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Public Comments From the Criminal Bureau: Navigating the Unchartered Waters of Professional Conduct Rule 3.6

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> *Circe*: When your crew have taken you past these Sirens, I cannot give you coherent directions as to which of two courses you are to take; I will lay the two alternatives before you, and you must consider them for yourself. . .
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> *Ulysses*: Then we entered the Straits in great fear of mind, for on the one hand was Scylla, and on the other dread Charybdis kept sucking up the salt water.
>
> The Odyssey by Homer, Book XII[2]

I. INTRODUCTION

Prosecutors in the Criminal Bureau are routinely called upon to make public statements about criminal cases and investigations. In doing so, we are called upon to navigate a narrow and difficult course between competing interests of paramount importance to a free and democratic society. On the one hand, the public holds an important right to obtain information about criminal acts that occur in New Hampshire, and it has a vested interest in monitoring the conduct of law enforcement authorities by questioning prosecutors.[3] On the other hand, as a minister of the court, a prosecutor has an ethical obligation to protect a defendant's constitutional right to a fair trial and impartial jury uninfluenced by adverse pre-trial publicity.[4]

Often, these competing interests clash during high-profile cases handled by the Criminal Bureau. The Criminal Bureau consists of a Public Integrity Crime Unit, a Drug Prosecution Unit, a Medicaid Fraud Unit, an Appellate Unit, an Economic Crime Unit and a Homicide Unit. Among its responsibilities, the Criminal Bureau investigates and prosecutes crimes committed by public officials and fiduciaries, major drug cases, healthcare fraud cases, homicides and complex financial crimes.[5] With the proliferation of print and broadcast media sources, and the growing regional coverage of major crimes in New Hampshire, the demand upon prosecutors in the Criminal Bureau to make public statements has increased sharply.[6] While the media has recognized the concerted efforts of the Attorney General's Office to uphold First Amendment rights,[7] the office also receives regular criticism from journalists who perceive a persistent, tight-lipped approach by prosecutors in response to trial publicity.[8]

Rule 3.6 of the New Hampshire Rules of Professional Conduct limits a lawyer's free speech rights and sets forth a lawyer's ethical duties when making extrajudicial statements.[9] The ABA Model Code Comments following the Rule, which were included to "compare counterparts to the Model Code,"[10] expressly acknowledge "the difficulty in striking a balance between protecting the rights to a fair trial and safeguarding the right

of free expression."[11]Lawyers look to this Rule for guidance to assist them in balancing the interplay between these competing rights, interests and responsibilities. A violation of the Rule subjects a lawyer to professional discipline,[12] and absent appropriate safeguards to cure a severe transgression, it could also impact a criminal defendant's Sixth Amendment rights.[13]

Yet, New Hampshire lawyers remain largely puzzled and divided about what the Rule actually says, and to what extent it limits public commentary about pending judicial proceedings. The New Hampshire Supreme Court has not had occasion to interpret Rule 3.6. In contrast to some other rules, there are no New Hampshire Comments to Rule 3.6 to offer guidance for interpretation.[14] Nor are there any Committee Notes to Decisions following the Rule, which are designed to provide non-authoritative, selected references to other authorities.[15] The ABA Model Code Comments following the Rule do not offer specific guidance.[16]

New Hampshire's Rule 3.6 was largely premised on the original 1983 version of the ABA Model Rule 3.6.[17] New Hampshire has not adopted any of the 1994 and 2002 revisions to Model Rule 3.6.[18] Those changes were designed in part to rectify potential constitutional inadequacies stemming from vague provisions set forth in the original 1983 Model Rule, as identified by the United States Supreme Court in 1991.[19] Presently, the New Hampshire Supreme Court's Advisory Committee on the Rules is conducting a comprehensive review and update of the New Hampshire Rules of Professional Conduct, awaiting comments from the New Hampshire Bar Association's Ethics Committee.[20]

This article discusses the ethical rules and constitutional provisions that govern a prosecutor's professional responsibilities when making public statements. Section II. outlines the special role of a prosecutor as a minister of justice and offers an historical perspective of the regulation of trial publicity in criminal cases. Section III. provides an overview and critique of New Hampshire Rule 3.6. Section IV. discusses the landmark 1991 United States Supreme Court decision in *Gentile v. State Bar of Nevada*[21] regarding attorney extrajudicial speech and evaluates its impact on New Hampshire Rule 3.6. Section V. outlines post-*Gentile* amendments to Model Rule 3.6 adopted by the ABA and makes recommendations about which Model Rule amendments should and should not be considered in New Hampshire. The article concludes that New Hampshire lawyers need better guidance in seeking to comply with New Hampshire Rule 3.6, and at times, the uncertainty about the meaning of New Hampshire's Rule 3.6 has led prosecutors to be overly cautious and restrictive in making extrajudicial statements about criminal proceedings.

II. AN HISTORICAL PERSPECTIVE ON THE REGULATION OF ATTORNEY EXTRAJUDICIAL SPEECH

The existing restrictions on a prosecutor's right to publicly comment about a pending criminal case or investigation trace their roots to the interplay between four important principles in our criminal justice system: (1) the defendant's constitutional right to a fair

trial and impartial jury; (2) the special responsibilities of a prosecutor as a minister of justice; (3) the ability of a State to regulate a lawyer's conduct as a condition of practicing law; and (4) the First Amendment right to freedom of expression as a means of fostering an open and accountable government.

