Communications, Inc. v. Virginia, supra*, 435 U.S., at 842-843, 98 S.Ct., at 1543-1544.

***1037** The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test. See ABA Annotated Model Rules of Professional Conduct 243 (1984) ("formulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality"; citing *Landmark Communications, supra*, at 844, 98 S.Ct., at 1544; *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); and *Bridges v. California, supra*, 314 U.S., at 273, 62 S.Ct., at 198, for guidance in determining whether statement "poses a sufficiently serious and imminent threat to the fair administration of justice"); G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 397 (1985) ("To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)"); *In re Hinds*, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982)

(substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger).

The difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application. Under those principles, nothing inherent in Nevada's formulation fails First Amendment review; but as this case demonstrates, ****2726** Rule 177 has not been interpreted in conformance with those principles by the Nevada Supreme Court.

II

Even if one were to accept respondent's argument that lawyers participating in judicial proceedings may be subjected, consistent with the First Amendment, to speech restrictions that could not be imposed on the press or general public, the judgment should not be upheld. The record does ***1038** not support the conclusion that petitioner knew or reasonably should have known his remarks created a substantial likelihood of material prejudice, if the Rule's terms are given any meaningful content.

We have held that "in cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286, 84 S.Ct. 710, 728-729, 11 L.Ed.2d 686 (1964)).

Neither the disciplinary board nor the reviewing court explains any sense in which petitioner's statements had a substantial likelihood of causing material prejudice. The only evidence against Gentile was the videotape of his statements and his own testimony at the disciplinary hearing. The Bar's whole case rests on the fact of the statements, the time they were made, and petitioner's own justifications. Full deference to these factual findings does not justify abdication of our responsibility to determine whether petitioner's statements can be punished consistent with First Amendment standards.

Rather, this Court is

"compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946).

" 'Whenever the fundamental rights of free speech ... are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually ***1039** did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.' " *Landmark Communications, Inc. v. Virginia*, 435 U.S., at 844, 98 S.Ct., at 1544 (quoting *Whitney v. California*, 274 U.S. 357, 378-379, 47 S.Ct. 641, 649-650, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring)).

Whether one applies the standard set out in *Landmark Communications* or the lower standard our colleagues find permissible, an examination of the record reveals no basis for the Nevada court's conclusion that the speech presented a substantial likelihood of material prejudice.

Our decision earlier this Term in *Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), provides a pointed contrast to respondent's contention in this case. There, the community had been subjected to a barrage of publicity prior to Mu'Min's trial for capital murder. News stories appeared over a course of several months and included, in addition to details of the crime itself, numerous items of prejudicial information inadmissible at trial. Eight of the twelve individuals seated on Mu'Min's jury admitted some exposure to pretrial publicity. We held that the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity. In light of that holding, the Nevada court's conclusion ****2727** that petitioner's abbreviated, general comments six months before trial created a "substantial likelihood of materially prejudicing" the proceeding is, to say the least, most unconvincing.

A.

Pre-Indictment Publicity. On January 31, 1987, undercover police officers with the Las Vegas Metropolitan Police Department (Metro) reported large amounts of cocaine (four kilograms) and travelers' checks (almost $300,000) missing from a safety deposit vault at Western Vault Corporation. The drugs and money had been used as part of an undercover ***1040** operation conducted by Metro's Intelligence Bureau. Petitioner's client, Grady Sanders, owned Western Vault. John Moran, the Las Vegas sheriff, reported the theft at a press conference on February 2, 1987, naming the police and Western Vault employees as suspects.

Although two police officers, Detective Steve Scholl and Sargeant Ed Schaub, enjoyed free access to the deposit box throughout the period of the theft, and no log reported comings and goings at the vault, a series of press reports over the following year indicated that investigators did not consider these officers responsible. Instead, investigators focused upon Western Vault and its owner. Newspaper reports quoted the sheriff and other high police officials as saying that they had not lost confidence in the "elite" Intelligence Bureau. From the beginning, Sheriff Moran had "complete faith and trust" in his officers. App. 85.

The media reported that, following announcement of the cocaine theft, others with deposit boxes at Western Vault had come forward to claim missing items. One man claimed the theft of his life savings of $90,000. *Id.,* at 89. Western Vault suffered heavy losses as customers terminated their box rentals, and the company soon went out of business. The police opened other boxes in search of the missing items, and it was reported they seized $264,900 in United States currency from a box listed as unrented.

Initial press reports stated that Sanders and Western Vault were being cooperative; but as time went on, the press noted that the police investigation had failed to identify the culprit and through a process of elimination was beginning to point toward Sanders. Reports quoted the affidavit of a detective that the theft was part of an effort to discredit the undercover operation and that business records suggested the existence of a business relation between Sanders and the targets of a Metro undercover probe. *Id.,* at 85.

The deputy police chief announced the two detectives with access to the vault had been "cleared" as possible suspects. ***1041** According to an unnamed "source close to the investigation," the police shifted from the idea that the thief had planned to discredit the undercover operation to the theory that the thief had unwittingly stolen from the police. The stories noted that Sanders "could not be reached for comment." *Id.,* at 93.

The story took a more sensational turn with reports that the two police suspects had been cleared by police investigators after passing lie detector tests. The tests were administered by one Ray Slaughter. But later, the Federal Bureau of Investigation (FBI) arrested Slaughter for distributing cocaine to an FBI informant, Belinda Antal. It was also reported that the $264,900 seized from the unrented safety deposit box at Western Vault had been stored there in a suitcase owned by one Tammy Sue Markham. Markham was "facing a number of federal drug-related charges" in Tucson, Arizona. Markham reported items missing from three boxes she rented at Western Vault, as did one Beatrice Connick, who, according to press reports, was a Colombian national living in San Diego and "not facing any drug related charges." (As it turned out, petitioner impeached Connick's credibility at trial with the existence of a money laundering conviction.) Connick also was reported to have taken and passed a lie detector ****2728** test to substantiate her charges. *Id.,* at 94-97. Finally, press reports indicated that Sanders had refused to take a police polygraph examination. *Id.,* at 41. The press suggested that the FBI suspected Metro officers were responsible for the theft, and reported that the theft had severely damaged relations between the FBI and Metro.

B.

The Press Conference. Petitioner is a Las Vegas criminal defense attorney, an author of articles about criminal law and procedure, and a former associate dean of the National College for Criminal Defense Lawyers and Public Defenders. *Id.,* at 36-38. Through leaks from the police department, he ***1042** had some advance notice of the date an indictment would be returned and the nature of the charges against Sanders. Petitioner had monitored the publicity surrounding the case, and, prior to the indictment, was personally aware of at least 17 articles in the major local newspapers, the Las Vegas Sun and Las Vegas Review-Journal, and numerous local television news stories which reported on the Western Vault theft and ensuing investigation. *Id.,* at 38-39; see Respondent's Exhibit A, before Disciplinary Board. Petitioner determined, for the first time in his career, that he would call a formal press conference. He did not blunder into a press conference, but acted with considerable deliberation.

1.

Petitioner's Motivation. As petitioner explained to the disciplinary board, his primary motivation was the concern that, unless some of the weaknesses in the State's case were made public, a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors, in particular the repeated press reports about polygraph tests and the fact that the two police officers were no longer suspects. App. 40-42. Respondent distorts Rule 177 when it suggests this explanation admits a purpose to prejudice the venire and so proves a violation of the Rule. Rule 177 only prohibits the dissemination of information that one knows or reasonably should know has a "substantial likelihood of materially prejudicing an adjudicative proceeding." Petitioner did not indicate he thought he could sway the pool of potential jurors to form an opinion in advance of the trial, nor did he seek to discuss evidence that would be inadmissible at trial. He sought only to counter publicity already deemed prejudicial. The Southern Nevada Disciplinary Board so found. It said petitioner attempted

> ***1043** "(i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) ... to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case." App. 3-4.

Far from an admission that he sought to "materially prejudic[e] an adjudicative proceeding," petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community.

Petitioner gave a second reason for holding the press conference, which demonstrates the additional value of his speech. Petitioner acted in part because the investigation had taken a serious toll on his client. Sanders was "not a man in good health," having suffered multiple open-heart surgeries prior to these events. *Id.,* at 41. And prior to indictment, the mere suspicion of wrongdoing had caused the closure of Western Vault and the loss of Sanders' ground lease on an Atlantic City, New Jersey, property. *Ibid.*

An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced ****2729** with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

***1044** 2.

Petitioner's Investigation of Rule 177. Rule 177 is phrased in terms of what an attorney "knows or reasonably should know." On the evening before the press conference, petitioner and two colleagues spent several hours researching the extent of an attorney's obligations under Rule 177. He decided, as we have held, see *Patton v. Yount,* 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), that the timing of a statement was crucial in the assessment of possible prejudice and the Rule's application, accord, *Stroble v. California,* 343 U.S. 181, 191-194, 72 S.Ct. 599, 604-606, 96 L.Ed. 872 (1952). App. 44.

Upon return of the indictment, the court set a trial date for August 1988, some six months in the future. Petitioner knew, at the time of his statement, that a jury would not be empaneled for six months at the earliest, if ever. He recalled reported cases finding no prejudice resulting from juror exposure to "far worse" information two and four months before trial, and concluded that his proposed statement was not substantially likely to result in material prejudice. *Ibid.*

A statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process. See ABA Annotated Model Rules of Professional Conduct 243 (1984) (timing of statement a significant factor in determining seriousness and imminence of threat). As turned out to be the case here, exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date.

In 1988, Clark County, Nevada, had population in excess of 600,000 persons. Given the size of the community from which any potential jury venire would be drawn and the length

of time before trial, only the most damaging of information could give rise to any likelihood of prejudice. The innocuous content of petitioner's statements reinforces my conclusion.

***1045** 3.

The Content of Petitioner's Statements. Petitioner was disciplined for statements to the effect that (1) the evidence demonstrated his client's innocence, (2) the likely thief was a police detective, Steve Scholl, and (3) the other victims were not credible, as most were drug dealers or convicted money launderers, all but one of whom had only accused Sanders in response to police pressure, in the process of "trying to work themselves out of something." Appendix A, *infra,* at 2736. App. 2-3 (Findings and Recommendation of the State Bar of Nevada, Southern Nevada Disciplinary Board). He also strongly implied that Steve Scholl could be observed in a videotape suffering from symptoms of cocaine use. Of course, only a small fraction of petitioner's remarks were disseminated to the public, in two newspaper stories and two television news broadcasts.

The stories mentioned not only Gentile's press conference but also a prosecution response and police press conference. See App. 127-129, 131-132; Respondent's Exhibit A, before Disciplinary Board.[1] The chief ****2730** deputy district attorney was ***1046** quoted as saying that this was a legitimate indictment, and that prosecutors cannot bring an indictment to court unless they can prove the charges in it beyond a reasonable doubt. App. 128-129. Deputy Police Chief Sullivan stated for the police department: " 'We in Metro are very satisfied our officers (Scholl and Sgt. Ed Schaub) had nothing to do with this theft or any other. They are both above reproach. Both are veteran police officers who are dedicated to honest law enforcement.' " *Id.,* at 129. In the context of general public awareness, these police and prosecution statements were no more likely to result in prejudice than were petitioner's statements, but given the repetitive publicity from the police investigation, it is difficult to come to any conclusion but that the balance remained in favor of the prosecution.

Much of the information provided by petitioner had been published in one form or another, obviating any potential for prejudice. See ABA Annotated Model Rules of Professional Conduct 243 (1984) (extent to which information already circulated significant factor in determining likelihood of prejudice). The remainder, and details petitioner refused to provide, were available to any journalist willing to do a little bit of investigative work.

Petitioner's statements lack any of the more obvious bases for a finding of prejudice. Unlike the police, he refused to comment on polygraph tests except to confirm earlier reports that Sanders had not submitted to the police polygraph; he mentioned no confessions and no evidence from searches or test results; he refused to elaborate upon his charge that the other so-called victims were not credible, except to explain his general theory that they were pressured to testify in an attempt to avoid drug-related legal trouble, and that some of ***1047** them may have asserted claims in an attempt to collect insurance money.

C.

