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## Supreme Court Pronouncements on the Conduct of Lawyers

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# SUPREME COURT PRONOUNCEMENTS ON THE CONDUCT OF LAWYERS

*The Honorable Ruth Bader Ginsburg\**

## INTRODUCTION

I am glad, at last, to share in the Law School's celebration of its 25th anniversary. There is much to celebrate: In a remarkably short time, Hofstra University's Law School has achieved national recognition for the range of instruction it provides, and for its talented faculty. The school has a reputation for excellence in diverse fields, including alternative dispute resolution, trial advocacy, international law and business, media and communications law, and — of particular relevance to this audience — legal ethics. Hofstra has received praise, too, for its clinical programs.

As the Law School has developed over the span of 25 years, it has gained and retained the appreciation and high regard of its students, faculty, and administrators. This respect and caring for the school are shown by supportive alumni who encourage programs like this one, and by the continuing service on the faculty of every former Dean of the Law School. May the next 25 years bring ever more rewarding adventures in learning to this institution.

Before launching into my remarks, I want to acknowledge the grand aid and comfort I have received in framing this talk from University of Indiana law professor Bill Hodes. Bill has studied, taught, and written about legal ethics, as I have not. He and I first met when he was a gifted young student, and I, a newly tenured teacher, at Rutgers Law School. He was one of the students who urged the school, most persuasively, to introduce a seminar on women and the law, a seminar I taught. When President Clinton nominated me for the good job I now hold, Bill volunteered to work on my team, as a law clerk, during his sabbatical year. That year will be the Court's 1996 term. Bill will have the distinction of being the Court's most seasoned law clerk, and I look forward to the

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\* Associate Justice, Supreme Court of the United States. These remarks are a revised version of the Dwight D. Opperman Lecture delivered at Drake University Law School on October 25, 1995.

pleasure of his company. (I received constant assistance also, throughout the development of this text, from my 1995 term law clerk, Maria Simon, and the helpful research and careful review of 1995 term law clerks Lisa Beattie, Michael Wang, and Paul Watford.)

There is a story, not apocryphal, about a first-year class in civil procedure at a well-known eastern law school in the 1950s. The professor, a somewhat stuck-on-himself type (you know the kind), was regaling his students with accounts of a good equity pleader's skill in tripping or trapping unwary counsel for the other side. One student, bothered and bewildered, spurted out: "But Professor, ethics, what about professional ethics?" With a warm and wonderful smile, the famed professor responded, "Ethics, my boy, is taught in the *second* year." In truth, at the law school I first attended, ethics was an elective offered only in the third year.

This Conference bears witness to the change. As Stanford Law School's Dean, Paul Brest, recently said in a lecture delivered at Georgetown, legal ethics today is an area of legal education "on the ascendancy,"<sup>1</sup> one receiving extensive scholarly attention, a field for imaginative experiments. The speakers assembled here are leaders in new ways of thinking about and teaching legal ethics and professional responsibility. Although, along with others in this audience, I am in the student rather than the teacher ranks on topics listed in the program, I am pleased to be in such bright company.

The Conference that opened today is titled "Core Issues in Legal Ethics," but the program indicates considerable emphasis on lawyers engaged in or anticipating eventual litigation. Most lawyers, it is true, are engaged in endeavors outside the law courts most of the time. But public comment on lawyers' ethics often homes in on lawyers in courtrooms or preparing for their day or days in court. And although today's codes of professional responsibility take account of the various roles of lawyers — as counselors, negotiators, planners, transaction structurers — regulation continues to bear heavily on litigation-related ethics.

This emphasis on lawyers in or anticipating litigation, as a famous Frenchman observed in his 1830s travels in the United States,<sup>2</sup> reflects a society accustomed to resorting to court for settlement of even the most burning, divisive social issues (and, sometimes, on the other hand, the

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1. Paul Brest, *Does Law School Matter*, 15th Annual Thomas F. Ryan Lecture (Oct. 12, 1994), in *GEORGETOWN LAW*, Summer 1995, at 42.