A. The Defendant's Right to a Fair Trial and Impartial Jury

A criminal defendant is guaranteed a fair and impartial jury by the Sixth Amendment of the United States Constitution, as made applicable to New Hampshire through the Fourteenth Amendment.[22] The United States Supreme Court has described the right to a fair trial as "the most fundamental of all freedoms."[23] In 1907, Justice Holmes declared that "[t]he theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[24]

Part 1, article 15 of the New Hampshire Constitution also guarantees this same right.[25] Inside the courtroom, New Hampshire law provides that "[i]f it appears that any juror is not indifferent, he shall be set aside on that trial."[26]But as early as 1853, in the case of *Cochecho R.R. v. Farrington*, the New Hampshire Supreme Court also recognized that influences stemming from outside of the courtroom might also threaten the right to fair public trial.[27] Justice Eastman predicted that "[a]s the population of some of our smaller counties becomes more dense, and the business interests of the larger towns and cities become more intimately connected with the remote sections of the counties, so that excitements, partialities and prejudices may generally pervade society, it will be more difficult to obtain impartial juries, and still more difficult to satisfy parties that they have had fair trials."[28]

In two criminal cases, the New Hampshire Supreme Court has considered the potential impact of adverse trial publicity on a defendant's right to a fair trial and impartial jury. In *State v. Smart*, the Court rejected the defendant's argument that pretrial publicity and widespread media coverage of her murder trial had presumptively prejudiced her right to a fair and impartial jury. [29] The Court credited the trial court's careful efforts to ensure selection of an impartial jury through intensive *voire dire* questioning, forceful juror instructions to avoid media exposure, and effective control of the media in the courtroom.[30] In *State v. Lamaan*, the Court held that pretrial publicity about the defendant, consisting of negative newspaper articles and repeated radio station news releases, did not create inherent prejudice that prevented the defendant from receiving a fair and impartial jury trial.[31] However, neither of these cases involved direct allegations of prosecutorial misconduct regarding trial publicity and extrajudicial statements.

B. Professional Restraints on Free Speech and The Special Responsibilities of a Prosecutor

When an attorney makes an inappropriate extrajudicial statement about a defendant's case, it has the potential to impact the trial court's ability to assemble an impartial jury.

As a result, an attorney's First Amendment freedom to speak about an adjudicative proceeding is limited by his or her professional obligations to the court. Justice Cardozo stated that "[m]embership in the bar is a privilege burdened with conditions."[32] Inside the courtroom, the rules of evidence and principles of relevance place rigid restrictions on what an attorney may say, and when and how he or she may speak.[33] Similarly, outside of the courtroom, the speech of a lawyer may be curtailed to an extent greater than an ordinary citizen's.[34] In *Gentile v. State Bar of Nevada,* which is the leading United States Supreme Court decision analyzing the regulation of attorney extrajudicial speech, Chief Justice Rehnquist stated that "[l]awyers 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."[35] Because lawyers have "special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyer's statements are likely to be received as especially authoritative."[36]

In particular, a prosecutor has the responsibility of a minister of justice and not simply that of an advocate.[37]Justice Sutherland's often-quoted passage from his 1935 decision in *Berger v. United States* recognized that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. . .It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[38]

Due to their unique role as both advocate and minister of justice, prosecutors are held to even higher standards of conduct than other attorneys in guarding against the risks of adverse trial publicity. For example, New Hampshire Rule 3.8(e) requires the prosecutor, unlike other attorneys, to exercise reasonable care to prevent investigators, law enforcement officers, employees, and other persons assisting or associated with the prosecutor in a criminal case from making extrajudicial statements that a prosecutor could not make under Rule 3.6.[39] The ABA Ethics Committee and Criminal Justice Section have stated that "because of a prosecutor's special power and visibility, a prosecutor should use special care to avoid [adverse trial] publicity."[40] Some courts and commentators have argued that comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public.[41] As a consequence of these special responsibilities, most prosecutors are particularly mindful that their public comments will be closely scrutinized by the court, attorney disciplinary boards and criminal defendants.

C. The Origins of Professional Restraints On Attorney Extrajudicial Statements

Limiting extrajudicial speech to preserve a fair trial, however, must be accomplished in a way that is consistent with the fundamental right to free expression under the First Amendment.[42] In constitutional terms, the restraint on attorney speech must be narrowly tailored to achieve the State's legitimate interest in regulating the activity in question.[43]

In 1908, the American Bar Association first attempted to reduce adverse trial publicity caused by attorneys when it promulgated professional standards entitled the "Canons of Professional Ethics."[44] Prior to adoption of the Model Code and Model Rules, New Hampshire decisions cited the ABA Canons as authoritative ethical guidelines.[45]Canon 20 "[g]enerally. . .condemned" newspaper publications "by a lawyer" regarding a pending case because such publications "may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice."[46] During the 1950's and 1960's, the rapid growth of televised media coverage exacerbated the judiciary's concerns about adverse pretrial publicity, and the United States Supreme Court reversed several criminal convictions on the grounds that excessive trial publicity deprived the defendants of due process rights.[47] In the seminal case of *Sheppard v. Maxwell*, the United States Supreme Court reversed the murder conviction of Sam Sheppard because his high-profile trial was pervaded by a media frenzy.[48] The Supreme Court noted that many of the prejudicial news items could be traced to the prosecution and the defense, and the Court admonished the trial court for failing to effectively minimize inflammatory publicity generated by the attorneys affiliated with the case.[49]The Supreme Court advised courts to take affirmative steps to remedy harmful trial publicity, stating:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the 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 it is highly censurable and worthy of disciplinary measures.[50]

This mandate led the ABA to develop more stringent standards to regulate extrajudicial speech by attorneys. In 1968, the ABA introduced Criminal Justice Standards Relating to Fair Trial and Free Press (the ABA Standards).[51]Standard 1-1 stated that it was the duty of a lawyer to prevent the release of information for dissemination that was "reasonably likely to interfere with a free trial."[52] Shortly thereafter, the ABA also promulgated the Model Code of Professional Responsibility of 1969 (the Model Code).[53] The Model Code contained Disciplinary Rule 7-107, which established mandatory guidelines governing a lawyer's ability to make extrajudicial statements.[54] New Hampshire adopted the Model Code in 1974.[55]

However, the 1970's ushered in a backlash against these new ethical rules, as several courts strongly criticized the restrictions as running afoul of First Amendment protections by imposing vague and overbroad restrictions on attorney speech.[56] The United States Supreme Court noted that "[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right [to a fair trial and impartial jury]."[57] In response to these decisions, the ABA revised the Standards pertaining to extrajudicial statements by attorneys in 1978.[58] In its Introduction, the revised Standards noted that "[t]he profound concern for fairness to the criminal defendant reflected in *Sheppard* has led to a serious distortion of first amendment values in high-publicity cases."[59] The revised Standards indicated that its

restrictions were no longer "categorical in nature," casting aside the prior, more encompassing regulation of all attorney speech that was "reasonably likely to interfere with a free trial." Instead, the revised Standards embraced the more familiar First Amendment principle of restricting only extrajudicial statements that presented a "clear and present danger to the fairness of the trial."[60]

