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**THE PERMISSIBLE SCOPE OF ATTORNEY SPEECH:
CONSTITUTIONAL CHALLENGES, THE CURRENT STANDARD, AND
THE NEED FOR CLARITY**

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Ethics in Criminal Advocacy

I. INTRODUCTION

Attorneys may have any number of internal and/or external incentives or motivations to speak publicly about an upcoming or current trial. The incentives or motivations may differ based on whether the attorney is a criminal defense lawyer or a state or federal prosecutor. Defense attorneys may seek to advocate for their clients by publicizing to the public at large through the press the evidence that points toward their clients' innocence. Or, they may want to use the media to combat prejudicial information previously disseminated by the press. If a defense attorney retains a prominent or famous client, or if the attorney is involved in a case that has caught the media's attention, the attorney may want to capitalize on that once-in-a-lifetime high-profile case as a means of advertising their services to future clients.¹

Prosecutors also may have certain motivations to speak publicly about a pending legal matter. They may want to inform the public of the nature of the case. They may want to disseminate certain information that serves a legitimate law enforcement purpose. They may also have more personal reasons for disclosing certain types of information, including their personal beliefs regarding a defendant's guilt, or due to pressure from a victim's grieving family. Further, many prosecutors achieve their positions, and retain them, through an electoral process. As such, their frequent presence in the media may serve as a platform to garner good publicity during campaign season.

Whatever the reasons underlying an attorney's decision to speak publicly about a pending legal matter may be, the courts and legislatures of the United States have long recognized that extrajudicial speech made by attorneys has the unique ability of potentially prejudicing public opinion either for or against a particular defendant. Due to this realization, a series of rules were promulgated in an effort to constitutionally restrict certain aspects of out-of-court attorney speech. The current controlling standard regarding the permissible scope of the extrajudicial speech of

attorneys connected with a pending legal matter is Model Rule of Professional Rule 3.6, supplemented by Rule 3.8(f), although the latter only regulates the out-of-court speech of prosecutors. Under Rule 3.6(a), “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”ⁱⁱ After years of questioning whether the “substantial likelihood of materially prejudicing” standard was constitutional under the First Amendment, the Supreme Court finally decided that it was in the 1991 landmark case *Gentile v State Bar of Nevada*.

The problem with the current standard, as will be developed much more fully in the sections below, is that it is vague and broad. Frequently, attorneys have little guidance as to whether a specific statement will breach the permissible requirements of the rule. Further, due to this vagueness, disciplinary boards will often have a very difficult time justifiably sanctioning an attorney’s conduct for an alleged breach. As a result, attorneys are afforded great leeway in disseminating potentially prejudicial information to the public with little risk of being disciplined for running afoul of the requirements of the rules. An attorney is thus granted a great deal of discretion in deciding what may or may not be permissibly publicized about a case, and the perceived scope of the permissible contours provided by the rules may be driven by how risk-averse an attorney chooses to be. Whether or not an attorney’s dissemination of information related to a case is motivated by legitimate or questionable factors, those factors compelling the speech may induce or assist an attorney in rationalizing a larger scope of permissible speech than is actually afforded under the vague dictates of the rules. In other words, the lack of clarity in the rules allows lawyers to decide with great leeway what may be said publicly. That lack of clarity

also affords lawyers with great room to argue why their conduct was permissible under the rules should they be cited for a violation. Lawyers may thus divulge certain information that potentially prejudices a trial without great risk of being sanctioned for their conduct.

The discussion below first traces the history of trial publicity rules in the United States. Part II discusses the enactment of the first legal code in this country aimed at limiting attorney speech and then analyzes the influences and constitutional restraints that molded the scope of subsequent rules. Part III discusses the amendments to the Model Rules following the Supreme Court's decision in *Gentile v State Bar of Nevada*, which largely resulted in the current version of Model Rules 3.6 and 3.8. Part IV examines the discernible scope of permissible attorney speech under the current Model Rules as well as certain arguments regarding the appropriate standard for regulating attorney speech. Part V discusses some of the reasons why the extrajudicial speech of prosecutors in particular needs to be closely scrutinized and controlled.

II. HISTORY AND BACKGROUND

A. Origins of the Rules Regulating Pre-Trial Publicity and Attorney Speech

In the United States, concerns regarding the potential prejudicial effects caused by pre-trial publicity can be traced back to at least as early as 1807, when former Vice President Aaron Burr was arrested and charged with treason. Leading up to his trial, Burr argued, to no avail, that it would be difficult, if not impossible, to find an unbiased jury of his peers because the charges against him had been so extensively publicized in the newspapers.ⁱⁱⁱ

The historical record is sparsely populated with additional isolated nineteenth century instances indicating a concern with the potential prejudicial impact caused by the media's coverage of a case.^{iv} One such instance surfaced when an 1855 Chicago trial dubbed "The Trial of the Rioters" caught the attention of the Chicago media. The attorney for the defendants accused the Chicago

Tribune of making false and disrespectful comments about his clients. He then unsuccessfully attempted to persuade the Court to prohibit the Tribune from reporting on the case and to hold the paper in contempt.^v The Court refused to do so, but the judge still chose to admonish the press by stating, "it was very wrong for newspapers to publish articles which may influence the result of the trial one way or another; and that it was very desirable that if any reports at all were published, that they should be simple relations of facts as they occurred."^{vi}

The two above-cited examples, along with others not mentioned here,^{vii} suggest that there was at least an early awareness in the United States that publicity could potentially unfairly impact a trial. However, despite such possible concerns, eighteenth and nineteenth century lawyers in the United States made frequent use of the media in order to comment on pending cases.^{viii} Scholars have traced this tradition back to as early as the late 1700s when John Adams, while representing John Hancock in a forfeiture proceeding, liberally disseminated information relating to the case to the media for subsequent publication.^{ix} Adams's son, John Quincy, has confirmed that his father's "contentions and later a text of his [father's] undelivered argument were thoroughly aired in the press of the time, along with running commentaries on the legal issues."^x

No legislative body in the United States affirmatively adopted any type of regulation concerning out-of-court statements made by attorneys until 1887.^{xi} In that year, Alabama created the first legal code of ethics in this country. Section 17 of the Alabama Code, entitled, "Avoid Newspaper Discussion of Legal Matters," stated:

Newspaper publications by an attorney as to the merits of pending or anticipated litigation, call forth discussion and reply from the opposite party, tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously.^{xii}

Just over two decades later, in 1908, the American Bar Association (“ABA”) promulgated the Canons of Professional Ethics (“the Canons”), which was quickly adopted by numerous states.^{xiii}

Like Section 17 of the 1887 Alabama Code, the Canons included a section specifically proscribing certain public statements made by attorneys regarding anticipated or pending legal matters.^{xiv}

Canon 20, entitled, “Newspaper Discussion of Pending Litigation,” read:

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.^{xv}

In the interest of providing some context behind this enactment, it is noteworthy to point out that when this rule was announced, only three percent of American attorneys were members of the ABA.^{xvi} Also, modern commentators have proclaimed that the concerns underlying the Canon had less to do with protecting parties’ rights to a fair trial than they did with instructing non-ABA lawyers on how to practice law as gentlemen.^{xvii} Furthermore, while the Canon declared that noncompliant lawyers were generally to be condemned, the standard was vague, it was difficult to apply, it did “not adequately warn” lawyers what out-of-court speech was permitted and what was barred, and the law was rarely enforced.^{xviii} Nevertheless, the Canon still unequivocally conveyed the message that lawyers should not be disseminating litigation-related information to the press and the text of the statute professes a concern that such activity should be prohibited because it could impact the fairness of a trial.

B. Road to the Modern Rules

After its 1908 enactment, Canon 20 controlled the extrajudicial speech of attorneys in the United States for nearly sixty consecutive years.^{xix} Then, in the 1960s, two significant events would

reinvigorate legislative and judicial interest in the area of regulating trial publicity and attorney speech.^{xx} The first event was the 1963 assassination of President John F. Kennedy by Lee Harvey Oswald and Oswald's subsequent assassination by Jack Ruby.^{xxi} The second event was the Supreme Court's 1966 reversal of a murder conviction in *Sheppard v Maxwell*.^{xxii}

1. The Warren Report

President John F. Kennedy was assassinated in Dallas, Texas on November 22, 1963. Two days later, his alleged attacker, Oswald, was gunned down while being transported by police to the county jail. Within a week of both Kennedy's and Oswald's deaths, the new president, Lyndon Baines Johnson, announced the assembly of the President's Commission on the Assassination of President Kennedy, also known as the Warren Commission, which was tasked with investigating Kennedy's assassination.^{xxiii} This investigation ultimately produced the Warren Report, which criticized the unrestricted flow of information disseminated by the press about the alleged assassin, Oswald.^{xxiv}

The Warren Report clearly evinced a concern that had Oswald lived, he would not have been able to receive a fair trial due to the extensive coverage by the news media. The Report also condemned the Dallas Police Department's policy of keeping the media fully informed about the progress of the investigation, flatly stating, "A fundamental objection to the news policy pursued by the Dallas police...is the extent to which it endangered Oswald's constitutional right to a trial by an impartial jury."^{xxv} The Report continues, "Because of the nature of the crime, the widespread attention which it necessarily received, and the intense public feelings which it aroused, it would have been a most difficult task to select an unprejudiced jury, either in Dallas or elsewhere."^{xxvi} The Report also stated, "The disclosure of evidence encouraged the public, from which a jury would ultimately be impaneled, to prejudge the very questions that would be raised at trial."^{xxvii}

Furthermore, the Report proclaimed that both the police and the news media were partly responsible for Oswald's death.^{xxviii}

Ultimately, the Warren Report recommended that appropriate action should be taken to establish ethical standards of conduct for the news media, and that the creation of such standards was the responsibility of the press, State and local governments, the bar, and the public.^{xxix} In other words, the Warren Commission advised that a collaborative effort amongst lawyers, government officials, the press, and the public was necessary in order to establish much-needed ethical standards regulating the conduct of the media so as to prevent interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.^{xxx}

While the Warren Report's condemnation regarding the dissemination of prejudicial information was largely directed toward the policies and actions of both the press and the Dallas police, and not toward specific acts of any attorneys involved, its publication and the above-cited recommendation compelled the subsequent creation of "the Advisory Committee on Fair Trial and Free Press," also known as the Reardon Committee.^{xxxi} The Reardon Committee, which included a group of prominent lawyers and was chaired by a Massachusetts State Supreme Court Justice, Paul Reardon, was tasked with examining the ethical issues raised in the Warren Report, "with special emphasis on the role of defense lawyers, prosecutors, and law enforcement officials."^{xxxii} The Reardon Committee would eventually author the ABA Standards Relating to Fair Trial and Free Press for the ABA Project on Minimum Standards for Criminal Justice. Yet, while this task was still being undertaken, the second significant event of the 1960s that would further compel the legislature and judiciary to more closely consider regulations regarding trial publicity and attorney speech occurred. That event was the United States Supreme Court's 1966 reversal of the murder conviction of Dr. Samuel Sheppard.^{xxxiii}

2. Sheppard v. Maxwell

Dr. Sheppard was tried and convicted of the 1954 murder of his pregnant wife, Marilyn. Almost immediately after the murder, Sheppard became local law enforcement's primary suspect.^{xxxiv} The press gravitated to the story nearly just as quickly and soon after began publishing sensational stories regarding the progression of the investigation and openly speculating on the suspect's guilt or innocence.