Events Following the Press Conference. Petitioner's judgment that no likelihood of material prejudice would result from his comments was vindicated by events at trial. While it is true that Rule 177's standard for controlling pretrial publicity must be judged at the time a statement is made, *ex post* evidence can have probative value in some cases. Here, where the Rule purports to demand, and the Constitution requires, consideration of the character of the harm and its heightened likelihood of occurrence, the record is altogether devoid of facts one would expect to follow upon any statement that created a real likelihood of material prejudice to a criminal jury trial.

The trial took place on schedule in August 1988, with no request by either party for a venue change or continuance. The jury was empaneled with no apparent difficulty. The trial judge questioned the jury venire about publicity. Although many had vague recollections of reports that cocaine stored at Western Vault had been stolen from a police undercover operation, and, as petitioner had feared, one remembered that the police had been cleared of suspicion, not a single juror indicated any recollection of petitioner or his press conference. App. 48-49; Respondent's Exhibit B, before Disciplinary Board.

At trial, all material information disseminated during petitioner's press conference was admitted in evidence before the jury, including information questioning the motives and credibility of supposed victims who testified against Sanders, and Detective Scholl's ingestion of drugs in the course of ****2731** undercover operations (in order, he testified, to

gain the confidence of suspects). App. 47. The jury acquitted petitioner's client, and, as petitioner explained before the disciplinary board,

> ***1048** "when the trial was over with and the man was acquitted the next week the foreman of the jury phoned me and said to me that if they would have had a verdict form before them with respect to the guilt of Steve Scholl they would have found the man proven guilty beyond a reasonable doubt." *Id.*, at 47-48.

There is no support for the conclusion that petitioner's statements created a likelihood of material prejudice, or indeed of any harm of sufficient magnitude or imminence to support a punishment for speech.

III

[1] As interpreted by the Nevada Supreme Court, the Rule is void for vagueness, in any event, for its safe harbor provision, Rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline. Rule 177(3)(a) provides that a lawyer "may state without elaboration ... the general nature of the ... defense." Statements under this provision are protected "[n]otwithstanding subsection 1 and 2(a-f)." By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general nature of the ... defense" "without elaboration" need fear no discipline, even if he comments on "[t]he character, credibility, reputation or criminal record of a ... witness," and even if he "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide " 'fair notice to those to whom [it] is directed.' " *Grayned v. City of Rockford*, 408 U.S. 104, 112, 92 S.Ct. 2294, 2301, 33 L.Ed.2d 222 (1972). A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic ***1049** terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Petitioner testified he thought his statements were protected by Rule 177(3), App. 59. A review of the press conference supports that claim. He gave only a brief opening statement, see Appendix A, *infra*, p. 2736-2737, and on numerous occasions declined to answer reporters' questions seeking more detailed comments. One illustrative exchange shows petitioner's attempt to obey the rule:

> "QUESTION FROM THE FLOOR: Dominick, you mention you question the credibility of some of the witnesses, some of the people named as victims in the government indictment.
>
> "Can we go through it and *elaborate* on their backgrounds, interests-
>
> "MR. GENTILE: *I can't because ethics prohibit me from doing so.*
>
> "Last night before I decided I was going to make a statement, I took a good close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?
>
> "I can't name which of the people have the drug backgrounds. I'm sure you guys can find that by doing just a little bit of investigative work." App. to Pet. for Cert. 11a (emphasis added).[2]

****2732** ***1050** Nevertheless, the disciplinary board said only that petitioner's comments "went beyond the scope of the statements permitted by SCR 177(3)," App. 5, and the Nevada Supreme ***1051** Court's rejection of petitioner's defense based on Rule 177(3) was just as terse, App. to Pet. for Cert. 4a. The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary.

[2] The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, *Kolender v. Lawson*, 461 U.S. 352, 357-358, 361, 103 S.Ct. 1855, 1858-1859, 1860, 75 L.Ed.2d 903 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 1246-1247, 39 L.Ed.2d 605 (1974), for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real

possibility. The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

IV

The analysis to this point resolves the case, and in the usual order of things the discussion should end here. Five Members of the Court, however, endorse an extended discussion which concludes that Nevada may interpret its requirement of substantial likelihood of material prejudice under a standard more deferential than is the usual rule where speech is concerned. It appears necessary, therefore, to set forth my objections to that conclusion and to the reasoning which underlies it.

Respondent argues that speech by an attorney is subject to greater regulation than **2733 speech by others, and restrictions on an attorney's speech should be assessed under a balancing test that weighs the State's interest in the regulation of a *1052 specialized profession against the lawyer's First Amendment interest in the kind of speech that was at issue. The cases cited by our colleagues to support this balancing, *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978); and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), involved either commercial speech by attorneys or restrictions upon release of information that the attorney could gain only by use of the court's discovery process. Neither of those categories, nor the underlying interests which justified their creation, were implicated here. Petitioner was disciplined because he proclaimed to the community what he thought to be a misuse of the prosecutorial and police powers. Wide-open balancing of interests is not appropriate in this context.

A

Respondent would justify a substantial limitation on speech by attorneys because "lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations," and so lawyers' statements "are likely to be received as especially authoritative." Brief for Respondent 22. Rule 177, however, does not reflect concern for the attorney's special access to client confidences, material gained through discovery, or other proprietary or confidential information. We have upheld restrictions upon the release of information gained "only by virtue of the trial court's discovery processes." *Seattle Times Co. v. Rhinehart, supra*, 467 U.S., at 32, 104 S.Ct., at 2207. And *Seattle Times* would prohibit release of discovery information by the attorney as well as the client. Similar rules require an attorney to maintain client confidences. See, *e.g.*, ABA Model Rule of Professional Conduct 1.6 (1981).

This case involves no speech subject to a restriction under the rationale of *Seattle Times*. Much of the information in *1053 petitioner's remarks was included by explicit reference or fair inference in earlier press reports. Petitioner could not have learned what he revealed at the press conference through the discovery process or other special access afforded to attorneys, for he spoke to the press on the day of indictment, at the outset of his formal participation in the criminal proceeding. We have before us no complaint from the prosecutors, police, or presiding judge that petitioner misused information to which he had special access. And there is no claim that petitioner revealed client confidences, which may be waived in any event. Rule 177, on its face and as applied here, is neither limited to nor even directed at preventing release of information received through court proceedings or special access afforded attorneys. Cf. *Butterworth v. Smith*, 494 U.S., at 632-634, 110 S.Ct., at 1381-1382. It goes far beyond this.

B

Respondent relies upon *obiter dicta* from *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), for the proposition that an attorney's speech about ongoing proceedings must be subject to pervasive regulation in order to ensure the impartial adjudication of criminal proceedings. *In re Sawyer* involved general comments about Smith Act prosecutions rather than the particular proceeding in which the attorney was involved, conduct which we held not sanctionable under the applicable ABA Canon of Professional Ethics, quite apart from any resort to First

Amendment principles. *Nebraska Press Assn.* considered a challenge to a court ****2734** order barring the press from reporting matters most prejudicial to the defendant's Sixth Amendment trial right, not information released by defense counsel. In *Sheppard v. Maxwell,* we overturned a conviction after a trial that can only be described as a circus, with the courtroom taken over by the press and jurors turned into media stars. The prejudice to Dr. Sheppard's fair trial right can be traced in principal ***1054** part to police and prosecutorial irresponsibility and the trial court's failure to control the proceedings and the courthouse environment. Each case suggests restrictions upon information release, but none confronted their permitted scope.

At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. See, *e.g., In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *Bates v. State Bar of Arizona, supra.* We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.

V

Even if respondent is correct, and as in *Seattle Times* we must balance "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' 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,' " *Seattle Times, supra,* 467 U.S., at 32, 104 S.Ct., at 2207 (quoting *Procunier v. Martinez,* 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974)), the Rule as interpreted by Nevada fails the searching inquiry required by those precedents.

A

Only the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it ***1055** and base their verdict upon the evidence presented in court. See generally Simon, Does the Court's Decision in *Nebraska Press Association* Fit the Research Evidence on the Impact on Jurors of News Coverage?, 29 Stan.L.Rev. 515 (1977); Drechsel, An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue, 18 Hofstra L.Rev. 1 (1989). *Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial. All of these factors weigh in favor of affording an attorney's speech about ongoing proceedings our traditional First Amendment protections. Our colleagues' historical survey notwithstanding, respondent has not demonstrated any sufficient state interest in restricting the speech of attorneys to justify a lower standard of First Amendment scrutiny.

Still less justification exists for a lower standard of scrutiny here, as this speech involved not the prosecutor or police, but a criminal defense attorney. Respondent and its *amici* present not a single example where a defense attorney has managed by public statements to prejudice the prosecution of the State's case. Even discounting the obvious reason for a lack of appellate decisions on the topic-the difficulty of appealing a verdict of acquittal-the absence of anecdotal or survey evidence in a much-studied area of the law is remarkable.

****2735** The various bar association and advisory commission reports which resulted in promulgation of ABA Model Rule of Professional Conduct 3.6 (1981), and other regulations of attorney speech, and sources they cite, present no convincing case for restrictions upon the speech of defense attorneys. See Swift, Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity, 64 B.U.L.Rev. 1003, 1031-1049 (1984) (summarizing studies and concluding there is no empirical or anecdotal evidence of a need for restrictions on defense publicity); see also Drechsel, *supra,* at 35 ("[D]ata ***1056** showing the heavy reliance of journalists on law enforcement sources and prosecutors confirms the appropriateness of focusing attention on those sources when attempting to control pre-trial publicity"). The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information

adverse to a criminal defendant, many of which are not within the scope of Rule 177 or any other regulation. By contrast, a defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel for the sole purpose of countering prosecution statements. These factors underscore my conclusion that blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny.

B

Respondent uses the "officer of the court" label to imply that attorney contact with the press somehow is inimical to the attorney's proper role. Rule 177 posits no such inconsistency between an attorney's role and discussions with the press. It permits all comment to the press absent "a substantial likelihood of materially prejudicing an adjudicative proceeding." Respondent does not articulate the principle that contact with the press cannot be reconciled with the attorney's role or explain how this might be so.

Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases. "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (CA7 1975). To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the ***1057** public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent.

One may concede the proposition that an attorney's speech about pending cases may present dangers that could not arise from statements by a nonparticipant, and that an attorney's duty to cooperate in the judicial process may prevent him or her from taking actions with an intent to frustrate that process. The role of attorneys in the criminal justice system subjects them to fiduciary obligations to the court and the parties. An attorney's position may result in some added ability to obstruct the proceedings through well-timed statements to the press, though one can debate the extent of an attorney's ability to do so without violating other established duties. A court can require an attorney's cooperation to an extent not possible of nonparticipants. A proper weighing of dangers might consider the harm that occurs when speech about ongoing proceedings forces the court to take burdensome steps such as sequestration, continuance, or change of venue.

****2736** If as a regular matter speech by an attorney about pending cases raised real dangers of this kind, then a substantial governmental interest might support additional regulation of speech. But this case involves the sanction of speech so innocuous, and an application of Rule 177(3)'s safe harbor provision so begrudging, that it is difficult to determine the force these arguments would carry in a different setting. The instant case is a poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statements about ongoing adjudicative proceedings. At the very least, however, we can say that the Rule which punished petitioner's statements represents a limitation of First Amendment freedoms greater than is necessary ***1058** or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood.

The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though cost and delays undermine it in all too many cases, the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases. And in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts. It cannot be said that petitioner's conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment.[3]

VI

The judgment of the Supreme Court of Nevada is

Reversed.

***1059** APPENDIX TO OPINION OF KENNEDY, J.

Appendix A

Petitioner's Opening Remarks at the Press Conference of February 5, 1988. App. to Pet. for Cert. 8a-9a.

"MR. GENTILE: I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of the sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases-at least two cases there-have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.

"When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl.

****2737** "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

"And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office.

"Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two-four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

***1060** "Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.

"Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' c[h]ecks were missing.

"Many of the contracts that these people had show on the face of the contract that there is $100,000 in insurance for the contents of the box.

"If you look at the indictment very closely, you're going to see that these claims fall under $100,000.

"Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of '87, that being the date that Metro said that there was something missing from their box.

"And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box.

"That's about all that I have to say."

[Questions from the floor followed.]

Appendix B

Nevada Supreme Court Rule 177, as in effect prior to January 5, 1991.