Finally, in 1983, the ABA promulgated the Model Rules of Professional Conduct (the Model Rules).[61] Model Rule 3.6 was more protective of lawyer speech than Model Code DR 7-107 in that Model Rule 3.6 only restricted extrajudicial speech that had a "substantial likelihood of materially prejudicing" an adjudicative proceeding, as opposed to the Model Code's "reasonable likelihood of prejudice" standard.[62] New Hampshire, along with 31 additional states, adopted Model Rule 3.6, either verbatim or with insignificant variations.[63] New Hampshire Rule 3.6 became effective in 1986.[64]

III. AN OVERVIEW OF NEW HAMPSHIRE PROFESSIONAL CONDUCT RULE 3.6

New Hampshire Rule 3.6 has three subsections. Rule 3.6(a) sets forth the general rule that regulates a lawyer's speech in adjudicative proceedings. Rule 3.6(b) lists areas of public comment that "ordinarily" are prohibited under the Rule. Rule 3.6(c) contains "safe harbor provisions" that recognize various circumstances where public statements are authorized, irrespective of an analysis of prejudice under the first two subsections of the Rule.

A. Subsection (a) - The General Rule

Subsection (a) announces the general standard applicable to lawyers making extrajudicial statements:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of a public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[65]

Three important considerations are contained within this subsection. First, the Rule only applies if "a reasonable person" would expect the extrajudicial statement to be disseminated by means of a public communication. There is no restriction on a lawyer's private speech or non-private speech that the lawyer should not have expected to be disseminated by means of a public communication.[66] That speech provides minimal risk of undermining the objective of the Rule, which is aimed at regulating speech that would either influence the actual outcome of the trial, or otherwise, would be likely to prejudice the jury venire even if an untainted panel could ultimately be found.[67]

Second, under New Hampshire Rule 3.6(a), if there exists an objective expectation of dissemination by means of a public communication, the Rule announces the "substantial likelihood of material prejudice test" for determining when the content of a lawyer's speech is restricted. This standard regulates a lawyer's speech more

restrictively than the regulation of media speech during adjudicative proceedings[68] or the regulation of a lawyer's speech in other non-adjudicative contexts, such as attorney business advertisements.[69] In *Gentile*, a deeply divided Court upheld the constitutionality of this standard as it pertains to lawyers who actually participate in a pending proceeding, and it ruled that the First Amendment does not require a heightened "clear and present danger of prejudice standard" in this context.[70] Under this standard, discipline may be imposed regardless of whether a particular statement, in retrospect, actually prejudiced a particular proceeding.[71]

Third, New Hampshire Rule 3.6 applies to all New Hampshire lawyers, whether or not the lawyer is affiliated with the adjudicative proceeding at issue.[72] In contrast, the 1994 amendment to subsection (a) of Model Rule 3.6, which has not been adopted in New Hampshire, limits the Model Rule's application to a lawyer who "is affiliated with or has participated in the investigation or litigation of a matter."[73] In *Gentile,* the United States Supreme Court declined to express an 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."[74] With the proliferation of media "legal commentators," and ongoing concerns about their impact on the integrity of the entire profession,[75] the enforceability of New Hampshire Rule 3.6 to discipline the speech of attorneys unaffiliated with a case is ripe for lively debate. Given the ongoing questions about the constitutionality of restricting the speech of legal commentators, some scholars have urged the ABA to adopt a "voluntary" code of ethics to govern them.[76]

B. Subsection (b) - Areas of Public Comment That Are Ordinarily Prohibited

New Hampshire Rule 3.6(b) provides five categories of extrajudicial statements that "ordinarily [are] likely" to have a substantial likelihood of materially prejudicing an adjudicative proceeding.[77] The examples in subsection (b) only pertain to certain types of adjudicative proceedings, including civil jury trials, criminal matters, or any other proceeding that could result in incarceration.[78] Under New Hampshire Rule 3.6(b), statements are ordinarily likely to have such an effect if they relate to:

1. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
2. in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
3. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
4. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

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.[79]

However, an extrajudicial statement that falls into one of these areas does not categorically result in a violation of the Rule. The ABA has commented that "there is no bright-line rule for determining when an extrajudicial statement is proper."[80] Certain factors have been identified to assist in the evaluation of whether a lawyer's extrajudicial statement violates the Rule, including the type of proceeding involved,[81] whether the information was otherwise available in the public domain,[82] the timing of a lawyer's extrajudicial statement,[83] and the lawyer's intent in making the statement.[84]

C. Subsection (c) - The Safe Harbor Provisions

Notwithstanding subsections (a) and (b), New Hampshire Rule 3.6(c) describes categories of statements that a lawyer may state "without elaboration" and without risking professional discipline.[85] The provisions under subsection (c) are known as "safe harbors."[86] These safe harbor provisions are only available to a lawyer who is "involved in the litigation or investigation of a matter."[87] Therefore, as drafted, subsection (c) does not provide any safe harbors for the legal commentator. Curiously then, the Rule restricts the speech of legal commentators to a greater extent than those who are affiliated with a case. Under the safe harbor provisions, a lawyer involved in the case may disclose without elaboration the following:

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 person involved;
4. the scheduling or result of any step in litigation;
5. a request for assistance in obtaining evidence and information necessary thereto;
6. a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
7. in a criminal case:
    i. the identity, residence and occupation and family status of the victim and 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.[88]

These safe harbor provisions recognize that there are permissible areas of public commentary by a lawyer that would not ordinarily present a substantial likelihood of

material prejudice, and in any event, should not be considered prohibited by the general standard set forth in New Hampshire Rule 3.6(a).