Just three days after the murder, a newspaper reported on the sharp criticisms made by the Assistant County Attorney, who would later be the chief prosecutor against Sheppard at his trial, that were aimed at Sheppard's family for their refusal to allow the immediate questioning of Sheppard.^{xxxv} Thereafter, as noted in the Supreme Court's opinion, "headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials."^{xxxvi} Several stories criticized Sheppard's refusal to take a lie detector test. When Sheppard refused to allow authorities to inject him with "truth serum," more articles were printed publicizing this refusal.^{xxxvii} According to the Court, "Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities."^{xxxviii} For example, a detective working on the case disclosed to a newspaper that scientific tests conducted at Sheppard's home would ultimately cast doubt on Sheppard's account of what happened on the night of the murder. Yet, no such evidence was produced at trial.^{xxxix}

Papers soon began running headlines openly questioning why Sheppard had not been arrested. Stories were published accusing Sheppard of carrying a gun, of having numerous mistresses, and of skirting arrest because of his prestige. When Sheppard was ultimately arrested, he "was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers

and reporters were awaiting his arrival. He was immediately arraigned—having been denied a temporary delay to secure the presence of counsel—and bound over to the grand jury.”^{xl}

Thereafter, the publicity surrounding the arrest, his indictment, and his eventual trial grew tremendously. Upon the Supreme Court’s review of Sheppard’s habeas corpus petition, it noted that in the six months spanning from the murder until Sheppard’s December 1954 conviction, three Cleveland newspapers had written so many stories about the case that the articles filled five volumes.^{xli} Moreover, right in the middle of this sixth-month period, 75 veniremen were called as prospective jurors. Their names and addresses were promptly published by all three Cleveland newspapers and, as a consequence, anonymous letters and telephone calls “regarding the impending prosecution were received by all of the prospective jurors.”^{xlii}

At the trial, the courtroom and courthouse were bombarded with members of the press. Local and out-of-town reporters from newspapers, magazines, television, and radio occupied a press table set up in the courtroom specifically for their presence at the “event.” More reporters planted themselves on the courtroom’s benches throughout the course of the trial. Members of the press used “all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial.”^{xliii} Private telephone lines and telegraphic equipment were installed in the courthouse for the convenience of the reporters. One radio station was allowed to set up broadcasting facilities in a room right next door to the jury room. Outside the courthouse, television and newsreel cameras were occasionally set up in order to record the comings and goings of the trial’s participants, including the jury and the judge. In this atmosphere, jurors were frequently exposed to the media. Moreover, eleven of the twelve jurors on the trial testified during voir dire that they had either read about the case in a Cleveland newspaper or had heard some other type of news broadcast about it.^{xliv}

The Supreme Court's recitation of the events and atmosphere surrounding the trial, only a portion of which is summarized above, palpably conveys a concern that the due process rights of the defendant had been infringed by the extensive coverage of the case both before and during the trial. However, the Court also noted that the news media has traditionally served an important function in the effective administration of justice. Specifically, the Court stated, "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."^{xlv} The Court further stated that it has traditionally "been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for what transpires in the court room is public property."^{xlvi} Yet, the Court also declared "Due process requires that the accused receive a trial by an impartial jury free from outside influences," thus indicating that a line is crossed when the jury's verdict is influenced by outside sources rather than the evidence received in open court.^{xlvii} Moreover, the way the Court framed the ultimate issue in the case confirms that the trial judge is largely responsible for taking appropriate measures to ensure that out-of-court statements do not influence the in-court verdict.

The issue in *Sheppard*, as framed by the Supreme Court, was "whether [the defendant] was deprived of a fair trial...because of the trial judge's failure to protect [him] sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution."^{xlviii} The Court answered this question "yes," holding that the failure of a state trial judge in a murder prosecution to protect the defendant from inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom deprived the defendant of a fair trial consistent with due process.^{xlix} The Court then recited the following test to be applied when a trial judge is confronted with a defendant whose due process rights have been potentially deprived because of

extensive trial publicity: “where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.”¹ This became known as the “reasonable likelihood” test.

While the bulk of the Supreme Court’s recriminations leading to the reversal in *Sheppard* were directed squarely at the trial judge for failing to exert control in his courtroom,^{li} the Court concluded its opinion by declaring:

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.^{lii}

The Court was thus clearly concerned with the pervasiveness of media coverage and the effects it could have on the fairness of a trial. It also determined that rules and regulations must be enacted and enforced in order to prevent such effects. It further indicated that such rules and regulations must be adhered to by both prosecutors and defense attorneys whose breach thereof should result in some kind of censure. Such insights have compelled several scholars to claim that the above-quoted dicta “became the call to arms for various bar committees that sought to establish trial publicity rules that would not only restrict but also sanction lawyers' extrajudicial speech.”^{liiii}

Recall that this opinion came on the heels of the publication of the Warren Report which concluded, “The burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne...by State and local governments, by the bar,

and ultimately by the public.”^{liv} As noted above, this conclusion led to the creation of the Reardon Committee, which sought to promulgate the ABA Standards Relating to Fair Trial And Free Press for the ABA Project on Minimum Standards for Criminal Justice.^{lv} While the Reardon Committee was undertaking the task of creating a rule to establish the ethical standards regulating attorney speech, *Sheppard* was decided by the Supreme Court.^{lvi} As such, the Reardon Committee relied heavily on *Sheppard* when creating its standard for restricting lawyers' extrajudicial speech.^{lvii} Despite the fact that the Supreme Court in *Sheppard* employed the “reasonable likelihood” test only to denote when judges should take preventive measures to ensure the fairness of trials, the Reardon Committee invoked this standard to control *lawyers'* extrajudicial comments.^{lviii} Some commentators have suggested that the reason for extending the “reasonable likelihood” test to encompass the conduct of lawyers was twofold. First, the members of the Reardon Committee believed that jurors previously exposed to extensive pre-trial publicity could not cure the inherent subconscious biases caused by such publicity.^{lix} Second, the Committee apparently presumed that voir dire was not an effective way to prevent potential jurors with conscious or subconscious biases from ending up on the jury.^{lx} As such, the Committee concluded that controlling attorney’s speech was an effective way to protect fair trial rights from the potential prejudicial effects of pretrial publicity.^{lxi}

It is also appropriate to point out that the conclusions in the Warren Report as well as the concerns discussed by the Court in *Sheppard* were mainly products of alleged unethical behavior perpetrated by the press and law enforcement. However, both the Commission and the Court suggested that efforts to quell the prejudicial effects of extensive publicity must essentially include the participation of attorneys. Further, in *Sheppard* the Court indicated that lawyers must be held responsible for preventing the dissemination of prejudicial information to outside sources. The

Court's decision to regulate lawyers in this regard is certainly a rational solution towards preventing the professed evils at their inception since lawyers are an obvious source for potentially prejudicial information. Yet, it also indicates that the rights afforded by the First Amendment are not as protective of attorneys as they are of others, such as the press. In other words, the Court has more authority to restrict and punish lawyers than it does the press, so lawyers' free speech rights must be restrained. As Judge Cardozo proclaimed long ago, a quote reiterated by the Supreme Court in the landmark case *Gentile v State Bar of Nevada*, "membership in the bar is a privilege burdened with conditions."^{lxii} The debate regarding the free speech rights of attorneys in the realm of impermissible out-of-court speech was just beginning.

C. Modern Rules

1. DR 7-107

A result of this confluence of events was the promulgation in 1968 of the first ABA Standards for Criminal Justice Relating to Fair Trial and Free Press, which incorporated the Reardon Committee's "reasonable likelihood" standard.^{lxiii} Standard 1-1 read:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.^{lxiv}

Thereafter, the ABA established Disciplinary Rule 7-107 ("DR 7-107") of the 1969 ABA Model Code of Professional Responsibility, which was significantly influenced by the Standards for Criminal Justice Relating to Fair Trial and Free Press. This strong influence is evidenced by the fact that DR 7-107 incorporated a "reasonable likelihood" standard directed at attorney speech.^{lxv}

As discussed above, the 1908 Canons of Professional Ethics were largely aspirational and did not subject lawyers to any meaningful type of disciplinary action.^{lxvi} DR 7-107, on the other

hand, was included in the disciplinary rules, which put lawyers on notice that any violation thereof could potentially result in meaningful sanction through the disciplinary process.^{lxvii} Moreover, DR 7-107 was much more detailed, citing explicit examples of allowable and prohibited speech. Permissible speech included “information from the public record, news that an investigation was in progress, general descriptions of the investigation and the offense, requests for information regarding related matters, descriptions of recently seized physical evidence, and warnings about any dangers facing the public.”^{lxviii} With regard to impermissible speech, barred speech included “remarks pertaining to the accused's character, reputation, or prior criminal record; the possibility of a plea arrangement; the accused's comments or lack thereof; whether any tests had been performed and their results; information regarding prospective witnesses and their testimony, and opinions regarding the suspect's guilt or innocence, evidence, or the merits of the case.”^{lxix} The reasonable likelihood of prejudice standard was incorporated into the rule as the bar for distinguishing between non-specified permitted and prohibited attorney speech.^{lxx} The rule was subsequently adopted in every state. However, the rule predictably quickly came into conflict with the Supreme Court’s standards governing free speech under the First Amendment.