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

***1061** "2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

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

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

"(c) the performance or results of any examination or test or the refusal or failure **2738 of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

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

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

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

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

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

*1062 "(b) the information contained in a public record;

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

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

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

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

"(g) in a criminal case:

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

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

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

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

Chief Justice REHNQUIST delivered the opinion of the Court with respect to Parts I and II, and delivered a dissenting opinion with respect to Part III, in which Justice WHITE, Justice SCALIA, and Justice SOUTER join.

Petitioner was disciplined for making statements to the press about a pending case in which he represented a criminal defendant. The state bar, and the Supreme Court of Nevada on review, found that petitioner knew or should have known that there was a substantial likelihood that his statements would materially prejudice the trial of his client. Nonetheless, petitioner contends that the First Amendment to the United States Constitution requires a stricter standard to be met before such speech by an attorney may be disciplined: *1063 there must be a finding of "actual prejudice or a substantial and imminent threat to fair trial." Brief for Petitioner 15. We conclude that the "substantial likelihood of material prejudice" standard applied by Nevada and most other States satisfies the First Amendment.

I

Petitioner's client was the subject of a highly publicized case, and in response to adverse publicity about his client, Gentile held a press conference on the day after **2739 Sanders was indicted. At the press conference, petitioner made, among others, the following statements:

"When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him,

but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' checks, is Detective Steve Scholl.

"There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

. . . . .

"... the so-called other victims, as I sit here today I can tell you that one, two-four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

"Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who ***1064** are going to say now that you can believe them." App. to Pet. for Cert. 8a-9a.

The following statements were in response to questions from members of the press:

"... because of the stigma that attaches to merely being accused-okay-I know I represent an innocent man.... The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case would be dismissed and it was. Okay?

"I don't take cheap shots like this. I represent an innocent guy. All right?

. . . . .

"[The police] were playing very fast and loose.... We've got some video tapes that if you take a look at them, I'll tell you what, [Detective Scholl] either had a hell of a cold or he should have seen a better doctor." *Id.*, at 12a, 14a.

Articles appeared in the local newspapers describing the press conference and petitioner's statements. The trial took place approximately six months later, and although the trial court succeeded in empaneling a jury that had not been affected by the media coverage and Sanders was acquitted on all charges, the state bar disciplined petitioner for his statements.

The Southern Nevada Disciplinary Board found that petitioner knew the detective he accused of perpetrating the crime and abusing drugs would be a witness for the prosecution. It also found that petitioner believed others whom he characterized as money launderers and drug dealers would be called as prosecution witnesses. Petitioner's admitted purpose for calling the press conference was to counter public opinion which he perceived as adverse to his client, to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and to publicly present his client's side of the case. The board found that in light of the ***1065** statements, their timing, and petitioner's purpose, petitioner knew or should have known that there was a substantial likelihood that the statements would materially prejudice the Sanders trial.

The Nevada Supreme Court affirmed the board's decision, finding by clear and convincing evidence that petitioner "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." 106 Nev. 60, 62, 787 P.2d 386, 387 (1990). The court noted that the case was "highly publicized"; that the press conference, held the day after the indictment and the same day as the arraignment, was "timed to have maximum impact"; and that ****2740** petitioner's comments "related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses." *Ibid.* The court concluded that the "absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice." *Ibid.*

II

Gentile asserts that the same stringent standard applied in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), to restraints on press publication during the pendency of a criminal trial should be applied to speech by a lawyer whose client is a defendant in a criminal proceeding. In that case, we held that in order to suppress press commentary on evidentiary matters, the State would have to show that "further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Id.*, at 569, 96 S.Ct., at 2807. Respondent, on the other hand, relies on statements in cases such as *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), which sharply distinguished between restraints on the

press and restraints on lawyers whose clients are parties to the proceeding:

> ***1066** "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." *Id.*, at 363, 86 S.Ct., at 1522.

To evaluate these opposing contentions, some reference must be made to the history of the regulation of the practice of law by the courts.

[3] In the United States, the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards. "Membership in the bar is a privilege burdened with conditions," to use the oft-repeated statement of Cardozo, J., in *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917), quoted in *Theard v. United States*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957).

More than a century ago, the first official code of legal ethics promulgated in this country, the Alabama Code of 1887, warned attorneys to "Avoid Newspaper Discussion of Legal Matters," and stated that "[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation ... tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice." H. Drinker, Legal Ethics 23, 356 (1953). In 1908, the American Bar Association promulgated its own code, entitled "Canons of Professional Ethics." Many States thereafter adopted the ABA Canons for their own jurisdictions. Canon 20 stated:

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

***1067** In the last quarter century, the legal profession has reviewed its ethical limitations on extrajudicial statements by lawyers in the context of this Court's cases interpreting the First Amendment. ABA Model Rule of Professional Responsibility 3.6 resulted from the recommendations of the Advisory Committee on Fair Trial and Free Press (Advisory Committee), created in 1964 upon the recommendation of the Warren Commission. The Warren Commission's report on the assassination ****2741** of President Kennedy included the recommendation that

> "representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."

Report of the President's Commission on the Assassination of President Kennedy (1964), quoted in Ainsworth, "Fair Trial-Free Press," 45 F.R.D. 417 (1968). The Advisory Committee developed the ABA Standards Relating to Fair Trial and Free Press, comprehensive guidelines relating to disclosure of information concerning criminal proceedings, which were relied upon by the ABA in 1968 in formulating Rule 3.6. The need for, and appropriateness of, such a rule had been identified by this Court two years earlier in *Sheppard v. Maxwell, supra*, 384 U.S., at 362-363, 86 S.Ct. at 1522-1523. In 1966, the Judicial Conference of the United States authorized a "Special Subcommittee to Implement *Sheppard v. Maxwell* " to proceed with a study of the necessity of promulgating guidelines or taking other corrective action to shield federal juries from prejudicial publicity. See Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 404-407 (1968). Courts, responding to the recommendations in this report, proceeded to enact local rules incorporating these standards, and thus the "reasonable likelihood of prejudicing a fair trial" test was used by a majority of courts, ***1068** state and federal, in the years following *Sheppard*. Ten years later, the ABA amended its guidelines, and the "reasonable likelihood" test was changed to a "clear and present danger" test. ABA Standards for Criminal Justice 8-1.1 (as amended 1978) (2d ed. 1980, Supp.1986).

When the Model Rules of Professional Conduct were drafted in the early 1980's, the drafters did not go as far as the revised fair trial-free press standards in giving precedence to the lawyer's right to make extrajudicial statements when fair trial rights are implicated, and instead adopted the "substantial likelihood of material prejudice" test. Currently, 31 States in addition to Nevada have adopted-either verbatim or with insignificant variations-Rule 3.6 of the ABA's Model Rules. [1] Eleven States have adopted Disciplinary Rule 7-107 of the ABA's Code of Professional Responsibility, which is less protective of lawyer speech than Model Rule 3.6, in that it applies a "reasonable likelihood of prejudice" standard. [2] Only one State, Virginia, has explicitly adopted a clear and present danger standard, while four States and the District of Columbia have adopted standards that arguably approximate "clear and present danger." [3]

**2742 *1069 Petitioner maintains, however, that the First Amendment to the United States Constitution requires a State, such as Nevada in this case, to demonstrate a "clear and present danger" of "actual prejudice or an imminent threat" before any discipline may be imposed on a lawyer who initiates a press conference such as occurred here. [4] He relies on decisions such as *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946), and *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), to support his position. In those cases we held that trial courts might not constitutionally punish, through use of the contempt power, newspapers and others for publishing editorials, cartoons, and other items critical of judges in particular cases. We held that such punishments could be imposed only if there were a clear and present danger of "some serious substantive evil which they are designed to avert." *Bridges v. California, supra*, 314 U.S., at 270, 62 S.Ct., at 197. Petitioner also relies on *1070 *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962), which held that a court might not punish a sheriff for publicly criticizing a judge's charges to a grand jury.

Respondent State Bar of Nevada points out, on the other hand, that none of these cases involved lawyers who represented parties to a pending proceeding in court. It points to the statement of Holmes, J., in *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 463, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907), that "[w]hen a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." Respondent also points to a similar statement in *Bridges, supra*, 314 U.S., at 271, 62 S.Ct., at 197:

> "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

These opposing positions illustrate one of the many dilemmas which arise in the course of constitutional adjudication. The above quotes from *Patterson* and *Bridges* epitomize the theory upon which our criminal justice system is founded: The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

At the same time, however, the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system. The way most of them acquire information is from the media. The First Amendment protections of speech and press have been held, in the cases cited above, to require a showing of **2743 *1071 "clear and present danger" that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial. The question we must answer in this case is whether a lawyer who represents a defendant involved with the criminal justice system may insist on the same standard before he is disciplined for public pronouncements about the case, or whether the State instead may penalize that sort of speech upon a lesser showing.

[4] [5] It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.

Sacher v. United States, 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717 (1952) (criminal trial); *Fisher v. Pace,* 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949) (civil trial). Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer,* 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. There, the Court had before it an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. The plurality opinion, which found the discipline improper, concluded that the comments had not in fact impugned the judge's integrity. Justice Stewart, who provided the fifth vote for reversal of the sanction, said in his separate opinion that he could not join any possible "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." *Id.,* at 646, 79 S.Ct., at 1388. He said that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id.,* at 646-647, 79 S.Ct., at 1388-1389. The four dissenting Justices who would have sustained the discipline said:

> ***1072** "Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer.
>
> . . . . .
>
> "He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *Id.,* at 666, 668, 79 S.Ct., at 1398, 1399 (Frankfurter, J., dissenting, joined by Clark, Harlan, and Whittaker, JJ.).

Likewise, in *Sheppard v. Maxwell,* where the defendant's conviction was overturned because extensive prejudicial pretrial publicity had denied the defendant a fair trial, we held that a new trial was a remedy for such publicity, but

> "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *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.*" 384 U.S., at 363, 86 S.Ct., at 1522 (emphasis added).

We expressly contemplated that the speech of *those participating before the courts* could be limited.[5] This distinction ***1073** between ****2744** participants in the litigation and strangers to it is brought into sharp relief by our holding in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). There, we unanimously held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery. In that case we said that "[a]lthough 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," *id.,* at 32-33, n. 18, 104 S.Ct., at 2207-2208, n. 18 (citation omitted), and noted that "on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Ibid.*

Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses. See, *e.g., Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.,* 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990); *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). In each of these cases, we engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue. These cases ***1074** recognize the long-

established principle stated in *In re Cohen,* 7 N.Y.2d 488, 495, 199 N.Y.S.2d 658, 661, 166 N.E.2d 672, 675 (1960):

> "Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was 'an officer of the court, and, like the court itself, an instrument ... of justice....' " (quoted in *Cohen v. Hurley,* 366 U.S. 117, 126, 81 S.Ct. 954, 959, 6 L.Ed.2d 156 (1961)).

[6] We think that the quoted statements from our opinions in *In re Sawyer,* 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), and *Sheppard v. Maxwell, supra,* rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and the cases which preceded it. Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in *Nebraska Press,* which was joined by Justices Stewart and MARSHALL, "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.,* at 601, n. 27, 96 S.Ct., at 2823, n. 27. Because lawyers have special access to information ****2745** through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative. See, *e.g., In re Hinds,* 90 N.J. 604, 627, 449 A.2d 483, 496 (1982) (statements by attorneys of record relating to the case "are likely to be considered knowledgeable, reliable and true" because of attorneys' unique access to information); *In re Rachmiel,* 90 N.J. 646, 656, 449 A.2d 505, 511 (N.J.1982) (attorneys' role as advocates ***1075** gives them "extraordinary power to undermine or destroy the efficacy of the criminal justice system"). We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.

[7] **[8]** **[9]** When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. See, *e.g., Seattle Times, supra,* 467 U.S. at 32, 104 S.Ct., at 2207. The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. See, *e.g., Sheppard,* 384 U.S., at 350-351, 86 S.Ct., at 1515-1516; *Turner v. Louisiana,* 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424 (1965) (evidence in criminal trial must come solely from witness stand in public courtroom with full evidentiary protections). Even if a fair trial can ultimately be ensured through *voir dire,* change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

***1076** The restraint on speech is narrowly tailored to achieve those objectives. The regulation of attorneys' speech is limited-it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

III

To assist a lawyer in deciding whether an extrajudicial statement is problematic, Rule 177 sets out statements that are likely to cause material prejudice. Contrary to petitioner's contention, these are not improper evidentiary

presumptions. Model Rule 3.6, from which Rule 177 was derived, was specifically designed to avoid the categorical prohibitions of attorney speech contained in ABA Model Code of Professional Responsibility Disciplinary Rule 7-107 (1981). See ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct, Notes and Comments 143-144 (Proposed **2746 Final Draft, May 30, 1981) (Proposed Final Draft). The statements listed as likely to cause material prejudice closely track a similar list outlined by this Court in *Sheppard:*

> "The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action.... Effective control of these sources-concededly within the court's power-might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity....
>
> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, *1077 witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State v. Van Duyne,* 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements." 384 U.S., at 361, 86 S.Ct., at 1521.