IV. THE *GENTILE* DECISION AND ITS AFTERMATH

In 1991, although the landmark *Gentile* decision upheld the "substantial likelihood of material prejudice" standard as a constitutionally permissible balance between First Amendment rights and the state's interest in fair trials, it also raised serious questions about whether the safe harbor provisions provide constitutionally adequate notice to attorneys about what speech is permissible under the rule.[89]

A. Critique of New Hampshire's Safe Harbor #1

By a 5-4 decision, the *Gentile* Court rejected Nevada's application of the safe harbor provision that allowed public comment on "the general nature of the claim or defense."[90] Nevada's former Rule 177 contained the identical safe harbor provision under current New Hampshire Rule 3.6(c).[91] The Nevada Supreme Court had imposed a sanction against Gentile, a criminal defense attorney, for making extrajudicial statements labeling the alleged victims in the case as "drug dealers" and "money launderers" and blaming the alleged crime on the police.[92]Gentile claimed that his statements were protected by the safe harbor provision, which allowed him to comment on the general nature of the defense without elaboration, even if the general statement would have a substantial likelihood of materially prejudicing an adjudicative proceeding.[93] The opinion of the court decided that "[a]s interpreted by the Nevada Supreme Court, the Rule is void for vagueness. . .for its safe harbor provision, Rule 177(3), misled [Gentile] into thinking that he could give his press conference without fear of discipline."[94] The Court reasoned:

> Given [the Rule's] 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". [citations omitted]. A lawyer seeking to avail himself of [the Rule'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 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 into the forbidden sea of the elaborated.[95]</P>

In the absence of precise guidance, the Court noted that the safe harbor provision "creates a trap for the wary as well as the unwary," as even lawyers who study the rule and make a conscious effort at compliance can unwittingly face discipline.[96] Moreover, in the Court's view, the Rule was so imprecise that it created an "impermissible risk of discriminatory enforcement."[97]

B. Critique of New Hampshire's Safe Harbor #2

The second safe harbor provision in New Hampshire Rule 3.6(c) authorizes extrajudicial statements without elaboration on "information contained in a public record."[98] Similarly, there is no settled usage or interpretation in the law of what constitutes "information contained in a public record." There are widely disparate meanings of "public record" espoused by learned experts in professional legal ethics. Broad definitions suggest that the term applies to "anything that has been filed in the court" . . and "anything that has been otherwise made public."[99]More narrow interpretations limit the term to information in the public domain that exists *prior to* or *separate from*the investigation or prosecution of the subject criminal matter.[100] In New Hampshire, there are at least 4 somewhat different definitions of the term "public record" contained in the New Hampshire Criminal Code,[101] the Right-To-Know law,[102] public records preservation laws,[103] and the Rules of Evidence.[104] The New Hampshire Rules of Professional Conduct provide no guidance as to which definition, if any, controls.

Because there is no settled definition of "information contained in a public record," in the recent case of *Attorney Grievance Comm'n of Maryland v. Gansler,* the Maryland Court of Appeals held that this safe harbor provision likewise does not provide constitutionally adequate guidance for determining which extrajudicial statements would qualify under the safe harbor.[105] The decision reversed, in part, sanctions imposed against a Maryland prosecutor who had commented on a defendant's criminal record, admissions and certain incriminating physical evidence.[106]The prosecutor believed that the safe harbor applied because the topics had been previously reported publicly from other sources of information. Absent advance notice to the prosecutor that his interpretation was misguided, the Maryland court construed the phrase in its "broadest form as applied to the prosecutor" to include "anything in the public domain, including public court documents, media reports and comments made by police officers."[107]However, for future cases, the Court adopted a more restrictive definition, which defined "information contained in a public record" as referring to "public government records - the records and papers on file with a government entity to which an ordinary citizen would have lawful access."[108] The court reasoned that a stricter definition of "public record" was necessary to "prevent the 'public record' exception from swallowing the rule," and to discourage attorneys from side-stepping the rule by encouraging non-lawyers to publicize information so that attorneys can speak freely about it.[109]

C. Critique of New Hampshire's Safe Harbor #3

Similarly, the third safe harbor in New Hampshire's 3.6 (c) allows a prosecutor to acknowledge that an investigation is ongoing, and to comment on the "general scope" of an investigation "without elaboration."[110] This safe harbor provision uses the same language and grammatical structure used in New Hampshire's safe harbor #1, which was ruled unconstitutionally vague as applied by Nevada in *Gentile*.[111] Therefore, it is subject to the same critique.

When reviewing the discipline of attorneys for violations of other professional conduct rules, the New Hampshire Supreme Court has been unsympathetic to arguments by offending attorneys that the rules are written too broadly.[112] In *In Re Wehringer's Case*,

when interpreting the Model Code, the Supreme Court noted that "[t]he language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen."[113] The Supreme Court asked attorneys to remember that the rules are "written by and for lawyers."[114] However, when First Amendment principles are at stake, the regulation must be narrowly tailored to meet the State's legitimate interest in limiting speech,[115] thus constitutionally mandating more clarity in drafting as compared to other professional conduct rules.

V. POST-*GENTILE* AMENDMENTS TO MODEL RULE 3.6

The *Gentile* decision was followed by a flurry of legal commentary.[116] In response to the decision, the ABA appointed a committee to re-evaluate Model Rule 3.6,[117] and in 1994, it adopted a new version of Model Rule 3.6, which contained several significant changes.[118] New Hampshire has not adopted any of the 1994 changes to Model Rule 3.6. A decade later, the New Hampshire Supreme Court's Advisory Committee on Rules and the New Hampshire Bar Association's Ethics Committee will be considering whether these post-*Gentile* amendments should be adopted in this State. The 1994 amendments to Model Rule 3.6 are evaluated below.

A. Relocation of "Ordinarily" Prohibited Statements From Text to Comment

The most important change in Model Rule 3.6 concerns the areas of public comment that were "ordinarily" prohibited under the 1983 Model Rule. Five of the six categories identified in the applicable subsection of the Model Rule were incorporated into New Hampshire Rule 3.6(b).[119] The 1994 Model Rule amendments remove that subsection from the text of the Model Rule and include the language in the official comment to the Rule, thus eliminating the pertinent language as controlling text and reducing it to suggestive commentary. The revised Comment now identifies this list of statements as topics which are "more likely than not" to have a material prejudicial effect, whereas the more restrictive text of the 1983 version had indicated that the listed statements were "ordinarily likely" to have such an effect.[120]

The Model Rule appropriately re-casts these public statements as areas that are "more likely than not" to have a material prejudicial effect, rather than areas that "ordinarily [are] likely" to have such an effect. By doing so, the amended Model Rule recognizes the logic of recent decisions, such as *State v. Smart*, which demonstrate that a trial judge has significant flexibility to consider a wide variety of curative measures to counter adverse pretrial publicity without irreconcilably prejudicing a defendant's right to a fair trial. [121] New Hampshire should adopt this amended language.