2. Attacks on the Constitutionality of DR 7-107

When DR 7-107 was enacted, the controlling standard regarding constitutionally protected First Amendment free speech and press rights was the “clear and present danger test” announced in *Schenck v United States*.^{lxxi} The issue in *Schenck* was whether the Espionage Act, which prohibited certain forms of otherwise protected speech during wartime, violated the First Amendment. The Court held that speech that would ordinarily be protected by the First Amendment may nevertheless be prohibited when it is used in such circumstances and is of such a nature as to create a clear and present danger of substantive evils that Congress has a right to

prevent.^{lxxii} Thereafter, this standard was further manipulated and clarified in subsequent decisions resulting in a still liberal speech-protecting rule as the Court explained that “the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”^{lxxiii} Further, the clear and present danger test came to require that in each case the court must ask “whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”^{lxxiv}

Obviously, a standard only prohibiting speech that could create a “clear and present danger of substantive evils” is much more permissive than one that bars the dissemination of information that has a “reasonable likelihood” of interfering with a fair trial or otherwise prejudice the due administration of justice. As a result, DR 7-107 was quickly attacked with charges that it was unconstitutional and many courts found that its prohibitions were overbroad.^{lxxv} Moreover, attacks regarding the constitutionality of the Rule were being initiated by attorneys. For example, the plaintiffs in *Chicago Council of Lawyers v Bauer* were an association of attorneys who argued that “lawyers are entitled to full First Amendment rights and that the ‘reasonable likelihood of interference with a fair trial’ standard employed by [DR 7-107] is unconstitutional.”^{lxxvi} The Seventh Circuit agreed that the “reasonable likelihood” standard was overbroad and then announced that a narrower and more restrictive standard, codified under prior precedent,^{lxxvii} should apply. According to the Court, “Only those comments that pose a ‘serious and imminent threat’ of interference with the fair administration of justice can be constitutionally proscribed.”^{lxxviii} Since DR 7-107 did not take into account the “serious imminent threat” standard, it was deemed constitutionally infirm and was struck down by the Court.^{lxxix} Thus, the Seventh Circuit still promoted the more liberal standard regarding permissible speech.

The conflict between the right to a fair trial and the rights of free speech and freedom of the press was again at issue in 1976, when the Supreme Court decided *Nebraska Press Association v. Stuart*. The issue in the case revolved around the trial judge's decision to enter an order restraining the petitioners, who were members of the press, from publishing accounts of confessions made by the defendant and from publishing facts that strongly implicated the defendant in the highly publicized murder of six people. The trial judge had implemented the gag order due to his legitimate concerns that the pre-trial publicity could interfere with the accused's right to a fair trial.^{lxxx} The Supreme Court determined that the implementation of the gag order was an unconstitutional violation of the First Amendment.^{lxxxi} In reaching this decision, the Court employed the "clear and present danger test," specifically focusing on "(a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."^{lxxxii} After consideration of these factors, the Court stressed that it must next determine whether the record supports implementation of the gag order, a measure which the Court deemed "one of the most extraordinary remedies known to our jurisprudence."^{lxxxiii} The Court determined in this case the record did not support the restriction.

3. Model Rule of Professional Conduct 3.6

Following these Court decisions, which collectively promoted free speech and free press rights, including the free speech rights of attorneys, the ABA initiated a study on fair trial and free press issues and eventually opted to revise its Free Trial and Free Press standards in 1978.^{lxxxiv} The amendments ultimately permitted "more attorney speech by raising the bar and modifying its 'reasonable likelihood' test to a more stringent 'clear and present danger' test to govern restrictions of extrajudicial commentary."^{lxxxv} Around this same time, the Kutak Commission was appointed

by the ABA to redraft the 1969 Code of Professional Responsibility. The result of these efforts was the creation of the Model Rules of Professional Conduct, which were adopted by the ABA House of Delegates in 1983.^{lxxxvi} In formulating Model Rule of Professional Conduct 3.6, which regulated trial publicity, the Commission was influenced by the 1978 ABA fair trial and free press standards.^{lxxxvii} However, rather than incorporating an explicit “clear and present danger” test, the new rule adopted a perceived middle ground between the two standards, authorizing sanctions for attorney speech that produced a “substantial likelihood of materially prejudicing an adjudicative proceeding.”^{lxxxviii}

The 1983 provisions of Rule 3.6 also included a list of statements that, when discussed within the context of civil matters, criminal proceedings, and other actions that could result in imprisonment, were presumed to breach the standard.^{lxxxix} The matters deemed prohibited included statements made about a party’s, a suspect’s, or a witness’s reputation, credibility, character, or criminal record. These prohibited statements were similar to those impermissible examples of speech listed in DR 7-107.^{xc} Also like DR 7-107, Rule 3.6 included a list of presumed permissible speech that closely mirrored the safe harbor provisions of the predecessor rule, DR 7-107.^{xcii} However, Model Rule 3.6 parted ways with DR 7-107 in that it specifically allowed “a lawyer involved in the litigation to ‘state without elaboration’ the ‘general nature of the claim or defense’”^{xciii} and it presumptively barred the dissemination of “information that [a] lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.”^{xciiii} Furthermore, the 1983 version of Rule 3.6 controlled the speech of all attorneys, not just those connected to a particular case.^{xcv}

Another significant innovation incorporated into the Model Rules of Professional Conduct of 1983 was a trial publicity rule that specifically regulated the conduct of prosecutors in criminal cases. Under the then new Rule 3.8(e) (the predecessor to current Rule 3.8(f)), a prosecutor was required to "exercise reasonable care to prevent investigators, law-enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."^{xv}

As will be further discussed below, despite being labelled the “ministers of justice,” many prosecutors, and by extension, their staff, are incentivized to obtain convictions. Likewise, many law enforcement personnel want their arrests to result in legal punishment for the party charged with the offense. Moreover, the prosecutor’s office often has the bulk of the evidence tending to establish a defendant’s guilt or innocence. Also, prosecutors’ hold tremendous powers, such as their authority to determine when to file criminal charges, when to offer a plea, when to prosecute, and when to hold a press conference. These factors, combined with the severe sanctions that may be imposed by our criminal justice system, suggest that the enactment of Rule 3.8(e) signifies a growing realization among the ABA that prosecutors needed to be held to a higher standard and that special care needed to be applied in the criminal context.^{xvi}

The preceding discussion regarding the development of trial publicity rules suggests that Model Rule 3.6 was enacted in response to the numerous cases of the 1960s and 1970s that struggled to develop a constitutionally permissible standard for effectively controlling extrajudicial speech. The enactment of these rules did not necessarily end that debate, but rather shifted the focus of it toward determining the meaning of the new “substantial likelihood of material prejudice standard”^{xvii} and whether the mandates of the rule toed a constitutionally

permissible line with regard to sufficiently protecting attorneys' rights under the First Amendment.^{xcviii} These were the issues faced by the Supreme Court when it decided the 1991 case *Gentile v State Bar of Nevada*.

4. *Gentile v State Bar of Nevada*

Gentile v State Bar of Nevada represents the first case wherein the Supreme Court directly considered the First Amendment rights of lawyers.^{xcix} Dominic Gentile, the petitioner, was a Nevada criminal defense attorney who took on the representation of a man named Grady Sanders. Sanders had been charged with stealing drugs and travelers checks that were stashed in the vault of a company he owned. The drugs and checks were part of an undercover police operation.^c Gentile recognized that the investigation and arrest of his client was generating a great deal of publicity, with numerous newspapers and television outlets reporting on the matter. He also presumed that the police and prosecution were disseminating information that was prejudicial to his client to the press. Shortly after the indictment, Gentile scheduled a press conference. However, prior to the conference, he and his colleagues researched the extent of a lawyer's obligations under Nevada Supreme Court Rule 177, which was almost identical to Model Rule 3.6.^{ci} Gentile ultimately determined that he would be within the permissible conduct of the Rule if he held his press conference a good six months before the scheduled trial, recognizing that jurors would not be empaneled for nearly six months after he made the public statements. He further determined that case law on the subject of prejudice resulting from juror exposure was on his side as reported cases had found no prejudice in similar instances with greater news coverage and where public statements by attorneys had been made much closer to the trial. As such, he "concluded that his proposed statement was not substantially likely to result in material prejudice."^{cii}

Gentile then held a press conference where he recited a prepared statement and responded to questions from the press. The statement generally announced that the evidence demonstrated his client's innocence, that the likely perpetrator of the crime was a named police detective, and that the other victims were mostly criminals whose statements incriminating his client were made in response to police pressure and were thus not credible.^{ciii} The criminal prosecution of Sanders convened six months later and he was acquitted on all charges against him. Thereafter, the State Bar of Nevada filed a complaint against Gentile for allegedly violating Nevada Supreme Court Rule 177. The State Disciplinary Board recommended that Gentile be privately reprimanded. Upon Gentile's appeal of this recommendation, the Nevada Supreme Court affirmed the Board's decision. The Supreme Court granted certiorari and ultimately delivered a fractured opinion consisting of two separate 5-4 majority votes.

When the case reached the Supreme Court, Gentile argued that under the First Amendment the State of Nevada was required to demonstrate a "clear and present danger" of "actual prejudice or an imminent threat" before a lawyer could be reprimanded for making the type of public statements that he had made.^{civ} In a portion of the majority decision penned by Justice Rehnquist, the Court explained its disagreement with this argument. The Court employed a balancing-of-interests test, weighing the State's interests in regulating attorney speech against an attorney's interest in being able to engage in such speech. The Court ultimately decided that the "reasonable likelihood" test of Rule 177 was constitutional because Nevada had a legitimate state interest in protecting the integrity and fairness of the State's judicial system, and the law placed both narrow and necessary limitations on attorney speech.^{cv} These limitations on attorney speech were deemed necessary to prevent the recitation of comments that would likely influence the outcome of a trial or prejudice the jury venire. Further, as claimed by the Court, it was uncertain whether alternative

safeguards such as voir dire and change of venue could to undo the effects of statements prohibited under the Rule after such statements are made.^{cvii} Additionally, voir dire and change of venue can be costly. As such, 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.”^{cviii} This majority also declared that the law was narrowly tailored because it only placed limitations on attorney speech that was substantially likely to have a materially prejudicial effect.