Gentile claims that Rule 177 is overbroad, and thus unconstitutional on its face, because it applies to more speech than is necessary to serve the State's goals. The "overbreadth" doctrine applies if an enactment "prohibits constitutionally protected conduct." *Grayned v. City of Rockford,* 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). To be unconstitutional, overbreadth must be "substantial." *Board of Trustees of State University of N.Y. v. Fox,* 492 U.S. 469, 485, 109 S.Ct. 3028, 3037, 106 L.Ed.2d 388 (1989). Rule 177 is no broader than necessary to protect the State's interests. It applies only to lawyers involved in the pending case at issue, and even those lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding. The fact that Rule 177 applies to bench trials does not make it overbroad, for a substantial likelihood of prejudice is still required before the Rule is violated. That test will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it. For these reasons Rule 177 is constitutional on its face.

Gentile also argues that Rule 177 is void for vagueness because it did not provide adequate notice that his comments were subject to discipline. The void-for-vagueness doctrine is concerned with a defendant's right to fair notice and adequate *1078 warning that his conduct runs afoul of the law. See, *e.g., Smith v. Goguen,* 415 U.S. 566, 572-573, 94 S.Ct. 1242, 1246-1247, 39 L.Ed.2d 605 (1974); *Colten v. Kentucky,* 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972). Rule 177 was drafted with the intent to provide "an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice." Proposed Final Draft 143. The Rule provides sufficient notice of the nature of the prohibited conduct. Under the circumstances of his case, petitioner cannot complain about lack of notice, as he has admitted that his primary objective in holding the press conference was the violation of Rule 177's core prohibition-to prejudice the upcoming trial by influencing potential jurors. Petitioner was clearly given notice that such conduct was forbidden, and the list of conduct likely to cause prejudice, while only advisory, certainly gave notice that the statements made would violate the Rule if they had the intended effect.

The majority agrees with petitioner that he was the victim of unconstitutional vagueness in the regulations because of the relationship between subsection 3 and subsections **2747 1 and 2 of Rule 177 (see *ante,* at 2724-2725). Subsection 3 allows an attorney to state "the general nature of the claim or defense" notwithstanding the prohibition contained in subsection 1 and the examples contained in subsection 2. It is of course true, as the majority points out, that the word "general" and the word "elaboration" are both terms of degree. But combined as they are in the first sentence of subsection 3, they convey the very definite proposition that the authorized statements must not contain the sort of detailed allegations that petitioner made at his press conference. No sensible person could think that the following were "general" statements of a claim or defense made "without elaboration": "the person that was in the most direct position to have stolen the drugs and the money ... is Detective Steve Scholl"; "there is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living

human being"; "[Detective ***1079** Scholl] either had a hell of a cold, or he should have seen a better doctor"; and "the so-called other victims ... one, two-four of them are known drug dealers and convicted money launderers." Section 3, as an exception to the provisions of subsections 1 and 2, must be read in the light of the prohibitions and examples contained in the first two sections. It was obviously not intended to negate the prohibitions or the examples wholesale, but simply intended to provide a "safe harbor" where there might be doubt as to whether one of the examples covered proposed conduct. These provisions were not vague as to the conduct for which petitioner was disciplined; "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 33, 83 S.Ct. 594, 598, 9 L.Ed.2d 561 (1963).

Petitioner's strongest arguments are that the statements were made well in advance of trial, and that the statements did not in fact taint the jury panel. But the Supreme Court of Nevada pointed out that petitioner's statements were not only highly inflammatory-they portrayed prospective government witnesses as drug users and dealers, and as money launderers-but the statements were timed to have maximum impact, when public interest in the case was at its height immediately after Sanders was indicted. Reviewing independently the entire record, see *Pennekamp v. Florida*, 328 U.S., at 335, 66 S.Ct., at 1031, we are convinced that petitioner's statements were "substantially likely to cause material prejudice" to the proceedings. While there is evidence pro and con on that point, we find it persuasive that, by his own admission, petitioner called the press conference for the express purpose of influencing the venire. It is difficult to believe that he went to such trouble, and took such a risk, if there was no substantial likelihood that he would succeed.

While in a case such as this we must review the record for ourselves, when the highest court of a State has reached a determination "we give most respectful attention to its reasoning ***1080** and conclusion." *Ibid.* The State Bar of Nevada, which made its own factual findings, and the Supreme Court of Nevada, which upheld those findings, were in a far better position than we are to appreciate the likely effect of petitioner's statements on potential members of a jury panel in a highly publicized case such as this. The board and the Nevada Supreme Court did not apply the list of statements likely to cause material prejudice as presumptions, but specifically found that petitioner had intended to prejudice the trial, [6] and that based upon the nature of the statements and their ****2748** timing, they were in fact substantially likely to cause material prejudice. We cannot, upon our review of the record, conclude that they were mistaken. See *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-396, 68 S.Ct. 525, 541-542, 92 L.Ed. 746 (1948).

***1081** Several *amici* argue that the First Amendment requires the State to show actual prejudice to a judicial proceeding before an attorney may be disciplined for extrajudicial statements, and since the board and the Nevada Supreme Court found no actual prejudice, petitioner should not have been disciplined. But this is simply another way of stating that the stringent standard of *Nebraska Press* should be applied to the speech of a lawyer in a pending case, and for the reasons heretofore given we decline to adopt it. An added objection to the stricter standard when applied to lawyer participants is that if it were adopted, even comments more flagrant than those made by petitioner could not serve as the basis for disciplinary action if, for wholly independent reasons, they had no effect on the proceedings. An attorney who made prejudicial comments would be insulated from discipline if the government, for reasons unrelated to the comments, decided to dismiss the charges, or if a plea bargain were reached. An equally culpable attorney whose client's case went to trial would be subject to discipline. The United States Constitution does not mandate such a fortuitous difference.

When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that "I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court ...." Rule 73, Nevada Supreme Court Rules (1991). The First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.

I would affirm the decision of the Supreme Court of Nevada.

Justice O'CONNOR, concurring.

[3] **[4]** **[5]** **[6]** **[7]** **[8]** **[9]** I agree with much of THE CHIEF JUSTICE's opinion. In particular, I agree that a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. Lawyers are officers of the court ***1082** and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. See *In re Sawyer*, 360 U.S.

622, 646-647, 79 S.Ct. 1376, 1388-1389, 3 L.Ed.2d 1473 (1959) (Stewart, J., concurring in result). This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies. I agree with THE CHIEF JUSTICE that the "substantial likelihood of material prejudice" standard articulated in Rule 177 passes constitutional muster. Accordingly, I join Parts I and II of THE CHIEF JUSTICE's opinion.

**2749 [1] [2] For the reasons set out in Part III of Justice KENNEDY's opinion, however, I believe that Nevada's Rule is void for vagueness. Section (3) of Rule 177 is a "safe harbor" provision. It states that "notwithstanding" the prohibitory language located elsewhere in the Rule, "a lawyer involved in the investigation or litigation may state without elaboration ... [t]he general nature of the claim or defense." Gentile made a conscious effort to stay within the boundaries of this "safe harbor." In his brief press conference, Gentile gave only a rough sketch of the defense that he intended to present at trial-*i.e.,* that Detective Scholl, not Grady Sanders, stole the cocaine and traveler's checks. When asked to provide more details, he declined, stating explicitly that the ethical rules compelled him to do so. *Ante,* at 2731. Nevertheless, the disciplinary board sanctioned Gentile because, in its view, his remarks went beyond the scope of what was permitted by the Rule. Both Gentile and the disciplinary board have valid arguments on their side, but this serves to support the view that the Rule provides insufficient guidance. As Justice KENNEDY correctly points out, a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement. See *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 42, 111 S.Ct. 1032, 1056, 113 L.Ed.2d 1 (1991) (O'CONNOR, J., dissenting). I join Parts III and VI of Justice KENNEDY's opinion reversing the judgment of the Nevada Supreme Court on that basis.

All Citations

501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888, 59 USLW 4858

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The sole summary of television reports of the press conference contained in the record is as follows:

"2-5-88:

"GENTILE NEWS CONFERENCE STORY. GENTILE COMPARES THE W. VAULT BURGLARY TO THE FRENCH CONNECTION CASE IN WHICH THE BAD GUYS WERE COPS. GENTILE SAYS THE EVIDENCE IS CIRCUMSTANTIAL AND THAT THE COPS SEEM THE MORE LIKELY CULPRITS, THAT DET. SCHOLL HAS SHOWN SIGNS OF DRUG USE, THAT THE OTHER CUSTOMERS WERE PRESSURED INTO COMPLAINING BY METRO, THAT THOSE CUSTOMERS ARE KNOWN DRUG DEALERS, AND THAT OTHER AGENCIES HAVE OPERATED OUT OF W. VAULT WITHOUT HAVING SIMILAR PROBLEMS.

"2-5-88: *METRO NEWS CONFERENCE IN WHICH CHIEF SULLIVAN EXPLAINS THAT THE OFFICERS INVOLVED HAVE BEEN CLEARED BY POLYGRAPH TESTS.* STORY MENTIONS THAT THE POLYGRAPHER WAS RAY SLAUGHTER, UNUSUAL BECAUSE SLAUGHTER IS A PRIVATE EXAMINER, NOT A METRO EXAMINER. REPORTER DETAILS SLAUGHTER'S BACKGROUND, INCLUDING HIS TEST OF JOHN MORAN REGARDING SPILOTRO CONTRIBUTIONS. ALSO MENTIONS SLAUGHTER'S DRUG BUST, SPECULATES ABOUT WHETHER IT WAS A SETUP BY THE FBI. QUOTES GENTILE AS SAYING THE TWO CASES ARE DEFINITELY RELATED." App. 131-132 (emphasis added).

2 Other occasions are as follows:

"QUESTION FROM THE FLOOR: Do you believe any other police officers other than Scholl were involved in the disappearance of the dope and-

"MR. GENTILE: Let me say this: What I believe and what the proof is are two different things. Okay? I'm reluctant to discuss what I believe because I don't want to slander somebody, but I can tell you that the proof shows that Scholl is the guy that is most likely to have taken the cocaine and the American Express traveler's checks.

"QUESTION FROM THE FLOOR: What is that? What is that proof?

"MR. GENTILE: It'll come out; it'll come out." App. to Pet. for Cert. 9a.

"QUESTION FROM THE FLOOR: I have seen reports that the FBI seems to think sort of along the lines that you do.

"MR. GENTILE: Well, I couldn't agree with them more.

"QUESTION FROM THE FLOOR: Do you know anything about it?
"MR. GENTILE: Yes, I do; but again, Dan, I'm not in a position to be able to discuss that now.
"All I can tell you is that you're in for a very interesting six months to a year as this case develops." *Id.,* at 10a.
"QUESTION FROM THE FLOOR: Did the cops pass the polygraph?
"MR. GENTILE: Well, I would like to give you a comment on that, except that Ray Slaughter's trial is coming up and I don't want to get in the way of anybody being able to defend themselves.
"QUESTION FROM THE FLOOR: Do you think the Slaughter case-that there's a connection?
"MR. GENTILE: Absolutely. I don't think there is any question about it, and-
"QUESTION FROM THE FLOOR: What is that?
"MR. GENTILE: Well, it's intertwined to a great deal, I think.
"I know that what I think the connection is, again, is something I believe to be true. I can't point to it being true and until I can I'm not going to say anything.
"QUESTION FROM THE FLOOR: Do you think the police involved in this passed legitimate-legitimately passed lie detector tests?
"MR. GENTILE: I don't want to comment on that for two reasons:
"Number one, again, Ray Slaughter is coming up for trial and it wouldn't be right to call him a liar if I didn't think that it were true.
"But, secondly, I don't have much faith in polygraph tests.
"QUESTION FROM THE FLOOR: Did [Sanders] ever take one?
"MR. GENTILE: The police polygraph?
"QUESTION FROM THE FLOOR: Yes.
"MR. GENTILE: No, he didn't take a police polygraph.
"QUESTION FROM THE FLOOR: Did he take one with you?
"MR. GENTILE: I'm not going to disclose that now." *Id.,* at 12a-13a.