2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed. & Henry Reeves trans., Alfred A. Knopf, Inc. 1945) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

most trivial injuries). For judges to do the heavy work our society constantly entrusts or punts to them, courts must be served by lawyers whose training fosters independence. To check against bad apples and behavior unbecoming to the fair administration of justice, courts have the contempt power and many other controls, including award, reduction, and forfeiture of counsel fees, disqualification for conflict of interest, and injunctions against disclosure of a client's confidences.

Most of this checking authority is exercised by state courts. The U.S. Supreme Court will figure in the picture only when a claim is persuasively made that a State's regulation is so tight or so unwarranted as to violate the U.S. Constitution.

Because a carpenter should stick to her craft, I will address, in this pause from your Conference discussions, Supreme Court decisions reflecting the justices' perceptions of how lawyers work or should work. In the array of cases, one lead theme repeats: lawyers representing private parties are officers of the court; they are not officers of the government. They must be independent professionals, equipped to perform their part effectively in the interest of their clients, without fear of official reprisal for diligent, honorable service.

The Supreme Court, in the main, has appreciated that lawyers must have leeway to be zealous in the representation of clients, but it has also comprehended the need for limitations, for rules that preserve the order essential to a system of justice. Nebraska lawyer Robert Kutak — a principal contributor to the composition of current rules of legal ethics — put it this way shortly before his death in 1983: "It may be a dog-eat-dog world, but one dog may eat another only according to the rules."<sup>3</sup> My colleague, Justice Antonin Scalia, spoke in a similar vein, but perhaps with more politesse, on lawyers and their clients. At a 1993 Supreme Court oral argument, counsel for petitioners opened on rebuttal:

"My adversary stated . . . ."

Justice Scalia corrected:

"[Respondent's counsel is] not your adversary . . . . He's your friend, [your colleague at the Bar]. [The] clients [you represent] are adversaries[.]"<sup>4</sup>

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3. Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER* 175 (David Luban ed. 1983).

4. Official Transcript, Proceedings Before the Supreme Court of the United States at 38, Local 144 Nursing Home Pension Fund v. Demisay, 113 S.Ct. 2252 (1993) (No. 91-610).

## PRIVILEGE

In this survey of the Supreme Court's effort to allow leeway within limits, I will refer first to the attorney-client privilege because it is central to the way lawyers work. The high ground occupied by the privilege (the obligation to preserve the confidences of one's client) is aptly illustrated by a decision in which the privilege figured only *en passant*. The case is *United States v. Nixon* (the President, not the Judge),<sup>5</sup> a matter heard and decided by a unanimous Supreme Court in July 1974.

In the aftermath of the June 1972 break-in at the National Democratic Party headquarters in a Watergate office building, several of the President's close aides<sup>6</sup> awaited trial on an indictment for conspiracy to obstruct justice and related charges. U.S. District Judge John Sirica, on request of the Special Prosecutor — first Archibald Cox, then Leon Jaworski — issued a subpoena directing the President to produce tape recordings and documents capturing Oval Office conversations with his advisers. The President resisted, but Judge Sirica insisted, and the Supreme Court — at the very time the House Judiciary Committee was considering Articles of Impeachment against Nixon — upheld the production order.

In deference to the importance of candor and confidentiality in exchanges between the President and his executive branch associates, the Court recognized a presumptive privilege, one that could be guarded by Judge Sirica's *in camera* review of the tapes and papers.<sup>7</sup> But that quality of privilege, the Court said, must be weighed against the demand of the justice system for "every man's evidence."<sup>8</sup> The asserted executive privilege was not in the same league as the more tightly brigaded constitutional and common law privileges — notably, the Fifth Amendment

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5. 418 U.S. 683 (1974).