In the portion of the 5-4 majority opinion scripted by Justice Kennedy, the Court, after confirming that the "substantial likelihood of material prejudice" test was constitutional, held that the rule, as applied in this case, was void for vagueness.^{cviii} The Court explained that Rule 177(3), which provided that a lawyer “may state without elaboration...the general nature of the...defense,” misled Gentile into believing that holding the press conference that he did was within the permissible scope of the Rule.^{cxix} He was misled because the Rule provided that statements under this section were permissible notwithstanding the provisions of subsections 1 and 2(a-f).^{cx} As such, according to Kennedy, this section necessarily implied that a lawyer who publicly describes the general nature of the defense without elaboration, permissible under Rule 177(3), need not worry that his conduct was sanctionable even if the disclosure included comments that were deemed impermissible under the other sections of the rule and even if the lawyer "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."^{cxii} The Court’s criticism, therefore, was that the rule did not provide attorneys with adequate notice regarding the contours of permissible speech.

The Supreme Court’s fragmented holding in *Gentile* has compelled legal commentators to proclaim that there is “a lack of consensus among the Court over the appropriate roles that lawyers should play in advocating on behalf of their clients and the different levels of protection that

lawyers' extrajudicial speech should thereby be entitled.”^{cxii} The two majority opinions collectively upheld the constitutionality of the “substantial likelihood of material prejudice” test for determining the permissible scope of extrajudicial attorney speech, but the language of the safe harbor provisions rendered the Rule unconstitutionality vague as applied in this context.^{cxiii} Aside from this clarity, there is a lot of confusion and disagreement within the Court’s opinion. For example, Chief Justice Rehnquist claimed “The basic premise of our legal system is that lawsuits should be tried in court, not in the media.”^{cxiv} He also asserted that attorneys are prominent and necessary players within the criminal justice system and, therefore, “speech of lawyers representing clients in pending cases may be regulated under a less demanding standard” than that established for others, such as the press.^{cxv} As such, he unequivocally confirmed that lawyer’s speech is more restricted under the First Amendment.

Meanwhile, Kennedy seemed to disagree on each of these points. Kennedy proclaimed “An attorney's duties do not begin inside the courtroom door...[A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment ...including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.”^{cxvi} This statement carried the approval of only four of the Justices, but nevertheless indicates that there were four Supreme Court justices at that time who were willing to afford attorneys with the right, if not the responsibility, to advocate for their clients in the media.^{cxvii}

Kennedy also disagreed with the scope afforded by the Rehnquist majority within which attorney speech could be constitutionally restricted. Kennedy asserted 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.”^{cxviii} While he did concede that attorney’s

rights under the First Amendment may be permissibly more restrictive in certain limited circumstances, he argued that the speech at issue in this case did not fall within any of the limited circumstances and, therefore, the Court's use of the balancing test in this case was inappropriate.^{cxi} As such, Kennedy expressed a willingness to be much more flexible and far less restrictive when determining the permissible contours of extrajudicial attorney speech.^{cxix}

5. Response to *Gentile*

The 1983 version of Model Rule 3.6 can be partially viewed as a response to the determination that the "reasonable likelihood" test proffered under DR 7-107 was unconstitutionally broad, as the Model Rule attempted to bring the test closer to the "clear and present danger" test.^{cxix} The *Gentile* decision confirmed that the "substantial likelihood of material prejudice" test under Model Rule 3.6 was constitutional but was too vague as applied because the safe harbor provisions rendered it misleading and overbroad.

In 1994, the ABA responded to *Gentile* by making several amendments to Model Rule 3.6, but the Rule retained the "substantial likelihood of materially prejudicing an adjudicative proceeding" test. One of the 1994 amendments was the removing from the Rule the words that permitted an attorney to state the "general nature of" the defense "without elaboration."^{cxix} The ABA also added paragraph (c),^{cxixiii} which allowed lawyers to respond to prejudicial publicity that was not initiated by the lawyer or his client.^{cxixiv} Also, while the Nevada rule at issue in *Gentile* was construed by the Court as only applying to lawyer's connected to the litigation, that is not what the 1983 version of Model Rule 3.6 said.^{cxixv} However, the ABA subsequently amended the rule to cover only lawyers who are "participating or [have] participated in the investigation or litigation of the matter."^{cxixvi} As such, and as can be seen in any number of professional and

sensationalized commentaries of ongoing legal matters, lawyers not connected with a case are afforded the same free speech rights as everyone else.^{cxxvii}

The ABA, as part of the 1994 amendments, also relocated the list of statements that were presumed to prejudice the proceeding. This list was removed from the text of the rule itself and placed into the Comments section.^{cxxviii} Comment 6 of the rule was added, which stated that the nature of the proceeding was a factor to be considered in determining prejudice.^{cxxix} The Comment declares that “Criminal jury trials will be most sensitive to extrajudicial speech.”^{cxxx} Finally, subsection (d) was added to Rule 3.6, which extended the prohibitions of paragraph (a) to cover an attorney’s colleagues in his or her firm or government agency.^{cxxxi}

In concert with amending Rule 3.6, the ABA also amended Rule 3.8 in 1994 by adding subsection (g) to the rule (currently subsection (f)).^{cxxxii} Under the new provision, prosecutors in a criminal case are now generally permitted to make statements that are necessary to inform the public of the nature and extent of the prosecutor’s action as well as those statements that serve a legitimate law enforcement purpose. However, prosecutors must “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”^{cxxxiii} The Committee noted that prosecutors should use special care to avoid such publicity due to their special power and visibility.^{cxxxiv} In 2002, the ABA again amended Rules 3.6 and 3.8, but the amendments were intended to be mainly technical and did not change the substantive requirements of the rules.^{cxxxv}

III. THE SHORTCOMINGS OF THE CURRENT RULES REGULATING ATTORNEY SPEECH

A. Criticism of Gentile and the Subsequent Amendments to the Model Rules

A major criticism from attorneys regarding the pieced-together mandates established in *Gentile* is that the decision left lawyers with “little or no practical guidance concerning the permissible

range of their speech outside of the courtroom.”^{cxv} Kennedy indicated that a more lenient standard was preferable while Rehnquist indicated that a much stricter standard was necessary. Even after the 1994 amendments to Rule 3.6, many of these critics continued to argue that lawyers were still having a very difficult time in determining when they may talk to the press and what they are permitted to say under the rules without running the risk of being sanctioned for statements that affect the impartiality of trials.^{cxvii}

The reason for this uncertainty, as proffered by one prominent legal ethics professor, Stephen Gillers, is twofold. First, lawyers may be uncertain as to what the applicable test is in a given case.^{cxviii} Rule 3.6 bars lawyers from making certain statements that have a substantial likelihood of materially prejudicing an adjudicative proceeding. The ABA has consistently rejected the “clear and present danger test.”^{cxix} Justice Kennedy indicated that the substantial likelihood test applies to statements that create a danger of imminent and substantial harm.^{cxl} The Third Circuit requires courts under its jurisdiction to use the ABA standard.^{cxli} Meanwhile, a few states afford attorneys more protection than Rule 3.6 does.^{cxlii}

Second, whatever test controls in a given jurisdiction, a lawyer is always at risk when he or she makes a public statement because they must try to predict in advance “the ‘likelihood’ of the effect of that statement on any subsequent trial.”^{cxliii} Gillers questions how an attorney is supposed to know in advance if a given statement had such a likelihood? If it did, but the case never goes to trial, how can a pre-trial statement prejudice the trial?^{cxliv} If a lawyer is censured for breaching the rule, how can the disciplinary committee retrospectively assess whether the statement violated the test at the time it was made?^{cxlv} To these questions, Gillers asserts that “the answer...must be that the violation occurs, or not, at the moment the statement is made, regardless of what happens thereafter.”^{cxlvi} Under this reasoning, a lawyer is at risk of breaching the rule even

if no juror ever hears any of the lawyer's out-of-court statements and even if the case never goes to trial.^{cxlvii}

Given the above, a risk-adverse lawyer might think long and hard before making any public statement at all. The statement could be deemed to run afoul of the rule even if no actual prejudice results. Moreover, unpredictable events could subsequently render a statement prejudicial in retrospect. In that situation, the disciplinary committee will have to attempt to impartially determine whether the lawyer knew or reasonably should have known at the time of making the statement that said statement had a substantial likelihood of materially prejudicing an adjudicative proceeding. Often, it will be difficult, if not impossible, to completely erase any conscious or subconscious biases that inherently manifest in the minds of the disciplinary decisionmakers in the interim period. However, while the uncertainty surrounding the Rule's permissible contours could theoretically compel attorneys to take more caution with regard to what they publicly state, the effect of the rule has actually produced the opposite result.

B. The Broad Latitude Afforded to Attorney Speech Under the Model Rules

The current ABA standard governing attorney speech is controlled by Model Rule of Professional Conduct 3.6, with prosecutors being held to the additional restraints imposed by Rule 3.8(f). Rule 3.6(a) states: "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."^{cxlviii} The Supreme Court in *Gentile* confirmed that this standard is constitutional. Still, however, the standard remains vague and its permissible contours are difficult to define, thus prompting critics, such as legal

ethics professor Lonnie T. Brown Jr., to complain that violators of the Rule will only be disciplined for making statements that are particularly outlandish and central to a pending case.^{cxlix} To support these complaints, Brown notes that establishing “material prejudice” has traditionally been a high bar to meet.^{cl} For example, in *Nebraska Press Ass’n v Stuart* the Supreme Court stated that “pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.”^{cli} As such, it is very difficult to predict in advance if a particular statement is “substantially likely” to “materially prejudice” an adjudicative proceeding^{clii} but precedent has indicated that attorneys have a lot of leeway. Further, it is also difficult for a disciplinary board to prove after the fact that an attorney had the requisite mens rea when making the statement to warrant his or her subsequent punishment.^{cliii}

In addition to the liberal scope of attorney speech resulting from the difficult-to-establish “material prejudice” bar, the permissive scope of such speech is extended even further under the safe harbor provisions afforded by the Rule. Rule 3.6(b) allows an attorney to state information contained in the public record,^{cliv} which permits attorneys to disseminate a lot of information to the press.^{clv} Rule 3.6(c), often referred to as the “right of reply” section, allows lawyers to make statements that a reasonable attorney “would believe [are] required to protect a client from the substantial undue prejudicial effect of recent publicity” initiated by others.^{clvi} This subsection of the Rule limits the lawyer’s right to respond by only permitting dissemination of information that is necessary to mitigate the recent prejudicial publicity. However, as the Comments to the rule explain, as long as a lawyer’s public response conforms to the text of the Rule, the lawyer will not be disciplined, even if his or her statements produce a “substantial likelihood of materially prejudicing” the judicial proceeding, which is otherwise sanctionable under 3.6(a).^{clvii}

Similarly, the text of Rule 3.6 confirms that the safe harbor provisions are permissible notwithstanding the requirements of subsection (a). Therefore, attorneys may be granted under the subsections significant additional leeway to make extrajudicial statements beyond the scope afforded under the already vague and difficult to define subsection 3.6(a).^{clviii} Moreover, as noted above, it will often be very difficult for a disciplinary board to prove, under the requirements of the Rule, that an attorney has sufficiently violated the Rule so as to warrant discipline.