3 Petitioner argues that Rule 177(2) is a categorical speech prohibition which fails First Amendment analysis because of overbreadth. Petitioner interprets this subsection as providing that particular statements are "presumptively prohibited regardless of the circumstances surrounding the speech." Brief for Petitioner 48. Respondent does not read Rule 177(2)'s list of statements "ordinarily likely" to create material prejudice as establishing an evidentiary presumption, but rather as intended to "assist a lawyer" in compliance. Brief for Respondent 28, n. 27. The opinions of the Disciplinary Board and the Nevada Supreme Court do not address this point, though petitioner's reading is plausible, and at least one treatise supports petitioner's reading. See G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 398-399 (1985) (analogous subsection (b) of ABA Model Rule 3.6 creates a presumption of prejudice). Given the lack of any discussion in the lower court opinion, and the other difficulties we find, we do not address these arguments.

1 Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Wyoming have adopted Model Rule 3.6 verbatim. Delaware, Florida, Louisiana, Montana, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Texas, and Wisconsin have adopted Model Rule 3.6 with minor modifications that are irrelevant to the issues presented in this case. Michigan and Washington have adopted only subsection (a) of Model Rule 3.6, and Minnesota has adopted only subsection (a) and limits its application to "pending criminal jury trial [s]." Utah adopted a version of Model Rule 3.6 employing a "substantial likelihood of materially influencing" test.

2 Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, Ohio, Tennessee, and Vermont have adopted Disciplinary Rule 7-107 verbatim. North Carolina also uses the "reasonable likelihood of ... prejudic[e]" test. Rule of Professional Conduct 7.7 (1991).

3 Illinois Rule of Professional Conduct 3.6 (1990) ("serious and imminent threat to the fairness of an adjudicative proceeding"); Maine Bar Rule of Professional Responsibility 3.7(j) (1990) ("substantial danger of interference with the administration of justice"); North Dakota Rule of Professional Conduct 3.6 (1990) ("serious and imminent threat of materially prejudicing an adjudicative proceeding"); Oregon DR 7-107 (1991) ("serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect"); and the District of Columbia DR 7-101 (Supp.1991) ("serious and imminent threat to the impartiality of the judge or jury").

4 We disagree with Justice KENNEDY's statement that this case "does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a 'substantial likelihood of materially prejudicing an adjudicative proceeding,' but is limited to Nevada's interpretation of that standard." *Ante,* at 2724. Petitioner challenged

Rule 177 as being unconstitutional on its face in addition to as applied, contending that the "substantial likelihood of material prejudice" test was unconstitutional, and that lawyer speech should be punished only if it violates the standard for clear and present danger set forth in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). See Brief for Petitioner 27-31. The validity of the rules in the many States applying the "substantial likelihood of material prejudice" test has, therefore, been called into question in this case.

5 The Nevada Supreme Court has consistently read all parts of Rule 177 as applying only to lawyers in pending cases, and not to other lawyers or nonlawyers. We express no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made. We note that of all the cases petitioner cites as supporting the use of the clear and present danger standard, the only one that even arguably involved a nonthird party was *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962), where a county sheriff was held in contempt for publicly criticizing instructions given by a judge to a grand jury. Although the sheriff was technically an "officer of the court" by virtue of his position, the Court determined that his statements were made in his capacity as a private citizen, with no connection to his official duties. *Id.*, at 393, 82 S.Ct., at 1374. The same cannot be said about petitioner, whose statements were made in the course of, and in furtherance of, his role as defense counsel.

6 Justice KENNEDY appears to contend that there can be no material prejudice when the lawyer's publicity is in response to publicity favorable to the other side. *Ante*, at 2727-2729. Justice KENNEDY would find that publicity designed to counter prejudicial publicity cannot be itself prejudicial, despite its likelihood of influencing potential jurors, unless it actually would go so far as to cause jurors to be affirmatively biased in favor of the lawyer's client. In the first place, such a test would be difficult, if not impossible, to apply. But more fundamentally, it misconceives the constitutional test for an impartial juror-whether the " 'juror can lay aside his impression or opinion and render a verdict on the evidence presented in court.' " *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961)). A juror who may have been initially swayed from open-mindedness by publicity favorable to the prosecution is not rendered fit for service by being bombarded by publicity favorable to the defendant. The basic premise of our legal system is that law suits should be tried in court, not in the media. See, *e.g.*, *Bridges v. California*, 314 U.S. 252, 271, 62 S.Ct. 190, 197, 86 L.Ed.2d 192 (1941); *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907). A defendant may be protected from publicity by, or in favor of, the police and prosecution through *voir dire*, change of venue, jury instructions and, in extreme cases, reversal on due process grounds. The remedy for prosecutorial abuses that violate the rule lies not in self-help in the form of similarly prejudicial comments by defense counsel, but in disciplining the prosecutor.

End of Document

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-3. Advocate

West's F.S.A. Bar Rule 4-3.6

Rule 4-3.6. Trial Publicity

Currentness

(a) Prejudicial Extrajudicial Statements Prohibited. 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 due to its creation of an imminent and substantial detrimental effect on that proceeding.

(b) Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

Credits
Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282).

Editors' Notes

COMMENT

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Notes of Decisions (13)

West's F. S. A. Bar Rule 4-3.6, FL ST BAR Rule 4-3.6
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 12/15/15. All other State Court Rules are current with amendments received through 12/15/15.

644 So.2d 282 (Mem)

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Supreme Court of Florida.

THE FLORIDA BAR RE AMENDMENTS TO RULES REGULATING THE FLORIDA BAR.

No. 83222.
|
Oct. 20, 1994.
|
Rehearing Denied Dec. 2, 1994.

***282** Original Proceeding-Rules Regulating The Florida Bar.

Attorneys and Law Firms

William F. Blews, President, Miami, John A. DeVault, III, President-elect, Jacksonville, and John F. Harkness, Jr., Executive Director, Paul F. Hill, Gen. Counsel and John A. Boggs, Director, Lawyer Regulation, Tallahassee, for petitioner The Florida Bar.

Henry P. Trawick, Jr., Sarasota, Henry M. Brown, Longwood, Robert Bertrand, Miami Lakes, Jimmy Hatcher, Bristol, Beverly Comstock, Dalwin Albert, Bradenton, Ronald C. Eubanks, Ft. Walton, Gregory G. Cartotto, Miami Springs, Stephen Lane, Margate, Marvin A. Berkowitz, Boca Raton, Samuel Cintron, Paul Melkonian, Miami, Robert Frankl, Hollywood, and Ronald Bibace, Boca Raton, interested parties.

PER CURIAM.

The Florida Bar, as part of its annual review and with the authorization of the Board of Governors, petitions this Court to amend the Rules Regulating The Florida Bar and to adopt new rules. Several private citizens have also filed petitions requesting the amendment and adoption of rules. The Bar opposes the citizen petitions, and various members of the Bar and the public oppose the Bar's petition. We have jurisdiction pursuant to article V, sections 2(a) and 15 of the Florida Constitution.

The specific Rules Regulating The Florida Bar that the Bar has petitioned to create or amend include: rule 1-3.3 (Official Bar Name and Address); bylaw 2-3.5 (Board of Governors; Nomination of Members; Staggered Terms); bylaw 2-9.7 (Policies and Rules; Insurance for Members of Board of Governors, Officers, Grievance Committee Members, UPL Committee Members, Clients' Security Fund Committee Members, and Employees); rule 3-2.1 (Rules of Discipline; Definitions); rule 3-5.1 (Types of Discipline); rule 3-5.3 (Diversion of Disciplinary Cases to Practice and Professionalism Enhancement Programs); rule 3-7.1 (Confidentiality; Notice to Judges; Alcohol and Drug Treatment); rule 3-7.3 (Review of Inquiries, Complaint Processing, and Initial Investigatory Procedures); rule 3-7.4 (Grievance Committee Procedures); rule 3-7.6 (Procedures Before a Referee; Costs); rule 4-1.5 (Fees for Legal Services); rule 4-1.6 (Confidentiality of Information); rule 4-3.4 (Fairness of Opposing Party and Counsel); rule 4-3.6 (Trial Publicity); rule 4-5.4 (Professional Independence of a Lawyer; Sharing Fees With Nonlawyers); rule 4-7.6 (Communication of Fields of Practice); subchapter 6-14 (Standards for Certification of Board Certified Health Law Attorney); subchapter 6-15 (Standards for Certification of Board Certified Immigration and Nationality Lawyer); [1] and chapter 14 (Fee Arbitration Rule; Jurisdiction; Institution of Proceedings; Rules of Procedure for Arbitration Proceedings).

With minor modifications as set forth in this opinion, we approve the Bar's proposals. We also consider, on our own motion, amendment to rule 3-7.10 (Reinstatement and Readmission Procedures). A number of private citizens also filed petitions and appeared at oral argument in this cause. We commend those citizens who participated in these proceedings and took the time to share their concerns and frustrations with the Court. However, we find the citizen proposals to be without merit, and thus do not approve the amendments or new rules set forth in the citizen petitions.

Some of the amendments proposed by the Bar involve only technical changes, and others are self-explanatory. However, we find the following rules deserve discussion.

Rule 3-5.3-Professional Enhancement Programs

Rule 3-5.3 is a new rule that creates a program of diverting disciplinary cases to ***283** practice and professionalism enhancement programs as an alternative to existing sanctions. The practice and professionalism enhancement programs are intended to provide educational opportunities to members

of the Bar for enhancing skills and avoiding misconduct allegations. The rule specifies that only those disciplinary cases that would otherwise be disposed of by a finding of minor misconduct or by a finding of no probable cause with a letter of advice are eligible for diversion to practice and professionalism enhancement programs. Furthermore, a respondent who has been the subject of a prior diversion within seven years is not eligible for diversion. The rule also outlines the mechanics of the diversion process, the responsibilities of a respondent whose case is diverted, and the effects, costs, and possible sanctions in the event that a diversion program is not completed.

In spite of several comments in opposition to this new rule, we find that diversion to such practice and professionalism enhancement programs is a remedial action which serves the interests of both the Bar and the public. The thrust of this program is to identify lawyers who are beginning to have problems with the management of their practices as evidenced by minor disciplinary complaints. The lawyers are then provided skills training or professional enhancement, thereby diverting serious matters of misconduct. We note that a similar pretrial intervention program operating in the criminal justice system has been effective in dealing with persons charged with nonviolent offenses. *See* § 948.08, Fla.Stat. (1993).

Rule 3-7.6-Procedures Before a Referee

Proposed subdivision (*o*) clarifies what are taxable costs in disciplinary proceedings and provides for the assessment of a respondent's costs against the Bar in the event that the Bar raises no justiciable issue of law or fact. The rule also codifies this Court's reaffirmation that the award of costs in disciplinary actions is subject to the referee's discretion. *See The Fla. Bar v. Bosse,* 609 So.2d 1320, 1322 (Fla.1992); *The Fla. Bar v. Chilton,* 616 So.2d 449, 451 (Fla.1993).

While we agree with the Bar that most of the changes to this rule are in accord with recent decisions of this Court, we agree with bar member Henry Trawick that the proposed "clear and convincing evidence" standard is unfair to a respondent seeking an assessment of costs against the Bar or attempting to avoid an assessment of costs in the Bar's favor that the respondent claims to be unnecessary, excessive, or improperly authenticated. Accordingly, we do not include such a standard in the amended rule.

Rule 4-3.6-Trial Publicity

The proposed amendment of this rule follows the United States Supreme Court's recent decision in *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). In *Gentile,* the Supreme Court held that a Nevada rule that is almost identical to our current rule 4-3.6 was unconstitutional because of vagueness. The proposed amendment of rule 4-3.6 deletes the type of "safe harbor" language that the Supreme Court found misleading in *Gentile,* 501 U.S. at 1047-51, 111 S.Ct. at 2731-32, and incorporates the "substantial likelihood of material prejudice" standard that the Supreme Court found to be a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials." *Id.,* 501 U.S. at 1075, 111 S.Ct. at 2745.