6. John N. Mitchell, H.R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan.

7. 418 U.S. at 713–714. To reach the ultimate issue decided in the Watergate tapes case, the Court had to pass anterior questions: (1) was the President amenable to judicial process; (2) was the scope of executive privilege entrusted to the executive branch for final decision under our constitutional scheme. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 378 (12th ed. 1991).

8. 418 U.S. at 709, 710. This weighing process continues, although not always in the courts. For example, in the summer of 1995, President Clinton refused to release confidential memos and notes bearing on his decision to approve an FBI raid in Waco, Texas, but agreed to allow the leaders of the joint House committee investigating the incident to view the documents in a secured office in the House of Representatives. See John Mintz, *No 'Smoking Gun' Found in Waco Siege Documents; GOP, White House Collision Shapes Up*, WASH. POST, July 13, 1995, at A7. See also Ann Devroy & John Mintz, *GOP Demands Clinton Papers on Waco Raid*, WASH. POST, July 11, 1995, at A1 (quoting White House Counsel Abner J. Mikva as stating that, while the documents sought were "totally innocuous," "some of them go to the core of the kinds of things the institutional presidency must protect").

privilege against self-incrimination and the general rule that a lawyer “may not be required to disclose what has been revealed [by a client] in professional confidence.”<sup>9</sup>

Thus the lone lawyer, upon recording a conversation with his client in the holding cell of the local police court, gains a tape more secure from compulsory process than the tape a president makes of an Oval Office conversation. The fleeting reference to attorney-client privilege in the Watergate tapes opinion says a great deal about the attorney’s freedom from oversight, the leeway lawyers have in our system of justice to shield and zealously represent their clients.

A complementary characteristic of our system, the main theme of *United States v. Nixon*,<sup>10</sup> was recalled in June 1995 in press comment on the death of the 1974 unanimous opinion writer, Chief Justice Warren E. Burger.<sup>11</sup> In his campaigns for the Presidency, Nixon had called for the restoration of “law and order”<sup>12</sup> and he pledged to appoint judges equal to the task. A Court that included four Nixon appointees<sup>13</sup> declared the law and affirmed an order the President obeyed, after which he promptly resigned from office — a stunning example of the independence of our judicial branch, for in most other nations, “it is unthinkable that the courts . . . should issue an order to [the country’s] Chief of State.”<sup>14</sup>

### WORK PRODUCT

Privilege is only part of the lawyer’s leeway or independence in the service of clients, as the celebrated 1947 case of *Hickman v. Taylor*<sup>15</sup> confirmed. When the Federal Rules of Civil Procedure were new, they

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9. 418 U.S. at 709.

10. *Supra* note 5.

11. *See, e.g., Justice Burger’s Contradictions*, N.Y. TIMES, June 27, 1995 at A16 (“Chief Justice Burger’s unanimous 1974 opinion that Mr. Nixon could not keep the infamous White House tape recordings was the pinnacle of his career and one of the judiciary’s finest achievements.”).

12. *See, e.g.,* 2 STEPHEN E. AMBROSE, NIXON: THE TRIUMPH OF A POLITICIAN 1962–1972, at 376 (1989).

13. In addition to Chief Justice Burger, now Chief Justice Rehnquist and Justices Powell and Blackmun.

14. *See* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 4 (1976). In one of a series of lectures delivered at Oxford University, Cox reported his conversation with a Scandinavian legal scholar who remarked, when told of the subpoena demanding production of conversations taped in then President Nixon’s offices: “It is unthinkable that the courts of any country should issue an order to its Chief of State.” The Scandinavian scholar recognized that the head of state, of course, was obliged to adhere to the nation’s Constitution and laws. But that could mean simply that the President neither dictates to, nor is subject to the dictates of, the courts. Under that prevalent view, the President should self-monitor his compliance with constitutional requirements, as should the legislature.