We next turn to Rule 3.8(f), which supplements the restrictions imposed under Rule 3.6^{clix} and applies only to communications made by prosecutors. Rule 3.8(f) prohibits prosecutors from making extrajudicial statements “that have a substantial likelihood of heightening public condemnation of the accused.”^{clx} Again, legal commentators have attacked the vagueness of this rule for there is little instruction as to what actually qualifies as “public condemnation” as well as what constitutes the punishable “heightening” of it.^{clxi} What is the bar and how is it measured? For example, when O.J. Simpson was being tried for the murder of his wife, there were obviously many Americans that condemned Simpson. At the height of this condemnation, was there anything that the prosecution could have publicly stated that would have heightened that condemnation further? If there was, how could it be pinpointed, measured, and quantified, let-alone justifiably punished under the Rule?

What makes a disciplinary board’s task much more difficult when determining whether to sanction a prosecutor for allegedly breaching the requirements of Rules 3.6 and 3.8(f) are the exceptions provided in Rule 3.8(f). Those exceptions allow a prosecutor (1) to make statements that are necessary to inform the public of the nature and extent of the prosecutor’s action, and (2) to make statements that serve a legitimate law enforcement purpose.^{clxii} These exceptions effectively give a prosecutor a large additional window through which they may permissibly

engage in extrajudicial speech.^{clxiii} For example, when a Michigan District Attorney indicted the former mayor of Detroit on charges of perjury and obstruction of justice that stemmed from his alleged cover-up of an affair with a former co-worker, she publicly stated, “Our investigation has clearly shown that public dollars were used, people’s lives were ruined, the justice system was severely mocked and the public trust trampled on...This is as far from being a private matter as one can get.”^{clxiv} As noted by Brown, these comments could legitimately “be explained as necessary to enlighten the public as to the justification for prosecuting him for what some characterized as a private affair.”^{clxv} As such, they are likely permissible under the Rule.

The exception allowing statements serving a legitimate law enforcement purpose also greatly extends the permissible scope of the Rule in that it seemingly allows the announcement of even the most inflammatory statements as long as the legitimate law enforcement purpose is promoted.^{clxvi} It is also necessary to point out that while Rule 3.8(f) is supplemented by Rule 3.6, there appears to be no indication that prosecutors are still not entitled to protection under the safe harbor provisions of Rule 3.6.^{clxvii}

Given the above, the current standard controlling attorneys’ out-of-court speech provides great latitude for both defense attorneys and prosecutors to engage in such speech. There are clearly many exceptions to speech deemed prohibited under the Rules and the Rules provide insufficient guidance for determining their full scope. The vagueness of the Rules also allows plenty of room for alleged violators to rationalize their actions and justify their statements,^{clxviii} which likely lessens the risk of actually being disciplined in the future for a previous breach.

IV. THE DEBATE SURROUNDING THE APPROPRIATE STANDARD FOR REGULATING ATTORNEY SPEECH

A. Attorneys Connected to the Case

Legal commentators have long debated whether free speech rights should be more restrictive for attorneys than for others. One popular argument contends that attorney speech needs to be more restrictive because attorneys have intimate knowledge regarding the facts of a particular case and their opinions are deemed to be substantially more authoritative and persuasive than those of laypeople.^{clxix} This was a point touched upon by Chief Justice Rehnquist in his portion of the *Gentile* majority. Rehnquist asserted that lawyers are granted special access to a great deal of information through discussions with their clients as well as through the discovery process. Because of this unique access to such information, the Chief Justice determined that lawyers' extrajudicial statements pose a distinct threat to the fairness of a trial since their statements are likely to be deemed especially authoritative.^{clxx}

Justice Kennedy, however, questioned whether this was a valid concern. He indicated that because attorneys are well informed about the facts of a case, their publicly disseminated information may be relied upon by the press and may be valuable to the public.^{clxxi} He also countered that the alleged persuasiveness of an attorney's statements does not validate their suppression, stating that "[t]he First Amendment does not permit suppression of speech because of its power to command assent."^{clxxii} One could argue that many people throughout the United States flat out do not trust lawyers due to stereotypes characterizing attorneys as exceedingly deceitful, which might assist in undermining portions of both Rehnquist's and Kennedy's positions.

Another argument supporting more restrictive free speech rights for attorneys, also noted by Chief Justice Rehnquist in *Gentile*, is that courts in the United States have traditionally regulated the conduct of lawyers, exercising the authority to discipline and even disbar them for violating prescribed rules of conduct.^{clxxiii} This points to the rationale underlying the oft-quoted phrase

“[m]embership in the bar is a privilege burdened with conditions.”^{clxxiv} Similarly, some believe that attorneys, in exchange for their unique right to practice law and the powers that go with it, owe fiduciary duties to the judicial system.^{clxxv} As such, lawyers are essentially put on notice upon admission to the bar that they may be held to higher and more restrictive standards due to the unique powers and privileges afforded by their profession.

Critics of this view, however, have been quick to point out that the government generally does not “condition privileges and benefits upon the sacrifice of first amendment rights.”^{clxxvi} In the same vein, critics have proffered that “[t]here is no logical reason why the right to speak should be less respected for those who choose to practice law. The focus should be on the speech, not the speaker.”^{clxxvii}

One more argument supporting the more restrictive view is the contention that trials should be held in the courtroom and not in the media.^{clxxviii} This rationale was promoted by the Supreme Court in *Sheppard v Maxwell* where the Court opined that a defendant’s due process rights are infringed when a jury’s verdict is influenced by outside sources rather than the evidence presented in open court.^{clxxix} Similarly, the Supreme Court stated in *Bridges v California* that “legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”^{clxxx} The Supreme Court has thus concluded that it is inappropriate for attorneys to attempt to sway the court of public opinion in their client’s favor through use of the media.^{clxxxi}

At least one legal scholar has compiled a list of attacks against this last argument. First, behavior that the Court deems either desirable or inappropriate must still be interpreted within the constitutional confines of the rights afforded to all under the First Amendment.^{clxxxii} Second, the safe harbor provisions of Rule 3.6 recognize that attorneys may have valid reasons and motivations for speaking publicly. For example, as was the case in both *Sheppard* and *Gentile*, there may be

so much prejudicial information about a trial publicly circulating that an attorney needs to speak out in order to counter the prejudicial effects of that information. Likewise, if one side engages in conduct prohibited under the Rules, the other side may necessarily need to combat it.^{clxxxiii}

Third, the attorney or his or her client “may believe that the subject matter of the case is worthy of public debate.”^{clxxxiv} Or, perhaps a client wants to speak out publicly to clarify certain issues or set the public record straight, but is hesitant to do so out of fear of hurting his or her own case.^{clxxxv} In this instance, the attorney provides a cautious outlet to meet such objectives. Additionally, waiting until after a trial has concluded to comment publicly on damaging accusations may result in a client’s reputation being damaged beyond repair.^{clxxxvi} Others have noted that the pervasiveness of the modern media also compels lawyers to affirmatively speak to the media in order to stave off any possible bias. In today’s society, according to some, when an attorney publicly responds to a question with the historically acceptable phrase “no comment,” they have essentially encouraged the listener to draw whatever negative conclusion that could be discerned from the question. The response, or lack thereof, acts as an admission or concession against his or her client’s interests.^{clxxxvii} As such, attorneys could potentially hurt their client’s case if they fail to give the media what they want.

B. Attorneys Not Connected to a Case

There actually appears to be a growing number of legal commentators advocating for more restrictive regulations governing attorney speech. As one legal scholar notes, “the expanding prevalence of bold, extrajudicial proclamations by lawyers on such points as the inevitability of conviction or acquittal have the potential to irreparably skew the public’s perception of the profession and the justice system as a whole.”^{clxxxviii} Under current Rule 3.6, attorneys not connected to a case have free reign to say essentially whatever they want. Multiple media outlets

give these attorneys a platform and a paycheck to offer their opinions and predictions about pending trials and parties. Moreover, their commentary can be either professional or sensationalized. At times, the sensationalized commentary can resemble a headline from the National Inquirer. Such commentary, and such freedom to report it with seemingly no restrictions, can certainly foster public disdain for the legal system as a whole. For example, in 2010, a woman named Toni Medrano was charged with two counts of second-degree manslaughter for allegedly killing her newborn child after she accidentally fell asleep on the child while she was intoxicated.^{clxxxix} The arrest subsequently became a big topic on a nationally televised legal program hosted by former Atlanta prosecutor, Nancy Grace. During her show, Grace, with seemingly no inside knowledge of the facts surrounding the case, opined that the charges against Medrano were too lenient, despite the fact that Medrano faced up to ten years in jail. Grace then made a series of wild accusations, stating that this could not have been an accident and calling for Medrano to be charged with murder.^{cxc} She further declared to her national audience, “The baby is dead because of vodka mommy...I don’t care if she was driving a car, holding a pistol or holding a fifth of vodka. [It] doesn’t matter to me. The baby is dead at the hands of the mommy.”^{cxci} Meanwhile, a detective professed his sincere belief that Medrano had no intent to cause harm to her child, noting that she had a reputation for being a good, productive mother. In his opinion, the child’s death was likely an accident.^{cxcii} Medrano’s family subsequently confirmed that Medrano had seen the Grace segment and that “it broke her spirit in the worst way.”^{cxciiii} Less than a month after the segment aired, Medrano committed suicide by lighting herself on fire.

Six years prior to Medrano’s death, a woman named Melinda Duckett had agreed to appear on Grace’s television program. During the interview, Grace questioned Duckett about the disappearance of her two-year-old son. When Duckett refused to answer certain questions on the

advice of her attorney, Grace bombarded her with questions and accusations, the tone and subtext of which clearly implied that Grace thought Duckett was hiding something. Duckett committed suicide a few days later, before the pre-taped interview even aired.^{cxciiv}

The above is not intended to shed blame for Medrano's or Duckett's suicide on Grace. Nor is it even to imply that Grace breached any duty. It is only meant to highlight the fact that extrajudicial proclamations by attorneys, or in this case a former attorney, do have the potential to irreparably skew the public's perception of the legal profession and the justice system as a whole.^{cxciiv} If the public does presume, as several judges have traditionally suggested it does, that attorneys have some specialized knowledge or are exceptionally reliable or are extremely persuasive in forming the public's opinion, groundless and unwarranted attacks from legal "pundits" such as Grace pose the risk that the public will lose faith in the fairness and impartiality of the legal system. This fear is not accounted for in any way in the current version of the Model Rules.