Rule 3-7.10-Reinstatement and Readmission Procedures

In addition to the Bar's proposals, this Court, on its own motion, amends rule 3-7.10 to include a new subdivision that specifies the costs that are taxable in reinstatement and readmission proceedings. As this Court explained in *Bosse* and *Chilton,* only those costs specifically identified in the Rules Regulating The Florida Bar may be assessed against either a respondent or the Bar. 609 So.2d at 1322; 616 So.2d at 451. Rule 3-7.10(d) currently provides that costs may include "court reporters' fees, witness fees and traveling expenses, and reasonable traveling expenses and out-of-pocket costs of the referee and attorneys for The Florida Bar." Thus, the rule currently does not permit the assessment ***284** of other costs such as investigative expenses. *See The Fla. Bar re Janssen,* 643 So.2d 1065 (Fla. 1994); *The Fla. Bar re Williams,* 538 So.2d 836 (Fla.1989). We have added subdivision (*o*) to permit the assessment of the same taxable costs that may be assessed in a disciplinary proceeding before a referee, as provided by amended rule 3-7.6(*o*).

Accordingly, the rules are amended and adopted as reflected in the appendix to this opinion. The new language is indicated by underscoring; deletions are indicated by strike-through type. Committee comments are included for explanation and guidance only and are not adopted as an official part of the rules. These amendments take effect upon the release of this opinion. [2] The filing of a motion for rehearing shall not modify the effective date of the rules.

The duty of confidentiality continues after the client-lawyer relationship has terminated.

RULE 4-3.4 FAIRNESS OF OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.

(b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness ~~that is prohibited by law~~ , except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for the professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

(d) in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of ***314** facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client, and

(2) it is reasonable to believe that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Subdivision (a) applies to evidentiary material generally, including computerized information.

With regard to subdivision (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Subdivision (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also rule 4-4.2.

RULE 4-3.6 TRIAL PUBLICITY

(a) Prejudicial Extrajudicial Statements Prohibited. 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 due to its

creation of an imminent and substantial detrimental effect on that proceeding.

(b) Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. ~~Prosecutors and defense c~~ Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a ~~criminal~~ case from making extrajudicial statements that are prohibited under this rule.

~~**(b) Matter Constituting Prejudicial Extrajudicial Statements.** A statement referred to in subdivision (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~~ *315 ~~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) Permitted Extrajudicial Statements.** Notwithstanding subdivisions (a) and (b)(1) through (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 likelihood of substantial harm to an individual or to the public interest; and~~

~~(7) in a criminal case:~~

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

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

~~(C) the fact, time, and place of arrest; and~~

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

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves.

The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

~~Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, mental disability proceedings, and perhaps other types of litigation. Rule 4-3.4(c) requires compliance with such rules.~~

RULE 4-5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) Sharing Fees ~~W~~ with Nonlawyers. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate, or to ~~one~~ 1 or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of ***316** rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price; and

(4) bonuses may be paid to nonlawyer employees based on their extraordinary efforts on a particular case or over a specified time period, provided that the payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm.

(4b) Qualified Pension Plans. A lawyer or law firm may include nonlawyer employees in a ~~compensation or~~ qualified pension, profit-sharing, or retirement plan, even though the lawyer's or law firm's contribution to the plan is based in whole or in part on a profit-sharing arrangement.

(~~b~~ c) Partnership ~~W~~ with Nonlawyer. A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c d) Exercise of Independent Professional Judgment. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(~~d~~ e) Nonlawyer Ownership of Professional Service Corporation or Association. A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in subdivision (c), such arrangements should not interfere with the lawyer's professional judgment.

The prohibition against sharing legal fees with nonlawyer employees is not intended to prohibit profit-sharing arrangements that are part of a qualified pension, profit-sharing, or retirement plan. Compensation plans, as opposed to retirement plans, may not be based on legal fees.

RULE 4-7.6 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

Re-order from Bushnell Company
(215) 842-9520
www.BushnellCo.com

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 14-1

June 25, 2015

Advisory ethics opinions are not binding.

A personal injury lawyer may advise a client pre-litigation to change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved.

Note: This opinion was approved by The Florida Bar Board of Governors on October 16, 2015.

RPC: 4-3.4(a)
Opinions: New York County Ethics Opinion 745; North Carolina Formal Ethics Opinion 5; Pennsylvania Bar Association Opinion 2014-300; Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5

Cases: *Allied Concrete Co. v. Lester,* 736 S.E.2d 699 (Va. 2013); *Gatto v. United Airlines,* 2013 WL 1285285, Case No. 10-cv-1090-ES-SCM (U.S. Dist. Ct. NJ March 25, 2013); *In the Matter of Matthew B. Murray,* 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013); *Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (NY 2010); *Root v. Balfour Beatty Construction, Inc.,*132 So.3d 867, 869-70 (Fla. 2nd DCA 2014)

Misc.: Guideline No. 4.A, Social Media Ethics Guidelines, New York State Bar Association's Commercial and Federal Litigation Section

A Florida Bar member who handles personal injury and wrongful death cases has asked the committee regarding the ethical obligations on advising clients to "clean up" their social media pages before litigation is filed to remove embarrassing information that the lawyer believes is not material to the litigation matter. The inquirer asks the following 4 questions:

1) Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are related directly to the incident for which the lawyer is retained?

2) Pre-litigation, may a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts that are not related directly to the incident for which the lawyer is retained?

3) Pre-litigation, may a lawyer advise a client to change social media pages/accounts privacy settings to remove the pages/accounts from public view?

4) Pre-litigation, must a lawyer advise a client not to remove posts, photos, videos and information whether or not directly related to the litigation if the lawyer has advised the client to set privacy settings to not allow public access?

Rule 4-3.4(a) is applicable and states as follows:

A lawyer must not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;

The comment to the rule provides further guidance:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Subdivision (a) applies to evidentiary material generally, including computerized information.

Under these facts, the proper inquiry is whether information on a client's social media page is relevant to a "reasonably foreseeable proceeding," rather than whether information is "related directly" or "not related directly" to the client's matter. Information that is not "related directly" to the incident giving rise to the need for legal representation may still be relevant. However, what is relevant requires a factual, case-by-case determination. In Florida, the second District Court of Appeal has determined that normal discovery principles apply to social media, and that information sought to be discovered from social media must be "(1) relevant to the case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that is admissible in court." *Root v. Balfour Beatty Construction, Inc.,*132 So.3d 867, 869-70 (Fla. 2nd DCA 2014).

What constitutes an "unlawful" obstruction, alteration, destruction, or concealment of evidence is a legal question, outside the scope of an ethics opinion. The committee is aware of cases addressing the issue of discovery or spoliation relating to social media, but in these cases, the issue arose in the course of discovery after litigation commenced. *See, Allied Concrete Co. v. Lester,* 736 S.E.2d 699 (Va. 2013) (Sanctions of $542,000 imposed against lawyer and $180,000 against the client for spoliation when client, at lawyer's direction, deleted photographs from client's social media page, the client deleted the accounts, and the lawyer signed discovery requests that the client did not have the accounts); *Gatto v. United Airlines,* 2013 WL 1285285, Case No. 10-cv-1090-ES-SCM (U.S. Dist. Ct. NJ March 25, 2013) (Adverse inference instruction, but no monetary sanctions, against plaintiff who deactivated his social media accounts, which then became unavailable, after the defendants requested access); *Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (NY 2010) (Court granted request for access to plaintiff's MySpace and Facebook pages, including private and deleted pages, when plaintiff's physical condition was at issue and information on the pages is inconsistent with her purported injuries based on information about plaintiff's activities available on the public pages of her MySpace and Facebook pages). In the disciplinary context, at least one lawyer has been suspended for 5 years for advising a client to clean up the client's Facebook page, causing the removal of photographs and other material after a request for production had been made. *In the Matter of Matthew B. Murray,* 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013).

The New York County Lawyers Association has issued NYCLA Ethics Opinion 745 (2013) addressing the issue. The opinion concludes that lawyers may advise their clients to use the highest level of privacy settings on their social media pages and may advise clients to remove information from social media pages unless the lawyer has a duty to preserve information under law and there is no violation of law relating to spoliation of evidence. Other states have since come to similar conclusions. See, e.g., North Carolina Formal Ethics Opinion 5 (attorney must advise client about information on social media if information is relevant and material to the client's representation and attorney may advise client to remove information on social media if not spoliation or otherwise illegal); Pennsylvania Bar Association Opinion 2014-300 (attorney may advise client to delete information from client's social media provided that this does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information); and Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5 (attorney may advise a client to change the privacy settings on the client's social media page but may not instruct client to destroy any relevant content on the page). Subsequent to the publication of the opinion, the New York State Bar Association's Commercial and Federal Litigation Section adopted Social Media Ethics Guidelines. Guideline No. 4.A, citing to the opinion, states as follows:

A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information. Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve. [Footnote omitted.]

The committee agrees with the NYCLA that a lawyer may advise a client to use the highest level of privacy setting on the client's social media pages.

The committee also agrees that a lawyer may advise the client pre-litigation to remove information from a social media page, regardless of its relevance to a reasonably foreseeable proceeding, as long as the removal does not violate any substantive law regarding preservation and/or spoliation of evidence. The committee is of the opinion that

if the inquirer does so, the social media information or data must be preserved if the information or data is known by the inquirer or reasonably should be known by the inquirer to be relevant to the reasonably foreseeable proceeding.

The committee is of the opinion that the general obligation of competence may require the inquirer to advise the client regarding removal of relevant information from the client's social media pages, including whether removal would violate any legal duties regarding preservation of evidence, regardless of the privacy settings. If a client specifically asks the inquirer regarding removal of information, the inquirer's advice must comply with Rule 4-3.4(a). What information on a social media page is relevant to reasonably foreseeable litigation is a factual question that must be determined on a case-by-case basis.

In summary, the inquirer may advise that a client change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the inquirer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information

[Revised: 01-11-2016]

FLORIDA SUPREME COURT

Judicial Ethics Advisory Committee

Opinion Number: 2009-20
Date of Issue: November 17, 2009

ISSUES

Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend."

ANSWER: No.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may post material on the committee's page on a social networking site, if the publication of the material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may establish a social networking page which has an option for persons, including lawyers who may appear before the judge, to list themselves as "fans" or supporters of the judge's candidacy, so long as the judge or committee does not control who is permitted to list himself or herself as a supporter.

ANSWER: Yes.

FACTS

Social networking sites, such as Facebook, MySpace, and LinkedIn, generally serve two functions, as exemplified by the questions posed by the inquiring judge. First, the site can be used by the member simply to post pictures, comments, and other material that visitors to the site can view. Second, the site can also be used to identify a member's "friends". The member of the social network must approve a person who requests to be identified as the member's "friend".

When used simply to post materials, social networking sites are similar to an internet webpage where information is posted and made accessible for the public to view. Certain social networking sites permit the member to set levels of privacy permitting the member to restrict information, including the identification of the member's "friends", to certain visitors to the member's page. For example, the member might be permitted to set the privacy settings in a manner such that only the member's "friends" could see the names of the member's other "friends".

In the social network, a "friend" may post comments and links to other websites on the member's home site, known as the member's "wall." The member may reply to these postings or delete them, but they will remain on the member's site until deleted. The "friend's" comments will be visible to anyone the member permits to view the site.

The Facebook website contains the following explanations about "friends" and privacy concerns:

- Your friends on Facebook are the same friends, acquaintances and family members that you communicate with in the real world.
- We built Facebook to make it easy to share information with your friends and people around you.
- We understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information. Our default privacy settings limit the information displayed in your profile to your networks and other reasonable community limitations that we tell you about.
- Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that restrict other users from accessing your information. We allow you to choose the information you provide to friends and networks through Facebook. Our network architecture and your privacy settings allow you to make informed choices about who has access to your information.

(**http://www.facebook.com/policy.php?ref-pf**)

Political campaigns may also establish pages on social networking sites which allow users to list themselves as "fans" or supporters of the candidate. However, as the practice exists on Facebook, the campaign is not required to accept or reject a "fan" in order for their name to appear on the campaign's Facebook page. Anyone desiring to be listed as a "fan" may do so unilaterally, without the campaign's knowledge or consent.