15. 329 U.S. 495 (1947).

contained no provision shielding from discovery materials commonly described as “work product.” Rule 26 broadly authorized discovery of any matter “relevant” and “not privileged.”<sup>16</sup> Privilege, in the law of evidence, is personal to the client and therefore did not cover the highly relevant statements Philadelphia lawyer Fortenbaugh had taken from third parties who had witnessed, or otherwise had information about, the sinking of the tug “John M. Taylor.” Despite the silence of Rule 26, the Court unanimously concluded that the rulemakers could not have intended to leave unprotected the privacy basic to the lawyer’s craft.

Since 1970, the Federal Rules — in particular, Rule 26(b)(3) — have filled in details the *Hickman* decision left open, but the essential point remains as Justice Murphy stated it: To play their historical and necessary role in our system of jurisprudence, lawyers must be able to “assemble information, sift . . . the relevant from the irrelevant facts, prepare [their] legal theories and plan [their] strategy without undue and needless interference.”<sup>17</sup> Separating what is due from what is undue, and the needful from the needless, remains a constant challenge for lawyers and courts, and may be a matter enlightened or enlivened by discussions at this Conference.

#### BARRIERS TO BAR ADMISSION

I turn next to bar admissions and the Court’s response to attempts to shut out qualified practitioners. The Supreme Court’s check on bar access barriers dates back at least to *Ex parte Garland* in 1866,<sup>18</sup> when the Court confronted federal legislation restricting the practice of law to those who swore they had not participated in or aided the Confederacy. On the challenge of an Arkansas lawyer once active in the secessionist government, the Court held the oath requirement incompatible with the Constitution’s bill of attainder and ex post facto clauses. The Court observed, tellingly, that lawyers are officers not of the United States, but of the court;<sup>19</sup> their admission, therefore, is properly “intrusted to the courts.”<sup>20</sup> The Supreme Court itself, however, had been careless. It had earlier amended its own rule on bar admission to match the statute declared unconstitutional in *Garland*. So the Justices ended the opinion by confessing error — that is, by rescinding the rule change the Court

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16. Sup. Ct. R. 26(b), 329 U.S. 854 (1946).

17. 329 U.S. at 511.

18. 71 U.S. 374 (1866).

19. *Id.* at 378.

20. *Id.* at 379 & n.\* (quoting holding of Court of Appeals in *In re Cooper*, 22 N.Y. 81, 84 (1860)).

had “unadvisedly adopted.”<sup>21</sup> (The lesson has been learned. The Court completed a thoroughgoing revision of its rules in June 1995, a project that reflects more than a year’s work by the Court’s staff, close review by a committee of three justices, public comment — a first for Supreme Court Rules — special attention from federal procedure buffs, and even aid from a grammarian.)

Not long after *Garland*, the Court made a decision fitting the climate and case law of the age. In an 1873 ruling in *Bradwell v. Illinois*,<sup>22</sup> the Court rejected Myra Bradwell’s claim of a constitutional right to be admitted to her state’s bar if, apart from her sex, she possessed the specified qualifications. The brethren’s comprehension of women’s place was then, and for generations after, woefully inadequate. Their dull wit on the subject was accurately conveyed by a brave and good-humored woman of an even earlier day. In December 1853, Sarah Grimke, great feminist and anti-slavery lecturer from South Carolina, visited Washington, D.C., and wrote this to a friend:

Yesterday, visited the Capitol, went into the Supreme Court, not in session [though the brethren were there], was invited to sit in the Chief Justice’s seat. As I took the place, I involuntarily exclaimed: Who knows, but this chair may one day be occupied by a woman. The brethren laughed heartily, nevertheless, it may be a true prophecy.<sup>23</sup>

And so it may.