It is harder to justify removing this language from the text of New Hampshire Rule 3.6(b) altogether. In New Hampshire, the introductory section of the Professional Conduct Rules (entitled Scope) establishes that the text of each Rule alone is authoritative. Comments are "intended as guides to interpretation."[122] Accordingly, if New Hampshire followed suit with the ABA and relegated the controlling language from the text to a

comment, the identified areas of public comment would no longer have any direct authoritative value for disciplinary purposes. The practical effect would be to entirely pull the teeth from the text of the Rule.

At a time where attorneys genuinely seek more definitive guidance as to what speech is restricted by the rule, it is hard to envision how removing the text altogether would result in a more effective Rule. Indeed, several commentators have argued that the ineffectiveness of the Rule stems precisely from the *absence* of clear boundaries defining permissible extrajudicial statements.[123] As one commentator noted: "Model Rule 3.6 . . .must better delineate what speech should be subject to restriction in trial and pretrial contexts."[124] Reducing areas of speech from the text to a comment might be perceived as counterintuitive, and it could confuse practitioners already familiar with the Rule, without substantially advancing First Amendment principles. While modifying the language of the applicable standard is appropriate, the merit of adopting a complete omission of text in favor of a comment is questionable.

B. The Retaliatory Exception: Codifying The Right To Reply

Another debatable change to the ABA Model Rule 3.6 is the addition of a right to reply provision.[125] This provision authorizes a lawyer to make a statement "that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[126]The ABA Comment to the Model Rule states: "[w]hen prejudicial state ments have been publicly made by others, responsive statements may have the salutatory effect of lessening any resulting adverse impact on the adjudicative proceeding."[127]

The retaliatory exception is ill-advised. When violations of New Hampshire Rule 3.6 occur, the responsibility to lessen "any resulting adverse impact on the adjudicative proceeding" should rest with the trial judge, and not the attorneys. Indeed, endorsing even a limited back-and-forth exchange of prejudicial statements otherwise violative of the Rule is more likely to bias a jury than would permitting the trial judge to undertake appropriate remedial measures. The trial court's arsenal of procedural tools to cure potential prejudice is vast, including individual *voiredire*, change of venue, limitations on media coverage, curative jury instructions, gag orders, contempt and professional discipline.[128] The retaliatory exception is more likely to exacerbate adverse trial publicity than limit it. [129]

C. The Amended Safe Harbors

The revised safe harbors in the Model Rule remain in the text of the Rule, but no longer contain the phrases "without elaboration" and "general nature" that were ruled unconstitutionally vague as applied in *Gentile*.[130]Otherwise, the revised Model Rule retains these categories of protected statements. Thus, the text of the Model Rule now contains only "ordinarily" permissible statements, but not "more likely than not" prohibited statements. This revision has the effect of removing one of the principle objections made by the *Gentile* court, which raised concerns that these safe harbors did

not provide clear notice to practitioners and might result in discriminatory enforcement.[131]

While these changes are necessary to overcome constitutionally deficient language identified in *Gentile*, the revised Model Rule does not provide attorneys with more practical guidance in determining what types of statements actually fall within the acceptable categories.[132] In this regard, New Hampshire should consider adding Comments and Reporter Notes of Decisions to the Rule, which might assist practitioners in defining terminology contained within these safe harbors.

D. Limiting Speech Restraints To Lawyers Affiliated With A Case

The revised Model Rule applies only to lawyers participating in or who have participated in the investigation or litigation of the case, whereas the 1983 version applied to comments made by any lawyer.[133] The ABA Comment explains this revision by stating that ". . . the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, . . ."[134] If New Hampshire does consider this amendment in light of *Gentile* and the ABA Comments, it should also consider whether additional New Hampshire Comments should be drafted to guide legal commentators in New Hampshire towards responsibly fulfilling their ethical duties as officers of the court.

E. The 2002 Model Rule Amendments

In 2002, the ABA amended Model Rule 3.6(a) to replace the "reasonable person" standard with a "reasonable lawyer" standard.[135] It determined that "lawyers should only be subject to professional discipline when their judgments are unreasonably inconsistent with those of their professional peers."[136] The revised Model Rule 3.6(a) also deleted the language "would expect" and replaced it with "knows or reasonably should know."[137] According to the Reporter's Explanation of Changes, no change in substance was intended by this latter amendment. New Hampshire Rule 3.6 likewise has not adopted these 2002 Model Rule amendments.

F. Local Prosecutorial Guidelines Are Needed to Foster Compliance

New Hampshire prosecutors do not benefit from any in-state policies or guidelines to consult when making public statements. In contrast, federal prosecutors are assisted by a United States Attorneys Manual, which provides detailed guidelines about handling media relations and making public statements about pending criminal cases.[138] The National Prosecution Standards regarding public statements, promulgated by the National District Attorneys Association, are of limited value to New Hampshire prosecutors, as they diverge from New Hampshire Rule 3.6 in some respects.[139] New Hampshire prosecutors should consider collaborative efforts to formulate statewide policies and further educate prosecutors about New Hampshire Rules 3.6 and 3.8(e).

VI. CONCLUSION

Prosecutors who make public statements must fulfill an awesome responsibility. When a prosecutor comments about a case, the pitfalls of steering off course in either direction are severe. The risk of materially prejudicing a defendant's criminal trial tears at the very fabric of our federal and state constitutional safeguards. Yet, any undue restriction of prosecutorial commentary about criminal proceedings might undermine the fundamental right to free speech and the role of a free press in serving as an important check on government operations. Often, this balancing act must be undertaken on short notice, with little sleep, under the pressure of intensive questioning from a skilled press.

With ongoing uncertainties about New Hampshire Rule 3.6, prosecutors have understandably leaned significantly towards avoiding any risk of jeopardizing a defendant's right to a fair trial and impartial jury. Some prosecutors continue to express understandable reluctance to fall into what Justice Kennedy termed the "trap for the wary." Prosecutors, who have carefully studied New Hampshire Rule 3.6 and endorse a reasonable interpretation of the safe harbor provisions, still recognize that there is substantial room for disagreement.