DISCUSSION

The first and third questions above, relating to the posting of materials by either the judge or the campaign committee are answered in the affirmative because they relate only to the method of publication. The Code of Judicial Conduct does not address or restrict a judge's or campaign committee's method of communication but rather addresses its substance. Therefore, this proposed conduct, whether by the judge or the campaign committee, does not violate the Code of Judicial Conduct. Of course, the substance of what is posted may constitute a violation. The Committee has previously concluded that campaign committees may establish websites for otherwise permitted campaign purposes. Fla. JEAC Op. **99-26**. See also Fla. JEAC Opns. **00-22** and **08-11** related to campaign activities and internet websites.

However, the second question poses a fundamentally different issue because the inquiring judge proposes to permit lawyers who may appear before the judge to be identified as "friends" on the judge's social networking page. Similarly, the inquiring judge contemplates the lawyers who may appear before the judge will list the judge as a "friend" on their pages, such listing requiring the consent of the judge in order to take effect.

The inquiring judge proposes to identify lawyers who may appear in front of the judge as "friends" on the judge's page and to permit those lawyers to identify the judge as a "friend" on their pages. To the extent that such identification is available for any other person to view, the Committee concludes that this practice would violate Canon 2B.

Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the

private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

With regard to a social networking site, in order to fall within the prohibition of Canon 2B, the Committee believes that three elements must be present. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page. Third, the identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. It is this selection and communication process, the Committee believes, that violates Canon 2B, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.[1]

While judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities, some restrictions upon a judge's conduct are inherent in the office. Thus, the Commentary to Canon 2A states:

"Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

A judge's participation in a social networking site must also conform to the limitations imposed by Canon 5A, which provides:
"A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;

2. undermine the judge's independence, integrity, or impartiality;

3. demean the judicial office;

4. interfere with the proper performance of judicial duties;

5. lead to frequent disqualification of the judge; or

6. appear to a reasonable person to be coercive."

The Committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence

the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

The Committee notes, in coming to this conclusion, that social networking sites are broadly available for viewing on the internet. Thus, it is clear that many persons viewing the site will not be judges and will not be familiar with the Code, its recusal provisions, and other requirements which seek to assure the judge's impartiality. However, the test for Canon 2B is not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge. Viewed in this way, the Committee concludes that identifying lawyers who may appear before a judge as "friends" on a social networking site, if that relationship is disclosed to anyone other than the judge by virtue of the information being available for viewing on the internet, violates Canon 2(B).

The inquiring judge has asked about the possibility of identifying lawyers who may appear before the judge as "friends" on the social networking site and has not asked about the identification of others who do not fall into that category as "friends". This opinion should not be interpreted to mean that the inquiring judge is prohibited from identifying any person as a "friend" on a social networking site. Instead, it is limited to the facts presented by the inquiring judge, related to lawyers who may appear before the judge. Therefore, this opinion does not apply to the practice of listing as "friends" persons other than lawyers, or to listing as "friends" lawyers who do not appear before the judge, either because they do not practice in the judge's area or court or because the judge has listed them on the judge's recusal list so that their cases are not assigned to the judge.

A minority of the committee would answer all the inquiring judge's questions in the affirmative. The minority believes that the listing of lawyers who may appear before the judge as "friends" on a judge's social networking page does not reasonably convey to others the impression that these lawyers are in a special position to influence the judge. The minority concludes that social networking sites have become so ubiquitous that the term "friend" on these pages does not convey the same meaning that it did in the pre-internet age; that today, the term "friend" on social networking sites merely conveys the message that a person so identified is a contact or acquaintance; and that such an identification does not convey that a person is a "friend" in the traditional sense, i.e., a person attached to another person by feelings of affection or personal regard. In this sense, the minority concludes that identification of a lawyer who may appear before a judge as a "friend" on a social networking site does not convey the impression that the person is in a position to influence the judge and does not violate Canon 2B.

The question then remains whether a campaign committee may establish a social networking page which allows lawyers who may practice before the judge to designate themselves as "fans" or supporters of the judge's candidacy.

To the extent a social networking site permits a lawyer who may practice before a judge to designate himself or herself as a fan or supporter of the judge, this practice is not prohibited by Canon 2B, so long as the judge or committee controlling the site cannot accept or reject the lawyer's listing of himself or herself on the site. Because the judge or the campaign cannot accept or reject the listing of the fan on the campaign's social networking site, the listing of a lawyer's name does not convey the impression that the lawyer is in a special position to influence the judge.

Although Facebook has been used as an example in this opinion, the holding of the opinion would apply to any social networking site which requires the member of the site to approve the listing of a "friend" or contact on the member's site, if (1) that person is a lawyer who appears before the judge, and (2) identification of the lawyer as the judge's "friend" is thereafter displayed to the public or the judge's or lawyer's other "friends" on the judge's or the lawyer's

page.

REFERENCES

Florida Code of Judicial Conduct: Canon 2B; Commentary to Canon 2A.

Florida Judicial Ethics Advisory Committee Opinions: **99-26**, **00-22**, and **08-11**.

The Judicial Ethics Advisory Committee is expressly charged with rendering advisory opinions interpreting the application of the Code of Judicial Conduct to specific circumstances confronting or affecting a judge or judicial candidate.

Its opinions are advisory to the inquiring party, to the Judicial Qualifications Commission and the judiciary at large. Conduct that is consistent with an advisory opinion issued by the Committee may be evidence of good faith on the part of the judge, but the Judicial Qualifications Commission is not bound by the interpretive opinions by the Committee. See *Petition of the Committee on Standards of Conduct Governing Judges*, 698 So. 2d 834 (Fla. 1997). However, in reviewing the recommendations of the Judicial Qualifications Commission for discipline, the Florida Supreme Court will consider conduct in accordance with a Committee opinion as evidence of good faith. See *Id.*

The opinions of this Committee express no view on whether any proposed conduct of an inquiring judge is consistent with the substantive law which governs any proceeding over which the inquiring judge may preside. This Committee only has authority to interpret the Code of Judicial Conduct, and therefore its opinions deal only with the issue of whether the proposed conduct violates a provision of that Code.

For further information, contact: Judge T. Michael Jones, Chair, Judicial Ethics Advisory Committee, 190 Governmental Center, M.C. Blanchard Judicial Building, Pensacola, Florida 32502.

Participating Members:

Judge Roberto Arias, Judge Robert T. Benton, Dean Bunch, Esquire, Judge Lisa Davidson, Judge Kerry I. Evander, Judge Jonathan D. Gerber, Judge T. Michael Jones, Patricia E. Lowry, Esquire, Judge Jose Rodriguez, Judge C. McFerrin Smith III, Judge Richard R. Townsend, Judge Dorothy Vaccaro.

Copies furnished to:

Justice Peggy Quince
Thomas D. Hall, Clerk of Supreme Court
All Committee Members
Executive Director of the J.Q.C.
Office of the State Courts Administrator
Inquiring Judge (Name of inquiring judge deleted from this copy)

[1] By way of contrast, many other websites do not have these characteristics and a judge's use of them does not conflict with Canon 2B. For example, there are many subject matter websites which people with similar interests use to communicate with one another. Parents of students in a particular club or organization in a high school, for example, may register as a part of a parent group, with the names of all of the members of the group being visible to all of the other members. Similarly, persons with an interest in studying a particular subject, or members of a club,

might be a part of a group on a website, with the names of the members visible to one another, or to the public at large. However, even if a judge is listed on one of these sites, and even if a lawyer who appears before the judge is also listed, Canon 2B is not implicated because the judge did not select the lawyer as a part of the group, nor have the right to approve or reject the lawyer's being listed in the group. The only message conveyed to a person viewing the website would be that both the judge and the lawyer both have children in the band, or are both interested in the study of a particular subject. Because the judge played no role in the selection of the lawyer whose name appears on the website, no impression is afforded to those who view the website that the lawyer is in a special position to influence the judge.

Re-order from Bushnell Company
(215) 842-9520
www.BushnellCo.com

RECYCLED PAPER
RECYCLABLE

High Stakes Trials – Jury Research, Jury Selection and Jury Misconduct

Presentation to Thomas S. Biggs American Inn of Court - March 8, 2016

By: Judge Christine Greider and Martín Nestares

How to prevent potential problems associated with jury research and selection, how to minimize jury misconduct during trial and what to do in the event of jury misconduct.

Researching Your Jury Through Social Media

1. Rule 4-3.5(d) of the Florida Rules of Professional Conduct, titled Communication With Jurors, states: a lawyer shall not:
    a. Before the trial of a case with which the lawyer is connected, communicate or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected;
    b. During the trial of a case with which the lawyer is connected, communicate or cause another to communicate with any member of the jury;
    c. During the trial of a case with which the lawyer is not connected, communicate or cause another to communicate with a juror concerning the case; or
    d. After dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.
2. In April 2014, the American Bar Association released a Formal Opinion addressing jury selection and social media. The Formal Opinion addressed three levels of review of a juror's Electronic Social Media.
    a. Passive lawyer review of a juror's website or Electronic Social Media that is available without making an access request and where the juror is unaware that a website or Electronic Social Media has been reviewed;
    b. Passive lawyer review where the juror becomes aware through a website or Electronic Social Media feature of the identity of the viewer; and
    c. Active lawyer review where the lawyer requests access to the juror's Electronic Social Media.
3. According to the ABA's Formal Opinion the first two levels are appropriate, but attorneys should be aware of the automatic, subscriber-notification features. Attorneys should be cautions and prevent from communicating with a juror or causing another to communicate with a juror.

High Stakes Trials – Jury Research, Jury Selection and Jury Misconduct

Presentation to Thomas S. Biggs American Inn of Court - March 8, 2016
By: Judge Christine Greider and Martín Nestares

How to Minimize Jury Misconduct

1. During voir dire, attorneys should ask questions in such a way that the average juror will understand what type of information the question is attempting to elicit.
2. Once the jury has been selected the judge should remind jurors at the commencement of the trial and at the beginning and end of each day that the jurors should not use social media or other types of media to either share with others about the trial or conduct independent research about the trial.
3. Judges should also ask if jurors have been contacted by: any of the attorneys, anyone acting on behalf of the attorneys, or anyone else about the case.
4. Attorneys should, out of an abundance of caution, continue to monitor a juror's social media throughout the trial.

How to Handle Juror Misconduct

1. The Florida Supreme Court has long held that juror honesty and integrity during voir dire is an essential underpinning of the jury trial system.
2. So what happens when juror misconduct is suspected. In the Florida Supreme Court case of *De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995), the Florida Supreme Court held that a party is entitled to a new trial as a matter of law upon a showing that:
    a. First, the complaining party must establish that the information is relevant and material to jury service in the case;
    b. Second, that the juror concealed the information during questioning; and
    c. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.
3. First Prong – Materiality – is only shown where the "omission of the information prevented counsel from making an informed judgment-which would in all likelihood have resulted in a peremptory challenge." *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So. 2d 334, 340 (Fla. 2002)(quoting *De La Rosa v. Zequeira*, 659 So. 2d at 245).
    a. To be material, a prospective juror's litigation history does not necessarily have to involve an action similar to the one in which he or she may be required to serve. *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So. 2d 334, 341 (Fla. 2002).
    b. Materiality does not require a finding of prejudice, prejudice is not part of the *De La Rosa* test. *Id.* at 342.
    c. No bright line test for materiality has been established and materiality must be based on the facts and circumstances of each case. *Id.* at 341.
4. Second Prong – Concealment of information during voir dire.
    a. A juror's nondisclosure need not be intentional to constitute concealment. *Id.* at 343.
    b. It is clear that nondisclosure along with partial or inaccurate disclosure is concealment in the voir dire process. Again, as with the concept of materiality, analysis of a single question or series of questions may or may not

provide an answer. The information disclosed by other prospective jurors may be as important in any particular inquiry by counsel, because the dynamics and context of the entire process may define the parameters of that which should be disclosed.

Id. at 344-45.

c. Attorneys must be mindful in the voir dire process to ask such questions in terms which an average citizen not exposed to a panoply of legal processes would be capable of understanding. Trial counsel must take special care during the interrogation process to explain in a lay person's terms all the types of legal actions which may be encompassed by the term "litigation," or other similar words commonly used by attorneys. *Id.* at 344.