Is it not fitting, in light of this history, that it was a woman who brought to the Supreme Court, in 1973, a case titled *In re Griffiths*,<sup>24</sup> yielding confirmation that arbitrary denial of admission to the bar of a state violates the due process and equal protection guarantees of the Fourteenth Amendment. The complainant, Fré Le Poole Griffiths, was denied admission to Connecticut’s bar because she chose to retain her Netherlands nationality rather than acquire United States citizenship by virtue of her marriage to a U.S. national.<sup>25</sup> The Court recalled in *Griffiths* its recognition in *Ex parte Garland* that lawyers, although officers of the court, are not government officials.<sup>26</sup> The State and the organized bar, of course, could require adherence to prescribed professional stan-

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21. *Id.* at 381.

22. 83 U.S. 130 (1873).

23. Letter from Sarah Grimke to Sarah Wattles (Dec. 23, 1853) (Weld-Grimke Papers, William L. Clements Library, The University of Michigan).

24. 413 U.S. 717 (1973).

25. See *id.* at 718 & n.1.

26. *Id.* at 728.



dards, but the categorical exclusion of resident aliens from the private practice of law was unwarranted.<sup>27</sup>

The Court was less secure, in years just prior to *Griffiths*, on the question whether postadmission sanctions — discipline, contempt judgments, criminal prosecutions, disbarment<sup>28</sup> — would suffice to check unprofessional conduct. In a series of divided opinions running from 1957 until 1971 — decisions less than crystalline in quality — the Court dealt with denial of bar membership based on refusal to respond to inquiries concerning Communist Party membership.<sup>29</sup> The Court held it improper to close the profession to persons based solely on party affiliation, but allowed inquiry designed to determine whether an applicant had joined an organization intending to further unlawful ends. Developments in First and Fifth Amendment law coinciding with the wind down and end of the Cold War era<sup>30</sup> may render this wavering line of decisions slim in precedential value.

#### SOLICITATION

Prominent in latter twentieth century Supreme Court encounters with state regulation of the legal profession are two lines of decisions, both fueled by First Amendment concerns: the associational rights cases sparked in 1963 by *NAACP v. Button*;<sup>31</sup> and the commercial speech/

27. *Id.* at 725–27. In later decisions, however, the Court backtracked from the view taken in *Griffiths* that alienage genuinely counts as a “suspect” category, one that routinely triggers close review. *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (probation and other peace officers).

28. *See Griffiths*, 413 U.S. at 727.

29. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (past membership in Communist Party cannot serve as basis for denial of bar admission); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (refusal to answer questions relating to Communist Party membership does not support inference of bad moral character); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961) (refusal to answer questions relating to Communist Party membership obstructs Committee’s investigation of applicant’s moral character and thus can serve as basis for denial of bar admission); *In re Anastaplo*, 366 U.S. 82 (1961) (same); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (refusal to answer questions relating to Communist Party membership cannot serve as basis for denial of bar admission); *In re Stolar*, 401 U.S. 23 (1971) (same); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (questions relating to knowing membership in organizations advocating violent overthrow of U.S. government are not facially invalid).

30. *See Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination held applicable to the States); *Spevack v. Klein*, 385 U.S. 511 (1967) (Fifth Amendment privilege against self-incrimination applies to lawyers in disciplinary proceedings); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (mere advocacy of illegal action protected by the First Amendment).

31. 371 U.S. 415 (1963).

lawyer advertising cases that began with *Bates v. State Bar of Arizona* in 1977.<sup>32</sup>

*Button* arose out of endeavors by the NAACP to achieve school desegregation in the face of relentless resistance in the South to *Brown v. Board of Education*.<sup>33</sup> Local NAACP branches in Virginia held meetings for parents and children at which staff attorneys explained the current state of the law. People in attendance willing to be plaintiffs in desegregation suits were asked to sign forms authorizing NAACP attorneys to represent them. No fees were charged, and costs of the litigation were paid by the NAACP. This activity, Virginia's highest court held, violated the State's law prohibiting the improper solicitation of legal business. The Supreme Court reversed, declaring the activities of the NAACP, its affiliates and legal staff, to be "modes of expression and association protected by the [First Amendment]." <sup>34</sup>