Another problem is that if the general public does view people like Nancy Grace as being authoritative and legitimate representatives of the legal system, they likely have no incentive to question whether their actions or statements run afoul of the ethical standards that practicing attorneys connected to a case are held to. As noted in the examples above, Grace frequently makes damning and damaging accusations toward people without having the requisite knowledge, foresight, or caution to determine the basis for their truth. How could Grace possibly have any factual basis to claim that Medrano intentionally killed her newborn child? This type of reckless conduct casts the entire legal system in a poor light if non-legal professionals take this behavior as representative of the profession.

Furthermore, at least in the case of Nancy Grace, what most of her fans likely do not know, and likely will never become aware of absent their own independent research, is that she has been cited multiple times for unethical behavior while acting as a Fulton County prosecutor. Upon appeal of a 1990 triple-murder that Grace prosecuted, the Eleventh Circuit Court of Appeals agreed with the lower court’s description of Grace’s conduct as playing “fast and loose” with her ethical duties. Her unethical behavior in that case consisted of failing to disclose the existence of other suspects and for allowing a police officer to testify to information that she knew to be false.^{cxvii} In 1994, the Georgia State Supreme Court cited Grace for making an improper final argument. In 1997, the same Court found that Grace had again withheld evidence from the defense that it was entitled to have. She was also found to have made improper opening and closing statements in that case.^{cxviii} Despite these three separate instances of prosecutorial misconduct, she was hired by CNN to provide commentary on legal matters to the general public. CNN has since described her as “one of television’s most respected legal analysts.”^{cxviii} A spokeswoman for the company commented that “Nancy had a great deal of success as a prosecutor and has never been disciplined or reprimanded by the state bar.”^{cxix} While technically true, this statement is very misleading given her legal history. Moreover, the public—her fans—are largely left in the dark about information that may compel them to question the legitimacy of the content she divulges to them. The potential result is that the public blindly presumes that what she is saying is both right as well as representative of the type of behavior accepted among practicing attorneys while engaged in their practice. Collectively, these potential results have the potential to undermine the public’s faith in, and respect for, the legal system as a whole. These are compounded by the fact that Grace’s fame and wealth may compel other attorneys and/or former attorneys to engage in similar conduct.

V. THE SPECIAL NEED TO RESTRICT THE EXTRAJUDICIAL SPEECH OF PROSECUTORS

Prosecutors have a unique role in our criminal justice system. Comment 1 to Model Rule 3.8 states, “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...”^{cc} As a “minister of justice,” it can be said that a prosecutor does not have a typical client in any proceeding. The client is the state, or society, which includes the particular defendant that the prosecutor is attempting to convict in any given trial. That definition of the prosecutor’s “client” also includes victims of crimes allegedly perpetrated by whatever defendant the prosecutor is trying to convict as well as the victim’s family. While the prosecutor may, and often does, converse with victims and their family, they do not represent either party, nor can they be guided solely by their preferences.^{cci} Thus, the prosecutor’s lack of a specific client, combined with their authority to indict, prosecute, or offer a plea, requires that the public and the legal system afford the prosecutor with a great deal of discretion. It also requires that the public place a great deal of reliance in that discretion. This is so because, unlike the client of a criminal defense attorney, who explicitly determines the goals of the representation, what is best for society is open to debate. As such, the role of the prosecutor necessarily requires that “decisions about certain tactics, such as when and how to use the public media in the case, are left to the prosecutor’s judgment as to ‘what is best for society.’”^{ccii}

While prosecutors do hold a great deal of power and are afforded a great deal of discretion in determining when to charge, when to try a case, when to plea, and when to hold a press conference, they are still bound by their jurisdictional regulations. Nevertheless, prosecutors are still people. Like all people, they may be susceptible to breaching their duties when tempted to do

so by internal or external forces. Moreover, there may be a number of unique internal and external forces pressuring the prosecutor to exercise his or her powers and discretion in ways that may violate his or her ethical obligations. When the permissible scope of a prosecutor's ethical obligations is vague, broad, and open to interpretation, the prosecutor may be motivated by the unique internal and external forces to test the parameters of the ethical obligations restraining him or her. A prosecutor's pushing or overstepping the boundaries of his or her ethical obligations is even more tempting and likely to occur when their breach is rarely disciplined. This is where the unclear scope of permissible prosecutorial speech under Rules 3.6 and 3.8 can cause a great deal of trouble.

As noted above, prosecutors frequently consult with victims of an alleged crime and their families. While they do not directly represent either the victim or their family, they may feel pressure from either or both to do whatever it takes to get a conviction. This may provide an external incentive for a prosecutor to push the boundaries of what they divulge to the media regarding the case. Another incentive may be the prosecutor's sincere belief that the defendant is guilty and needs to be punished, and the prosecutor likewise may want all the help he or she can get in obtaining a conviction. Additionally, a prosecutor's reputation is, or at least many perceive it to be, determined based on how many convictions they obtain, which may compel disclosure of information that is beneficial to their cause. Whatever the incentive, the information that they choose to share publicly could then "infect" the jury pool or otherwise prejudice the defendant. Whether it does or not, the prosecutor can likely excuse his conduct by pointing to the safe harbor provisions of Rule 3.6 or the exceptions provided under Rule 3.8(f), which allow a prosecutor to make statements that are necessary to inform the public of the nature and extent of the prosecutor's action, as well as those that serve a legitimate law enforcement purpose.^{cciii} Due to the collective

vagueness of the Rules and their liberal exceptions, the prosecutor will likely have plenty of room to rationalize his or her actions and to justify his or her statements. The breaching prosecutor will often have a viable argument caused by the unclear restraints and scope of the Rules. Furthermore, and for the same reasons, it will be difficult for a disciplinary committee to prove a clear violation of the rules. Nevertheless, the prosecutor's actions could have legitimately prejudiced the defendant's right to a fair trial by an impartial jury.

Likely, the greatest incentive compelling a prosecutor to breach the ethical mandates of Rules 3.6 and 3.8 is the simple fact that many District Attorneys obtain their positions through elections, and retain their positions via re-elections. As such, it is necessarily very important for them, especially when campaigning for office, to receive favorable media coverage. Presumably, this may be obtained through publicizing and sensationalizing certain cases in the media and divulging (or manufacturing) certain details that paint prosecutors and law enforcement in a good light and/or suspects in a bad light. Since District Attorneys desire favorable media coverage and have so much discretion in determining what to disclose to the media, they may have a personal bias—such as being re-elected—compelling them to disclose more than ethically permissible. Further, once they commit to a case by publicizing events pointing to the guilt of the accused, they may find themselves in a position where they are forced to continue to pursue the case, or to double-down so to speak, despite the subsequent findings of additional evidence pointing towards an accused party's innocence. That appears to be what happened when Durham County District Attorney Mike Nifong decided to pursue and highly publicize the rape charges he brought against three white lacrosse players from Duke University.

In March 2006, a group of Duke University lacrosse players hired two African American exotic dancers, Crystal Gail Magnum and Kim Pittman, to perform at a party they were hosting.

Magnum was described as appearing unsteady on her feet when she arrived, and she remained that way throughout the evening.^{cciv} During their performance, some of the party's attendees made sexually explicit and derogatory remarks to the dancers, causing the dancers to end their performance early and abruptly. While the dancers were getting into Pittman's car, Pittman yelled a sexually explicit and racially based comment to a group of exiting party attendees that were congregating across the street from her. At least one member of that group responded with racial slurs of his or her own.^{ccv} Thereafter, the dancers left the scene together in Pittman's car. Pittman subsequently stopped at a grocery store, but Magnum refused to exit the car and appeared to be unconscious when Pittman returned from shopping in the store.^{ccvi} Pittman then arranged for a police officer to check on Magnum. The officer then took Magnum to a center that offers assistance for substance abuse. At this location, Magnum reported to a nurse that she had been raped. She was then taken to the Duke University Medical Center emergency room where she recanted her rape allegations. Nevertheless, a rape kit was performed. Semen was found on the alleged victim and she again alleged that she had been raped. Subsequent investigation would confirm through cell phone records, video footage, and witness testimony that there was not even a ten-minute period during which the alleged rapists could have perpetrated the crimes on Magnum for which they were subsequently accused. Magnum alleged that the rape lasted for ten to twenty minutes.^{ccvii}

On March 23, 2006, Durham County District Attorney Mike Nifong was notified of an investigation revolving around three Duke lacrosse players who were alleged to have participated in a rape.^{ccviii} Nifong took control of the case the following day and began making public statements to the media four days later. The numerous public statements Nifong would ultimately make regarding this case, in conjunction with overt Brady violations, would substantiate the grounds for his eventual disbarment by the North Carolina State Bar Disciplinary Committee. In their

complaint filed against Nifong, the North Carolina State Bar charged him with violations stemming from forty-nine different pre-trial statements, each of which were alleged to violate the ethical provisions of Rules 3.6(a) and/or 3.8(f).^{ccix} The deemed violations included numerous statements to the press regarding the accused's failure or refusal to provide the police with requested information and for invoking their constitutional rights.^{ccx} There were also numerous statements regarding Nifong's personal belief that a crime had been committed and that the perpetrators were in fact the accused, which was alleged to be improper commentary under the ethical rules.^{ccxi} The bar also included statements in its complaint that it deemed to be violative of Rule 3.8(f)'s provision that prohibited prosecutors from making statements that have a substantial likelihood of heightening public condemnation of the accused, as the bar believed that certain statements made by Nifong implicitly indicated a racial motivation behind the alleged attack.^{ccxii}

Such cited statements included the following:

“The thing that most of us found so abhorrent, and the reason I decided to take it over myself, was the combination gang-like rape activity accompanied by the racial slurs and general racial hostility.”

“The reason that I took this case is because this case says something about Durham that I'm not going to let be said ... I'm not going to let Durham's view in the minds of the world to be a bunch of lacrosse players from Duke raping a black girl in Durham.”