5. Third Prong – Due diligence.
   a. The due diligence test requires that counsel provide a sufficient explanation of the type of information which potential jurors are being asked to disclose, particularly if it pertains to an area about which an average lay juror might not otherwise have a working understanding. Thus, resolution of this "diligence" issue requires a factual determination regarding whether the explanations provided by the judge and counsel regarding the kinds of responses which were sought would reasonably have been understood by the subject jurors to encompass the undisclosed information. *Id.* at 343.
   b. Attorneys should not be expected to be both in the courtroom presenting a case and at the same time in a different location determining the validity of disclosures made by jurors or the existence of non-disclosures. *Id.* at 345.
   c. Where possible, trial judges should allow counsel to check records, if such a request is made, and it can be done without unwarranted delay. Certainly a small delay at the beginning of a trial would be better than having to do a retrial of a case after it has been conclude. *Id.*
   d. In a local case where a records check as to a juror's litigation history was not completed until after the verdict was rendered and the investigation revealed the juror had failed to disclose his past involvement in litigation a motion for new trial was granted. *Vanderbilt Inn on the Gulf v. Pfenninger*, 834 So. 2d 202, 203 (Fla. 2d DCA 2002).

There are a number of nuances and case specific facts that need to be addressed when applying the three prong *De La Rosa* test in determining if a party should be granted a new trial. It is recommended attorneys review the decision in *Roberts* and *De La Rosa*.

In conclusion: (1) attorneys may use social media to investigate and research potential jurors as long as the attorney does not communicate with the juror nor causes anyone to communicate with the juror; (2) Judges should instruct jurors of their duty to fully disclose any facts associated with the questioning by attorneys and disclose any communications by the juror to anyone with regard to the trial; and (3) if an attorney suspects juror misconduct, follow the three prong test in *Roberts* and *De La Rosa* in order to determine if a new trial must be granted.

HIGH STAKES TRIALS-JURY RESEARCH-SELECTION-MISCONDUCT

QUICK REFERENCE TRIAL NOTEBOOK GUIDE

DO'S	DON'T
Research venire and juror backgrounds, including internet social media sites, before, during and after jury selection and trial.	In doing internet research on venire members or jurors, be mindful of sites that may notify the person of your access to their information.
Address how the Court should handle ongoing juror updates, research and internet/social media access at case managements and at final pretrial conference. Depending on the facts of case, consider drafting a colloquy/script to be addressed by the Court regarding internet research, blogging, blog reviews, etc. with jurors at the beginning of each day of trial to confirm compliance and troubleshoot issues that may arise during trial.	Don't allow anyone on behalf of your client or your firm to "friend", instant message, etc. a venire member or juror. Period. Don't allow anyone on behalf of your client or your firm to request access to the social media of a venire member or juror at any time.
Keep Fla. Std. Jury Instruction 200 available at all times. This is the qualification instruction for the jury as well as the admonishment regarding internet usage and research during trial.	Don't allow anyone from your firm, your client, or someone on behalf of your client to contact or speak to a venire member or juror. See Rule of Professional Conduct 4-3.5.
Suggest to client, client's family, staff, etc. that all discussions regarding case or parties STOPS when they arrive in the parking lot or parking garage of the courthouse.	Don't allow anyone (client, client's family, staff etc. to discuss ANYTHING about the case in a courthouse restroom, elevator, or parking garage).
Have the Court ask jurors if they have been contacted by anyone with regard to the case.	
In order to minimize the risk of concealment or non-disclosure from potential jurors during *voir dire* ask questions in terms which the average person will understand. For example, explain what you mean when asking about prior involvement in "litigation".	

Suggested Resources and Cases

Jury Research/Selection

Florida Rules of Professional Conduct - Rule 4-3.5(d)

ABA Formal Opinion 466 – Lawyer Reviewing Jurors' Internet Presence

Jury Misconduct

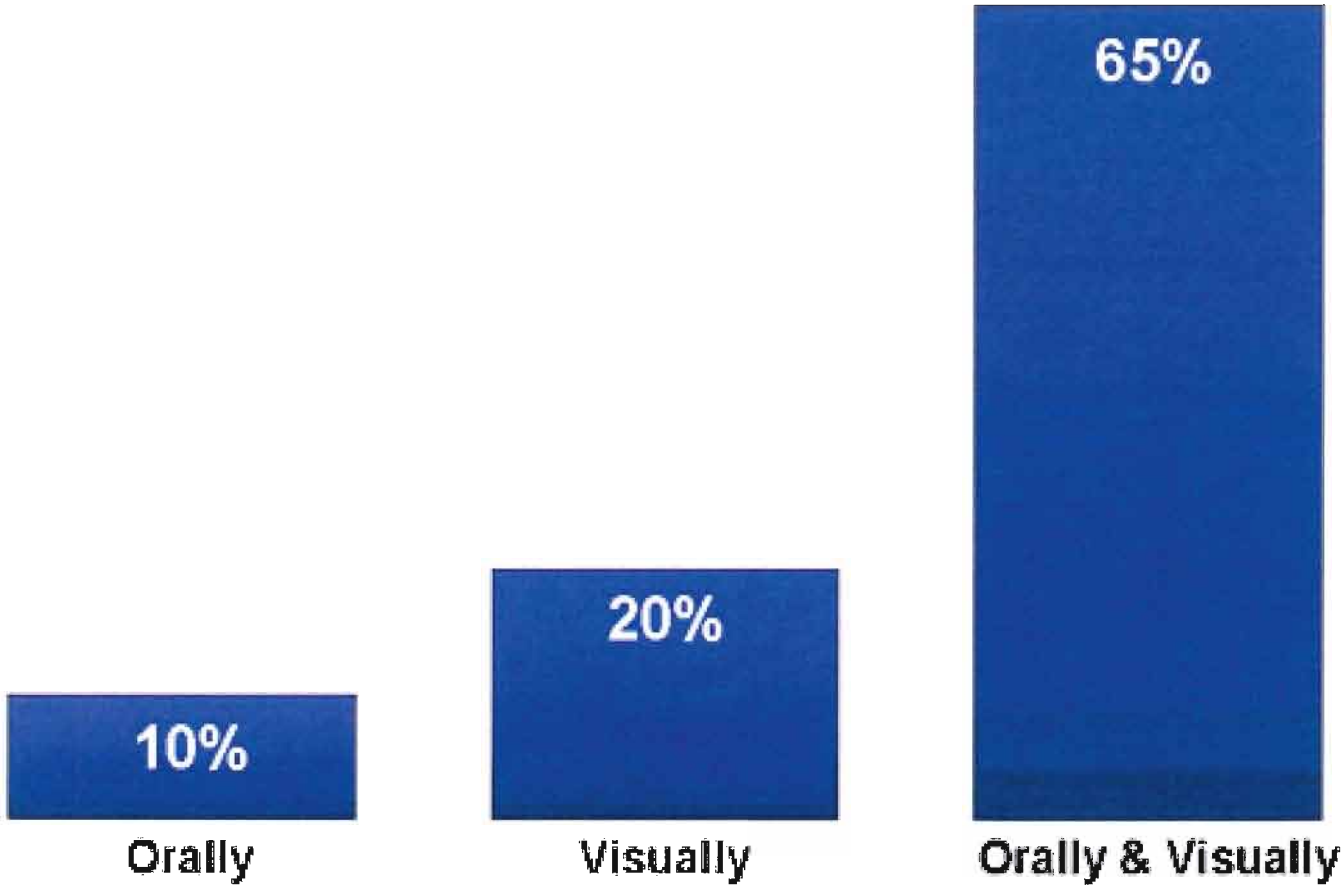
De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995)

Roberts ex rel. Estate of Roberts v. Tejada, 814 So. 2d 334 (Fla. 2002)

Vanderbilt Inn on the Gulf v. Pfenninger, 834 So. 2d 202 (Fla. 2d DCA 2002)

Re-order from Bushnell Company
(215) 842-9520
www.BushnellCo.com

Retention After 72 Hours



1. H. Weiss and J. B. McGrath, *Technically Speaking: Oral Communication for Engineers Scientists and Technical Personnel*, New York: McGraw-Hill 1963.

EXAMPLES OF DEMONSTRATIVE AIDS

1. ***Timelines*** ("The Court finds nothing problematic with Plaintiff using a multi-witness timeline demonstrative to assist in the presentation of her case.") *Woodruff v. R.J. Reynolds Tobacco Company*, 2015 WL 506281 (M.D. Fla.)

2. ***Medical Charts and a skeleton*** to aid an expert in explaining the nature of an injury (no reversible error even though items were admitted as evidence). *First Federal Savings & Loan Association of Miami v. Wylie*, 46 So.2d 396 (Fla. 1950)

3. ***Computer animations*** ("[W]e find no error in the trial court's decision permitting the computer generated animation to be shown to the jury as a demonstrative exhibit illustrating Detective Babcock's reconstruction of the motor vehicle accident.") *Pierce v. State*, 718 So.2d 806 (Fla. 4th DCA 1997)

4. ***"Day in the life"*** video (no reversible error in admitting video). *Protective Cas. Ins. Co. v. Killane*, 447 So.2d 316 (Fla. 4th DCA 1984)

EXAMPLES OF DEMONSTRATIVE AIDS (continued)

5. ***Firearm*** which was not identical to the one used in the crimes but "was in substantially the same condition" (no reversible error in allowing use as a demonstrative aid). *Walker v. State* 82 So.3d 115 (Fla. 4th DCA 2011)

6. ***Clay heads*** used by medical examiner to explain blows (reversible error because use of the heads "was certain to evoke an emotional response ... on a matter that had little or no bearing on the question for the jury.") *Taylor v. State*, 640 So.2d 1127 (Fla. 1st DCA 1994)

7. ***Styroform head*** and knife to demonstrate extent of wounds (no reversible error). *Brown v. State*, 550 So.2d 527 (Fla. 1st DCA 1989)

8. ***14 beer mugs*** admitted as evidence of the number and size of the beers on defendant's bar tab in prosecution for operating an aircraft while intoxicated (no reversible error; absence of any witness who observed how many mugs the defendant actually drank goes to weight not admissibility). *Hughes v. State*, 943 So.2d 176 (Fla. 3d DCA 2006)

WILL YOU BE ALLOWED TO USE YOUR DEMONSTRATIVE AID?

"The determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion."

Chamberlain v. State, 881 So.2d 1087 (Fla. 2004),
quoting *Brown v. State*, 550 So.2d 527 (Fla. 1st DCA 1989)

WHAT FACTORS SHOULD THE TRIAL COURT CONSIDER IN EXERCISING ITS DISCRETION?

1. Will the exhibit "aid the jury's understanding"?
2. Is it relevant?
3. Is it an "accurate and reasonable reproduction"?

Brown v. State,
550 So.2d 527 (Fla. 1st DCA 1989)

WHAT FACTORS SHOULD THE TRIAL COURT CONSIDER IN EXERCISING ITS DISCRETION?
(continued)

4. Does the "probative value" substantially outweigh "the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence?"

Rule 90.403 (While this rule addresses "admissibility," the test also applies to the use of demonstrative aids. *Taylor v. State*, 640 So.2d 1127 (Fla. 1st DCA 1984) and *Pierce v. State*, 718 So.2d 806 (Fla. 4th DCA 1987))

THE ONE ESSENTIAL DEMONSTRATIVE AID IN ANY COMPLEX TRIAL

TIMELINE OR STORYBOARD

WHY IS A TIMELINE OR STORYBOARD ESSENTIAL IN A COMPLEX CASE?

1. Creative process forces careful analysis
2. Gets trial team on same page
3. Builds confidence
4. Conveys message: prepared and organized
5. Provides context for all evidence
6. Facilitates continuity, consistency & repetition
    - opening
    - witness examinations
    - closing

RESOURCES RELATING TO DEMONSTRATIVE AIDS

C. Ehrhardt, Florida Evidence § 401.1 (2015 ed.)(subsection titled "Demonstrative Evidence").

The Florida Bar, Florida Civil Trial Practice (9th ed.), Chapter 14.

Ervin A. Gonzalez & Kyle B. Teal, *No Ideas but in Things:* A Practitioner's Look at Demonstrative Evidence, The Florida Bar Journal, Dec. 2015, at 16.

Neal Feigenson, Visual Evidence, Psychonomic Bulletin and Review, 2010, at 149 – 154.

Dr. Jeffery R. Boyll, Enhancing Juror Comprehension and Memory Retention, Trial Diplomacy Journal

Florida Standard Jury Instructions, § 301.4 ("Instruction regarding visual or demonstrative aids".)