In a trilogy of cases after *Button*, the Court broadly applied the decision to union programs designed to secure representation for injured workers in compensation proceedings or tort litigation.<sup>35</sup> Justice Black, in his majority opinion in the last of the three union-plan cases, supplied this summary of the "group legal action" decisions: "The common thread running through our decisions . . . is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."<sup>36</sup>

Today these decisions are hardly controversial. Groups advocating litigation and furnishing counsel free of charge — or at reduced rates — have proliferated, and now span the political spectrum. In 1971, then private practitioner Lewis F. Powell, Jr., mindful of the *Button* decision, commented that "the judiciary may be the most important instrument for social, economic and political change"; he advised the business community to adopt the "astute" ways of activist liberals "in exploiting judicial

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32. 433 U.S. 350 (1977).

33. 347 U.S. 483 (1954).

34. 371 U.S. at 428–29.

35. *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964) (union's attorney referral service organized to assist members with personal injury claims falls within First Amendment guarantees of free speech, petition and assembly); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (union employment of licensed attorney on salaried basis to assist union members and their families to pursue workers' compensation claims is protected under the First Amendment); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971) (union's arrangement to limit legal fees charged by attorneys that it recommends to union members and their families is protected under the First Amendment).

36. *United Transportation Union*, 401 U.S. at 585.

action."<sup>37</sup> The briefs that currently troop before the Supreme Court, from all manner of organizations, suggest that Powell's message has been heard.

"Anything goes," however, is not the Court's position on solicitation of clients, as a pair of 1978 cases decided the same day makes plain. The first of the pair, *In re Primus*,<sup>38</sup> overturned the South Carolina Supreme Court's reprimand of an ACLU cooperating attorney. The attorney, Edna Smith Primus, was charged with improper solicitation for a letter she wrote to a woman who had been sterilized by an Aiken County, South Carolina, doctor after the birth of the woman's third child. Primus asked whether the sterilized woman wanted to become a plaintiff in a lawsuit against the doctor, a physician who had allegedly participated in a program of sterilizing three-time mothers on public assistance as a condition of their continued receipt of health care under Medicaid. Lawyer Primus' letter, Justice Powell said for the Court, fell within "the generous zone of First Amendment protection reserved for associational freedoms."<sup>39</sup> Perhaps recalling his 1971 comment, Justice Powell concluded that a State may not punish a lawyer "who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses . . . that free legal assistance is available from a nonprofit organization."<sup>40</sup>

In the contrasting paired case, *Ohralik v. Ohio State Bar Association*,<sup>41</sup> with Justice Powell again writing the opinion, the Court upheld the indefinite suspension of a lawyer for in-person solicitation. The lawyer in that case had approached a young accident victim at her hospital bedside (while she lay in traction), surreptitiously tape recorded conversations with her and with her parents, and later refused to withdraw from the representation, although dismissed by his clients. Lawyer Ohralik's First Amendment plea, the Court thought, was not to be taken seriously.

A year earlier, in *Bates v. State Bar of Arizona*,<sup>42</sup> the Court had ventured down the commercial speech path by holding that States could not prohibit lawyers from price advertising of "routine legal services."<sup>43</sup>

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37. LEWIS POWELL, THE POWELL MEMORANDUM: ATTACK ON AMERICAN FREE ENTERPRISE SYSTEM 7 (Aug. 23, 1971) (memorandum addressed to the chairman of the Education Committee of the U.S. Chamber of Commerce) (reprint available from the Chamber of Commerce of the United States, 1615 H Street, N.W., Washington, D.C. 20062).

38. 436 U.S. 412 (1978).

39. *Id.* at 431.

40. *Id.* at 414.

41. 436 U.S. 447 (1978).

42. 433 U.S. 350 (1977).