With the upcoming comprehensive review of the New Hampshire Rules of Professional Conduct, we have an opportunity to offer better practical guidance to attorneys while making necessary revisions to New Hampshire Rule 3.6. In turn, these efforts should make this Rule more effective as an appropriate balance between all competing rights and interests.

ENDNOTES

1. The author would like to thank the following individuals for their helpful suggestions and review of this article: Attorney Carolyn K. Delaney, Associate Attorney General Ann M. Rice, Senior Assistant Attorney General N. William Delker and Senior Assistant Attorney General Michael S. DeLucia.
2. The Odyssey by Homer, Book XII, 800 B.C. (as translated by Samuel Butler and published in 1900).
3. *Cf. New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H.437, 438, 821 A.2d 1014, 1015 (2003) (purpose of the Right-To-Know law is to "ensure the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people").
4. New Hampshire Rules of Professional Conduct Rule 3.6 (West. 2004); s*ee also State v. Smart*, 136 N.H. 639, 646, 622 A.2d 1197, 1202 (1993), *cert. denied*, 501 U.S. 917 (1993) (discussing defendant's constitutional right to a trial by a fair and impartial jury).
5. *See* RSA 21-M:8 (outlining statutory responsibilities of New Hampshire Department of Justice, Criminal Justice Bureau).
6. *See* Gail D. Cox, *So You Want to Be a Quotemeister*, Nat'l L. J., Nov. 1, 1993, at 26 (discussing the proliferation of news stories and media coverage involving legal profession and court cases).
7. Former Attorney General Philip T. McLaughlin was recently awarded the first annual Nackey Loeb First Amendment Award for his leadership in promoting

First Amendment principles. See Carol Robideaux, *First Amendment Honored, Nackey Loeb Award Goes to McLaughlin*, The Manchester Union Leader, Nov. 14, 2003 at A1.

8. Shawn K. Wickham, *Roots of the Rules On What Prosecutors Can Say in NH*, The Manchester Union Leader, February 25, 2001 at A9 (criticizing lawyer's ethical rules as enacting virtual gag order on prosecutors in criminal trials of Robert Tulloch and James Parker for double murders of Dartmouth professors, Half and Susanne Zantop); *Enlisting the Public; AG's Office Slipped in Gehring Case*, The Manchester Union Leader, July 30, 2003 at A10 (criticizing timing of release of public information in case of *State v. Manuel Gehring*, No. 03-S-1318-19, Hillsborough North Superior Court).
9. New Hampshire Rules of Professional Conduct Rule 3.6 (West 2004).
10. New Hampshire Rules of Professional Conduct Scope (West 2004).
11. New Hampshire Rules of Professional Conduct Rule 3.6, ABA Model Code cmt. (West 2004).
12. New Hampshire Rules of Professional Conduct Scope (West 2004) ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process").
13. U.S. Const. amend. VI; s*ee also Smart*, 136 N.H. at 646, 622 A.2d at 1202.
14. New Hampshire Rules of Professional Conduct Scope (West 1994). ("The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.").
15. *Id.*
16. New Hampshire Rules of Professional Conduct Scope (West 2004) ("Research notes were prepared to compare counterparts in the Model Code of Professional Responsibility (adopted 1969, as amended) and to provide selected references to other authorities. The notes have not been adopted, and do not constitute part of the Rules, and are not intended to affect the application or interpretation of the Rules and Comments.").
17. Model Rules of Professional Conduct Rule 3.6 (1983).
18. Model Rules of Professional Conduct Rule 3.6 (2002).
19. *See Gentile v. State of Nevada*, 501 U.S. 1030, 1048 (1991) (holding that application of substantially similar Nevada Rule 177 was void for vagueness absent clarifying interpretation by state court because it failed to provide fair notice to lawyers about what speech is restricted).
20. Minutes of the Advisory Committee on Rules (June 4, 2003) (available on Supreme Court web page at http://www.courts.state.nh.us/committees/adviscommrules/jun2003.pdf). The Advisory Committee on Rules, established by New Hampshire Supreme Court Rule 51, receives and considers suggestions for changes to the rules governing the state courts.
21. 501 U.S. 1030 (1991).
22. U.S. Const. amend. VI, XIV; *Restrain v. Ross*, 424 U.S. 589, 595 n. 6, (1976) (Sixth Amendment, Fourteenth Amendment and principles of due process guarantee a criminal defendant an impartial jury in state court).

23. *Estes v. Texas*, 381 U.S. 532, 540 (1965).
24. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).
25. N.H. Const. pt. 1, art. 15; *Smart*, 136 N.H. at 646, 622 A.2d at 1202.
26. N.H. Rev. Stat. Ann. § 500-a:12, II (West 2004).
27. 26 N.H. 428 (1853).
28. *Id.*
29. 136 N.H. at 653, 622 A.2d at 1206.
30. 136 N.H. at 649-59, 622 A.2d at 1204-06.
31. 114 N.H. 794, 798, 331 A.2d 354, 357 (1974).
32. *In Re Rouss*, 221 N.Y. 81, 83, 116 N.E. 782, 783 (1917) (quoted in *Gentile*, 501 U.S. at 1066).
33. 501 U.S. at 1071.
34. *See id.*
35. 501 U.S. at 1074.
36. *Id.*
37. *See State v. McAdams*, 134 N.H. 445, 454, 594 A.2d 1273, 1279 (1991) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence") (quoting Model Rules of Professional Conduct Rule 3.8 cmt. (West 2004)).
38. *Berger v. United States*, 295 U.S. 78, 88 (1935).
39. New Hampshire Rules of Professional Conduct Rule 3.8(e) (West. 2004).
40. Model Rules of Professional Conduct Rule 3.8 cmt. (1994) (quoting ABA House of Delegates, Report No. 100 (Aug. 1994)).
41. *See e.g.*, *Attorney Grievance Comm'n of Maryland v. Gansler*, 377 Md. 656, 676, 835 A.2d 548, 559 (2003) ("Comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public. When such seemingly credible information reaches the ears or eyes of the public, the jury pool may become contaminated, greatly diminishing the court's ability to assemble an impartial jury).
42. *See Gentile*, 501 U.S. at 1075.
43. *See id.*
44. *See Gentile*, 501 U.S. at 1066 (providing historical overview of regulation of attorney speech); s*ee also In Re Wehringer's Case*, 130 N.H. 707, 720, 547 A.2d 252, 259 (1988) (discussing adoption of canon of professional ethics in 1908); Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 Loy. U. Chi. L.J. 323, 331 (2002).
45. *See In Re Mussman's Case*, 111 N.H. 402, 407, 286 A.2d 614, 617 (1971) (applying ABA Canons to attorney disciplinary action).
46. *Gentile*, 501 U.S. at 1066; *see also* Bernabe-Riefkohl, *supra* note 44, at 331.
47. *See Estes*, 381 U.S. at 535 (denial of due process where pre-trial hearing was televised live and court proceedings were disrupted by the media); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (reversing conviction absent change of venue where local television had broadcast defendant's confession 3 times and large percentage of community viewed broadcasts); *Irvin v. Dowd*, 366 U.S. 717,