“The circumstances of the rape indicated a deep racial motivation for some of the things that were done. It makes a crime that is by its nature one of the most offensive and invasive even more so.”^{ccxiii}

A defense attorney for one of the accused subsequently commented that he first found such statements by the prosecuting attorney to be completely outrageous before thinking "Wow, there must have been a rape that happened at that house that night."^{ccxiv}

It is likely, as is presumably the case when any prosecutor makes a potentially impermissible statement to the press, that Nifong initially believed the suspects were guilty. The chair of the hearing panel of the disciplinary committee deciding Nifong's case, Lane Williamson, later suggested that "having begun the publicity barrage, Nifong came to believe what he hoped the facts actually were. Whether or not that conclusion is true, once he started the process of publicity, Nifong was wedded to those facts unless he was willing to incur significant political damage."^{ccxv}

As suggested by Williamson, Nifong's decision to make such incendiary statements so frequently was also likely at least partially the product of Nifong's political aspirations. Nifong had been appointed as District Attorney following the former DA's promotion to state Superior Court judge.^{ccxvi} At the time of the rape allegations, Nifong was finishing out the remainder of his predecessor's term. When he took on the case and made the statements alleged to be in violation of the ethical rules, he was engaged in a contentious primary campaign against a former assistant district attorney from the same office, Freda Black.^{ccxvii} Black had name recognition as she had recently assisted in the successful prosecution of another high-profile defendant, writer and former mayoral candidate, Michael Peterson.^{ccxviii} The Peterson case helped propel the lead prosecutor, Nifong's predecessor, to Superior Court judge. Further, there is evidence to suggest that Black intended to terminate Nifong from the prosecutor's office if she were to win.^{ccxix} It therefore appears clear that Nifong had substantial interests in doing everything within his power to garner support from the Durham public while campaigning to be elected to a full term as District Attorney. As the chair of the hearing panel of the disciplinary committee would later state, "At that time [Nifong] was facing a primary...and...we can draw no other conclusion but that those initial statements that he made were to further his political ambition."^{ccxx}

A poll taken on the day Nifong made his first statements to the press regarding the rape case showed that Black had a substantial 37% to 20% lead over Nifong.^{ccxxi} Nifong indicated to his campaign manager that he hoped to win the election because he would then be guaranteed to serve as district attorney for five consecutive years, which would qualify him for an additional \$15,000 per year in retirement benefits.^{ccxxii} Nifong then began liberally giving interviews. He commented to his campaign manager early on "I'm getting a million dollars of free advertisements."^{ccxxiii} Nifong's opponents in the election criticized him for acting unethical and improper, and described him as jumping the gun by putting the issue in the public as he did.^{ccxxiv}

Nifong won the primary, beating out Black by nearly 4% of the vote. Among African-American voters, Nifong received 44%, compared to Black's 25.2%.^{ccxxv} Nifong's appeal to African American voters has been attributed by many to his indictment of the Duke lacrosse players. As noted by a longtime Durham Committee member and church bishop, Philip Cousin, "The Duke lacrosse case was the overwhelming issue...I think a lot of people thought there wouldn't be any arrests. When Nifong came through with the indictments, that indicated to the black community he would be fair."^{ccxxvi} Nifong then won the general election running against no Republican challengers.

In April 2007, more than a year after Nifong made his first statements regarding the rape case, the North Carolina Attorney General, Roy Cooper, ended the criminal prosecution against the three defendants. In a press conference, the Attorney General announced that "all charges had been dropped and that his investigation had found that the three indicted players were innocent."^{ccxxvii} Nifong was disbarred two months later. Nifong's disbarment for breaching the ethical requirements of Rules 3.6 and 3.8 was a rare instance of discipline for breach of these rules. Moreover, the decision to disbar was also based on blatant and inexcusable Brady violations. As

such, this instance of discipline should certainly be viewed as an outlier instead of the norm. Nevertheless, the ramifications of this case should point out the need to control and restrict the extreme power and discretion that a prosecutor has when disseminating information to the press. Nifong's comments instantly brought public condemnation down on the accused as well as the accuser. The case received national publicity and remained in the news for an entire year. The additional underlying tone suggesting that the invisible crime was racially motivated only compounded the condemnation of the defendants. As such, the case is a cautionary tale that innocent lives and reputations can be uprooted and destroyed in an instant on the whim or gut feeling of a prosecutor. Moreover, once those statements are made, the prosecutor may develop conscious or subconscious tunnel vision due to the impossibility of retroactively revoking such comments. The prosecutor then may decide to continue to pursue charges that should be dropped. Additionally, the events of this case surely do not garner public respect for the judicial system aside from the fact that the accused were ultimately publicly vindicated more than a year after they were accused. Nifong's reprehensible behavior was highly publicized following his disbarment, likely compelling non-legal laypeople to question how such an abuse of power could be exerted by a "minister of justice." For these reasons we need clear, enforceable laws restricting the extrajudicial speech of prosecutors.

VI. CONCLUSION

As the foregoing has shown, the development of the disciplinary rules defining the permissible contours of extrajudicial attorney speech has a long and sordid history. The current standard, deemed constitutional by the Supreme Court, is still very vague and unclear, resulting in great temptation to push the limits, and rare punishments for their breach. In the case of all lawyers, but

prosecutors especially, we need to clarify the lines between permissible and impermissible behavior and dole out meaningful discipline when the rules are breached.

ⁱ Roscoe C. Howard, Jr., Court System Panel: *The Media, Attorneys, and Fair Criminal Trials*, 4 Kan. J.L. & Pub. Pol'y 61

ⁱⁱ MODEL RULE 3.6(a)

ⁱⁱⁱ Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 840 (1996)) (citing Robert E. 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, 3 (1989).).

^{iv} Robert E. 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, 3 (1989).)

^v *Id.*

^{vi} *Id.* (citing *Trial of the Rioters*, Chi. Tribune, June 19, 1855, at 3, col. 2.).

^{vii} See Robert E. 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, 3 (1989), (who further cites United States v. Holmes, 26 F. Cas. 360, 363 (C.C.E.D. Pa. 1842) (No. 15,383) (court agreed to provide space in courtroom for press only after reporters agreed to publish nothing until after trial); Chi. Tribune, Aug. 8, 1875, at 16, col. 2 (reporting that prosecutor believed newspapers should be held in contempt for speculating about verdict, but apparently didn't pursue contempt citation); N.Y. Herald, Oct. 16, 1846, at 1, col. 1 (noting that defense counsel in murder case "intended" to seek order suppressing *ex parte* statements but didn't follow through).

^{viii} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 840 (1996)).

^{ix} *Id.* See also Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 502 (1993) (citing Petitioner's Brief at 17, Gentile v. Nevada State Bar, 510 U.S. 1030 (1991) (No. 89-1836)).

^x Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 502 (1993) (citing Petitioner's Brief at 17, Gentile v. Nevada State Bar, 510 U.S. 1030 (1991) (No. 89-1836)).

^{xi} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1516 (2010).

^{xii} William Scott Croft, *Free Speech & Fair Trials--Striking the Balance: A Case Comment and Analysis of the Maryland Trial Publicity Rule as Applied in Attorney Grievance Commission of Maryland v. Douglas F. Gansler*, 19 GEO. J. LEGAL ETHICS 345, 345 (2006) (citing ALA. CODE OF ETHICS § 17 (1887), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS 356 (1953)).

^{xiii} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1516 (2010).

^{xiv} *Id.*

^{xv} *Id.* (citing CANONS OF PROF'L ETHICS, Canon 20 (1908), *reprinted in* DRINKER, *supra* note 16, at 315).

^{xvi} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 840 (1996)).

^{xvii} *Id.* (citing Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 360 (1995).)”

^{xviii} Scott M. Matheson Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV 865, 870 (1990).

^{xix} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 840 (1996)).

^{xx} *Id.*

^{xxi} *Id.*

^{xxii} *Id.*

^{xxiii} https://www.history-matters.com/archive/contents/wc/contents_wr.htm

^{xxiv} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 841 (1996)).

^{xxv} REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 227, 232, 238 (1964) <https://www.archives.gov/research/jfk/warren-commission-report/chapter-5.html#news>.

^{xxvi} *Id.* at 238.

^{xxvii} *Id.*

^{xxviii} *Id.* at 242.

^{xxix} *Id.* at 242.

^{xxx} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1516 (2010) (citing Gentile v. State Bar of Nevada, 501 U.S. 1030, 1067 (1991) (Rehnquist, C.J., separate majority opinion) (citing Report of the President's Commission on the Assassination of President Kennedy (1964), quoted in Robert A. Ainsworth, Jr., Fair Trial-Free Press, 45 F.R.D. 417 (1968)).

^{xxxi} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 841 (1996)).

^{xxxii} Lonnie T. Brown, Jr., "*May It Please the Camera, . . . I Mean the Court*"--An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 97 (2004).

^{xxxiii} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1516, 1517 (2010). See also Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 841 (1996)); Lonnie T. Brown, Jr., "*May It Please the Camera, . . . I Mean the Court*"--An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 97 (2004).

^{xxxiv} Sheppard v. Maxwell, 384 U.S. 333, 336 (1966).

^{xxxv} *Id.*

xxxvi *Id.*

xxxvii *Id.* at 339.

xxxviii *Id.* at 339.

xxxix *Id.* at 339.

xl *Id.* at 341.

xli *Id.* at 342.

xlii *Id.* at 342.

xliii *Id.* at 343.

xliv *Id.* at 346.

xlv *Id.* at 350.

xlvi *Id.* at 350.

xlvii *Id.* at 350-1.

xlviii *Id.* at 333.

lix *Id.*

¹ *Id.* at 363.

^{li} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 842 (1996)).

^{lii} Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

^{liii} Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 507 (1993). See also Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 842 (1996)).

^{liv} REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 227, 242 (1964).

^{lv} Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 507 (1993).

^{lvi} *Id.*

^{lvii} *Id.*

^{lviii} *Id.* at 508.

^{lix} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 843 (1996)).