727 (1961) (reversing conviction based on adverse pretrial publicity in vicinity of trial about defendant's confession and juvenile record); *Marshall v. United States*, 360 U.S. 310, 312 (1959) (reversing conviction because 7 of 12 jurors were exposed to media news accounts of evidence not admitted at trial).

48. 384 U.S. 333, 363 (1966).
49. *Id.* at 361.
50. *Id.* at 363.
51. ABA Standards for Criminal Justice Fair Trial and Free Press Standard 1-1 (1st ed. 1968).
52. *Id.*
53. Model Code of Professional Responsibility (1969).
54. Model Code of Professional Responsibility DR 7-107 (1969).
55. *See In Re Wehringer*'s Case, 130 N.H. at 719, 547 A.2d at 259.
56. *See e.g.*, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied sub nom.*, *Cunningham v. Chicago*. Council of Lawyers, 427 U.S. 912 (1976) (local criminal rule following language of Standard 1-1 and DR 7-107 violated First Amendment).
57. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) (reversing unconstitutional gag order on press).
58. ABA Standards for Criminal Justice Fair Trial and Free Press Standard 8-1.1 (2nd ed. 1980).
59. ABA Standards for Criminal Justice Fair Trial and Free Press Introduction (2nd ed. 1980).
60. ABA Standards for Criminal Justice Fair Trial and Free Press Standard 8-1.1 (2nd ed. 1980).
61. Model Rules of Professional Conduct (1983).
62. *Compare* Model Rules of Professional Conduct Rule 3.6 (1983) with Model Code of Professional Responsibility DR 7-107 (1969).
63. *See Gentile*, 501 U.S. at 1068 (listing states that adopted 1983 version of Model Rule 3.6 verbatim and with insignificant modifications).
64. *In Re Wehringer*'s Case, 130 N.H. at 719, 547 A.2d at 259 (citing effective date as February 1, 1986).
65. New Hampshire Rules of Professional Conduct Rule 3.6 (West 2004).
66. *See id.*
67. *See Gentile*, 501 U.S. at 1075 (discussing these two principle evils protected by regulating attorney speech).
68. *See Nebraska Press,* 427 U.S. at 568 (applying clear and present danger standard to gag order on press coverage of defendant's confession and other prejudicial facts); *cf. Keene Pub. Corp. v. Keene Dist. Ct.*, 117 N.H. 959, 962, 380 A.2d 261, 263 (1977) (applying clear and present danger test for exclusion of press from pretrial hearing).
69. *See In Re R.M.J.*, 496 U.S. 91, 203 (1982) (outlining four-part analysis for regulation of lawyer advertising under commercial speech doctrine).
70. 501 U.S. at 1074.
71. Model Rules of Professional Conduct Rule 3.6 cmt. (2004).
72. New Hampshire Rules of Professional Conduct Rule 3.6(a) (West 2004).

73. Model Rules of Professional Conduct Rule 3.6(a) (2004).
74. 501 U.S. at 1074 n. 5.
75. *Compare* Am. Coll. Of Trial Lawyers, Report on Fair Trial of High Profile Cases (1998) ("In appropriate circumstances, legal commentators can play an important role in the reporting of court proceedings. They can assist the public by explaining the significance of events occurring in and out of court, and by 'demystifying' the judicial process") with Christopher A. Brown, *The Worsening Problem of Trial Publicity: Is "New" Model Rule 3.6 Solution or Surrender?*, 29 Ind. L. Rev. 379, at 402 (arguing that comprehensive and pervasive brand of publicity that follows notable trials casts doubt on trial process); Laurie L. Levenson, *Reporting the Rodney King Trial: The Role of Legal Experts*, 27 Loy.L.A.L. Rev. 649, at 657-660 (1994) (discussing legal commentator bias, incompetence, personal advertising interest and unwarranted credibility as posing dangers).
76. Erwin Chemerinsky and Laurie Levenson, The Ethics of Being a Commentator, 69 S. Ca. L. R. 1303 (May 1996).
77. New Hampshire Rules of Professional Conduct Rule 3.6(b) (West 2004).
78. *Id.*
79. Id.
80. Model Rules of Professional Conduct Rule 3.6 cmt. (1994).
81. *Id.* ("Whether a proceeding is criminal or civil, and whether it is jury or nonjury, bears on the potential prejudice of a statement") (citing cases).
82. *Id.* ("Whether the publicity involves information that is already in the public domain bears on the assessment of a statements prejudicial value") (citing cases).
83. *Id.* (statements timed for maximum impact are more likely to result in violation of rule) (citing cases).
84. *Id.* (in assessing prejudicial impact in Gentile, the court took note of the fact that the lawyer made a conscientious effort to follow trial publicity restrictions and declined to answer certain questions in an effort to comply with the Rule) (citing cases).
85. New Hampshire Rules of Professional Conduct Rule 3.6(c) (West 2004).
86. *See* Gentile, 501 U.S. at 1033 (describing the provisions of former Nevada Supreme Court Rule 177(3), which are substantively identical to New Hampshire Rule 3.6(c), as "safe harbors").
87. New Hampshire Rules of Professional Conduct Rule 3.6(c) (West 2004).
88. *Id.*
89. 501 U.S. at 1048.
90. *Id.* at 1048-1049.
91. *Compare Gentile*, 501 U.S. at 1060-61 app. B (full text of Nevada Supreme Court Rule 177, as in effect prior to January 5, 1991) with New Hampshire Rules of Professional Conduct Rule 3.6(c) (West 2004).
92. *See Gentile,* 501 U.S. at 1049, 1078-79.
93. *Id*. at 1048-49.
94. *Id.* at 1048.
95. *Id.* at 1048-49.

96. *Id.* at 1051.
97. *Id.*
98. New Hampshire Rules of Professional Conduct Rule 3.6(c) (West 2004).
99. *See Gansler*, 377 Md. at 688, 835 A.2d at 566 (discussing conflicting testimony of legal ethicists at disciplinary hearing).
100. *See* id.
101. *See* N.H. Rev. Stat. Ann. § 641:7 (West 2004) (defining "public record" as "any thing belonging to, received, or kept by the government for information or record, or required by law to be kept for information of the government").
102. *S*ee N.H. Rev. Stat. Ann. § 91-A:4 (West 2004) ("public records, including minutes of meetings of the bodies or agencies"); *see also Menge v. City of Manchester*, 113 N.H. 533, 536-37, 311 A.2d 116, 118(1973) (interpreting definition of "public record" under Right-to-Know law to include non-mandatory minutes of executive sessions).
103. *S*ee N.H. Rev. Stat. Ann. § 41:58 (West 2004) (defining "public record" as "all books, records, papers, vouchers, and documents which shall be in the possession of any officer, committee, or board of officers of the town") and N.H. Rev. Stat. Ann. § 48:9 (West 2004) (defining "public records" as "all records, books, papers, vouchers and documents of every kind which shall be in the hands of any officer, committee or board of officers of the city, not their individual property").
104. *See* N.H. R. Evid. 803(8) (defining "public records and reports" as "[r]ecords, reports, statements, or data compilations, in any form, of pu, blic offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness").
105. *See Gansler*, 377 Md. at 690, 835 A.2d at 567.
106. *Id.* at 691, 835 A.2d at 568.
107. *Id.* at 690, 835 A.2d at 567.
108. *Id.* at 692, 835 A.2d at 569.
109. *See* id.
110. New Hampshire Rules of Professional Conduct Rule 3.6(c) (West 2004)
111. *See Gentile,* 501 U.S. at 1048.
112. *See In Re Wehringer*'s *Case*, 130 N.H. at 720.
113. *Id.*
114. *Id.*
115. *See Gentile,* 501 U.S. at 1076.
116. *See e.g.,* Esther Berkowitz-Caballero, *In the Aftermath of Gentile*, *Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. Rev. 494 (1993); Andrew Blum, *Left Speechless*, Nat'l L.J., Jan. 18, 1993, at 1; Report, Committee on Pro fessional Responsibility, Association of the Bar of the

City of New York, *The Need for Fair Trials Does Not Justify A Disciplinary Rule That Broadly Restricts an Attorney's Speech*, 20 Fordham Urb. L. J. 881 (1993); Philip Hager, *Crackdown on Commentary*, Cal. Law., Feb. 1995, at 35; L. Cooper Campbell, *Gentile v. State Bar and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pretrial Publicity*, 6 Geo. J. Legal Ethics 583 (1993); Michael W. McTigue, Jr., *Court Got Your Tongue? Limitations on Attorney Speech in the Name of Federalism: Gentile v. State Bar*, 72 B.U. L. Rev. 657 (1992); Lester Porter, Jr., *Leaving Your Speech Rights At the Bar - Gentile v. State Bar*, 111 S.Ct. 2720 (1991), 67 Wash. L. Rev. 733 (1992).

117. *See* Berkowitz-Caballero, *supra* note 116, at 538 n. 256 (citing Letter of David Isbell, Chair of the ABA Standing Committee (June 23, 1993)).

118. Model Rules of Professional Conduct Rule 3.6 (1994).

119. *Compare* Model Rules of Professional Conduct Rule 3.6 cmt. (1994) (listing six categories of "more likely than not" prohibited statements *with* New Hampshire Rules of Professional Conduct Rule 3.6(b) (West 2004) (list five categories of "ordinarily" prohibited statements) (New Hampshire has not adopted the Model Rule suggestion that a lawyer not comment on 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).

120. *Compare* Model Rules of Professional Conduct Rule 3.6 cmt. (1994) *with* Model Rules of Professional Conduct Rule 3.6(b) (1983).

121. *See Smart*, 136 N.H. at 646, 622 A.2d at 1202.

122. New Hampshire Rules of Professional Conduct Scope (West 2004).

123. *See* Brown, *supra* note 75, at 386.

124. *See* Berkowitz-Caballero, *supra* note 116, at 500 ("Model Rule 3.6 . . must better delineate what speech should be subject to restriction in trial and pretrial contexts").

125. Model Rules of Professional Conduct Rule 3.6(c) (1994).

126. *Id.*

127. Model Rules of Professional Conduct Rule 3.6 cmt. (1994).

128. *See Smart*, 136 N.H. at 646, 622 A.2d at 1202.

129. *See* Bernabe-Riefkohl, *supra* note 44, at 355.

130. *Compare* Model Rules of Professional Conduct Rule 3.6(b) (1994) *with* Model Rules of Professional Conduct Rule 3.6(c) (1983).

131. *See Gentile*, 501 U.S. at 1048-1051.

132. *See* Catherine Cupp Theisen, *The New Model Rule 3.6: An Old Pair of Shoe*s, 44 U. Kan. L. Rev. 837 (1996), at 856-862.

133. *Compare* Model Rules of Professional Conduct Rule 3.6(a) (1994) *with* Model Rules of Professional Conduct Rule 3.6(a) (1983).

134. Model Rules of Professional Conduct Rule 3.6 cmt. (1994).

135. Model Rules of Professional Conduct Rule 3.6(a) (2002).

136. Model Rules of Professional Conduct Rule 3.6 cmt. (2002) (*quoting* ABA Report to House Delegates, No. 401 (Feb. 2002, Model Rule 3.6, Reporter's Explanation of Changes).

137. *Id.*

1. *See* Department of Justice, United States Attorneys Manual, Media Relations Guidelines (available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/7mdoj.htm#1-7.001).
2. *See* National Prosecution Standards Standard 34.1-.3, National District Attorneys Association (2nd ed. 1991).