^{lx} *Id.*

lxi *Id.*

lxii Gentile v. State Bar of Nevada, 501 U.S. 1030, 1066 (1991) (quoting In re Rouss, 116 N.E. 782, 783 (N.Y. 1917)).

lxiii Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1518-9 (2010).

lxiv Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 507 (1993) (citing ABA Advisory Comm. on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press Standard 1-1 (Approved Draft 1968)).

lxv Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1519 (2010).

lxvi *Id.* at 1516 (citing Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323, 331 (2002)).

lxvii *Id.* at 1519. See also Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323, 331 (2002).

lxviii Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 843 (1996) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1968)).

lxix *Id.*

lxx Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 508 (1993).

lxxi Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 844 (1996).

lxxii Schenck v United States, 249 U.S. 47 (1919).

lxxiii Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 844 (1996) (quoting Bridges v. California, 314 U.S. 252, 263 (1941)).

lxxiv United States v. Dennis, 183 F. 2d 201, 212 (CA2 1950)

lxxv Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1520 (2010).

lxxvi Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 247 (7th Cir. 1975). See also Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1520 (2010).

lxxvii See Chase v. Robson, 435 F.2d 1059, 1061-62 (7th Cir. 1970), (reaffirmed in In re Oliver, 452 F.2d 111 (7th Cir. 1971)).

lxxviii *Id.* at 249.

lxxix Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 845 (1996) (citing Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975)).

^{lxxx} *Nebraska Press Association v Stuart* 427 U.S. 539 (1976).

^{lxxxi} Scott M. Matheson Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV 865, 874-75 (1990).

^{lxxxii} *Nebraska Press Association v Stuart* 427 U.S. 539, 562 (1976).

^{lxxxiii} *Id.*

^{lxxxiv} Scott M. Matheson Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV 865, 874-75 (1990).

^{lxxxv} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1520 (2010).

^{lxxxvi} Scott M. Matheson Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV 865, 874-75 (1990).

^{lxxxvii} *Id.*

^{lxxxviii} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 845 (1996). *See also* MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.6 (1983).

^{lxxxix} *Id.* at 846. *See also* Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1521 (2010).

^{xc} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 847 (1996).

^{xc i} *Id.*

^{xc ii} *Id.*

^{xc iii} MODEL RULE 3.6, Comment 5 (same as modern version). *See also* Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1520 (2010) and Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 847 (1996).

^{xc iv} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1520 (2010)

^{xc v} *Id.* Citing STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2009).

^{xc vi} *Id.*

^{xc vii} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 847 (1996).

^{xc viii} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1520 (2010)

^{xc ix} Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 847 (1996).

^c Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics, 658 (2018)

^{ci} Gentile v. State Bar of Nevada, 501 U.S. 1030, 1044 (1991)

^{cii} *Id.*

^{ciii} *Id.* at 1045.

^{civ} *Id.* at 1069.

^{cv} *Id.* at 1075.

^{cvi} *Id.* at 1075.

^{cvii} *Id.* at 1076.

^{cviii} *Id.* at 1048.

^{cix} *Id.*

^{cx} *Id.*

^{cxii} *Id.*

^{cxiii} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1524 (2010). *See also* Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 852 (1996) noting criticism due to the lack of guidance provided by the fractured opinion.

^{cxiv} *Id.*

^{cxi} Gentile v. State Bar of Nevada, 501 U.S. 1030, 1080 n.6.

^{cxii} *Id.* at 1074.

^{cxiii} *Id.* at 1043. *See also* Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics, 664 (2018).

^{cxiv} Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics, 664 (2018).

^{cxv} *Id.* at 1054.

^{cxvi} *Id.*

^{cxvii} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1524 (2010).

^{cxviii} *Id.* at 1525.

^{cxix} Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics, 664 (2018).

^{cx} Rule 3.6(c) provided:

Notwithstanding paragraph (a), a lawyer may 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. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

MODEL RULE 3.6 (c)

^{cxxiv} Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics, 664 (2018).

^{cxxv} *Id.* at 665

^{cxxvi} *Id.* at 665 (citing MODEL RULE 3.6 (a)).

^{cxxvii} *Id.*

^{cxxviii} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1526 (2010) (citing Comment 5 of MODEL RULE 3.6).

^{cxxix} *Id.*

^{cxix} MODEL RULE 3.6, Comment 6.

^{cxix} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1526 (2010). (See also Model Rule 3.6(d): "No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)).

^{cxixii} *Id.* at 1527.

^{cxixiii} MODEL RULE 3.8.

^{cxixiv} Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 Am. Crim. L. Rev. 1526 (2010) (citing excerpts from the ABA Committee Report Explaining 1994 Amendment).

^{cxixv} *Id.* at 1527.

^{cxixvi} Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1350-51 (1993). See also Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 848-852 (1996).

^{cxixvii} *Id.*

^{cxixviii} Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics, 665 (2018).

^{cxixix} *Id.* at 665.

^{cxli} *Id.* (piecing together statements from Gentile v. State Bar of Nevada, 501 U.S. 1030.)

^{cxli} *Id.*

^{cxlii} *Id.* (noting that Illinois, New Mexico, and Oklahoma have a test affording speech more protection than does Rule 3.6).

^{cxliii} *Id.*

cxliv *Id.*

cxlv *Id.*

cxlvi *Id.*

cxlvii *Id.*

cxlviii MODEL RULE 3.6(a)

cxlix Lonnie T. Brown Jr., "*No Comment*" or "*Anything Goes*": *A retrospective view on the regulation of public commentary by lawyers*, 43 *ADVOC. 2*, at 3 (2009), available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1239&context=advocate>

cl *Id.*

cli *Nebraska Press Association v Stuart* 427 U.S. 539, 554 (1976). See also Lonnie T. Brown, Jr., "*May It Please the Camera, . . . I Mean the Court*"--*An Intrajudicial Solution to an Extrajudicial Problem*, 39 *GA. L. REV.* 83, 107 (2004).

clii Lonnie T. Brown Jr., "*No Comment*" or "*Anything Goes*": *A retrospective view on the regulation of public commentary by lawyers*, 43 *ADVOC. 2*, at 3 (2009), available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1239&context=advocate>

cliii *Id.*

cliv MODEL RULE 3.6(b)(2)

clv Lonnie T. Brown Jr., "*No Comment*" or "*Anything Goes*": *A retrospective view on the regulation of public commentary by lawyers*, 43 *ADVOC. 2*, at 3 (2009), available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1239&context=advocate>

clvi MODEL RULE 3.6(c)

clvii Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 *U. KAN. L. REV.* 837, 857 (1996), (citing MODEL RULE 3.6 comment 7).

clviii Lonnie T. Brown Jr., "*No Comment*" or "*Anything Goes*": *A retrospective view on the regulation of public commentary by lawyers*, 43 *ADVOC. 2*, at 3 (2009), available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1239&context=advocate>

clix MODEL RULE 3.6(f), comment 5

clx MODEL RULE 3.6(f)

clxi Lonnie T. Brown Jr., "*No Comment*" or "*Anything Goes*": *A retrospective view on the regulation of public commentary by lawyers*, 43 *ADVOC. 2*, at 3-4 (2009), available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1239&context=advocate>

clxii MODEL RULE 3.6(f)

clxiii Lonnie T. Brown Jr., "*No Comment*" or "*Anything Goes*": *A retrospective view on the regulation of public commentary by lawyers*, 43 *ADVOC. 2*, at 4 (2009), available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1239&context=advocate>

clxiv *Id.* (citing Perjury, Obstruction Charges Brought Against Detroit Mayor, Aide, FoxNews.com, March 24, 2008, <http://www.foxnews.com/story/0,2933,340939,00.html>.)

clxv *Id.*

clxvi *Id.*

clxvii *Id.*

clxviii *Id.*

clxix Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 858 (1996).

clxx *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991).

clxxi *Id.* at 1057.

clxxii *Id.* at 1057. *See also* Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 858 (1996).

clxxiii *Id.* at 1066. *See also* Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 858 (1996).

clxxiv *Gentile*, 501 U.S. at 1066 (Rehnquist, C.J., quoting *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917)).

clxxv Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1427 (1990). (citing *In re Snyder*, 472 U.S. 634, 644 (1985))

clxxvi Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 859 (1996) (citing Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1427 (1990)).

clxxvii Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 360 (1995).

clxxviii Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 860 (1996)

clxxix *Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966).

clxxx Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 860 (1996) (quoting *Bridges v. California*, 314 U.S. 252, 271 (1941)).

clxxxi *Id.*

clxxxii *Id.* (citing Scott M. Matheson Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 869 (1990)).

clxxxiii *Id.*

clxxxiv *Id.*

clxxxv *Id.*

clxxxvi *Id.*

clxxxvii *Id.*

clxxxviii Lonnie T. Brown Jr., "No Comment" or "Anything Goes": A retrospective view on the regulation of public commentary by lawyers, 43 *ADVOC.* 2, at 5 (2009), available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1239&context=advocate>

clxxxix Lohr, David. "Woman Dubbed 'Vodka Mom' By Nancy Grace Committed Suicide, Police Say." *HuffPost*, *HuffPost*, 7 Dec. 2017, www.huffpost.com/entry/toni-medrano-vodka-mom_n_1665792.

cx *Id.*

cxci *Id.*

cxcii *Id.*

cxciii *Id.*

cxciv *Id.*

cxcv Lonnie T. Brown Jr., "No Comment" or "Anything Goes": A retrospective view on the regulation of public commentary by lawyers, 43 *ADVOC.* 2, at 5 (2009), available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1239&context=advocate>

cxcvi *Id.*

cxcvii *Id.*

cxviii Rutten, Tim. "Grace Under Fire." *Los Angeles Times*, 14 May 2005, www.latimes.com/archives/la-xpm-2005-may-14-et-rutten14-story.html.

cxcix *Id.*

cc MODEL RULE 3.b, Comment 1

cci Victor Streib, Symposium Article: *Media Misuse: Criminal Lawyer Advertising and Prosecutor Campaigning under the Guise of the Public's Need to Know*, 34 *Ohio N.U.L. Rev.* 703, 714 (2008).

ccii *Id.*

cciii MODEL RULE 3.6(f)

cciv Robert P. Mollester, Symposium: *Ethics and Evidence: III. The Ethical Limitations on Prosecutors When Preparing and Presenting Evidence: The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *Fordham L. Rev.* 1337, 1343-45(2007).

ccv *Id.*

ccvi *Id.*

ccvii *Id.*

ccviii *Id.* at 1348.

ccix *Id.* at 1349.

ccx *Id.*

ccxi *Id.* at 1349.

ccxii *Id.*

ccxiii *Id.* at 1350.

ccxiv *Id.* at 1352.

ccxv *Id.* at 1356.

ccxvi *Id.* at 1355.

ccxvii *Id.*

ccxviii *Id.*

ccxix *Id.*

ccxx *Id.*

ccxxi *Id.* at 1356.

ccxxii *Id.* at 1355.

ccxxiii *Id.* at 1356.

ccxxiv *Id.*

ccxxv *Id.*

ccxxvi *Id.* at 1357.

ccxxvii *Id.* at 1337.