43. *Bates* involved a state rule against lawyer advertising as applied to ads for a "legal clinic" that provided services at low fees by accepting only routine cases.

Since *Bates*, the Court has decided a stream of lawyer advertising cases and has generally sustained First Amendment challenges to the prohibition of advertising when it is not misleading.<sup>44</sup>

But discomfort, distaste, and dissent attended these lawyer advertising decisions. Most recently, in a June 1995 opinion, *Florida Bar v. Went for It, Inc.*,<sup>45</sup> a five-member majority upheld, over strong dissent, a ban on targeted, direct-mail solicitations from plaintiffs' lawyers to accident victims within 30 days after the accident. Is *Went for It* an entering wedge to an eventual *volte-face* on lawyer advertising, or will it prove an isolated exception to the general run of First Amendment/commercial speech precedent? Perhaps others will respond to that question. I will note only that one of the Conference organizers, Monroe Freedman, has subtitled a passage in his book, *Understanding Lawyers' Ethics: "The Professional Responsibility to Chase Ambulances."*<sup>46</sup>

#### TALK IN AND OUT-OF-COURT

I will comment, finally, on comment by lawyers about ongoing court proceedings. What can a lawyer say while a case is in progress? If she is counsel in the case, her speech is not free.<sup>47</sup> I do not mean by "not free" that she may seek pay for her services, as ordinarily indeed she may. I mean, rather, that no one could seriously maintain a lawyer has a "free speech" right to tell the jury the contents of documents ruled inadmissible by the court, or to publish a book relating the salacious secrets her client told her in confidence. Nor may a lawyer escape control for dishonest or disruptive behavior — for example, framing frivolous

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44. See *Ibanez v. Florida Dep't of Business and Professional Regulation*, — U.S. —, 114 S. Ct. 2084 (1994) (reprimand of lawyer by State's board of accountancy for referring to her CPA and CFP credentials in her advertisements and letterhead violated her First Amendment rights in the absence of evidence that the public was misled); *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990) (lawyer, holder of a "Certificate in Civil Trial Advocacy" from the National Board of Trial Advocacy, had a First Amendment right to bill himself as a "Certified Civil Trial Specialist" in his letterhead); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (State may not prohibit the mailing of nondeceptive, personalized letters soliciting the business of persons against whom foreclosure suits had been filed); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (States may not prohibit the use of nondeceptive newspaper advertisements or direct mailings to solicit clients); *In re R.M.J.*, 455 U.S. 191 (1982) (States may not regulate the content of attorney advertising beyond restricting false or misleading advertising, absent a substantial state interest).

45. 515 U.S. — (1995).

46. MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 237 (1990) (chapter on solicitation of clients).

47. The Court, to date, has expressed "no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1072 n.5 (1991).

pleadings,<sup>48</sup> purloining letters, soliciting perjured testimony, or clownishly carrying on.<sup>49</sup>

What of the lawyer who goes to the newspapers? *Gentile v. State Bar of Nevada*,<sup>50</sup> decided by the Supreme Court in 1991, is the most recent High Court case in point. The day after the arraignment of Dominic Gentile's client, Grady Sanders, on theft charges, Gentile held a press conference to proclaim his client's innocence. Gentile met with the press to counter several news reports, adverse to Sanders, conveying information released by police and prosecutors. Gentile's client Sanders was tried and acquitted. But the State Bar reprimanded Gentile for conduct unbecoming an advocate, specifically, for violating the State Bar's rule that a lawyer may not make extrajudicial statements presenting "a substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>51</sup>

The Supreme Court upheld the Nevada Bar's "substantial likelihood" formulation against defense counsel Gentile's plea for a tighter — "clear and present danger" — test.<sup>52</sup> But a bare (5–4) majority nevertheless reversed the reprimand. Nevada's rule on pretrial publicity included a "safe haven" provision that described public statements engaged advocates may make without fear of discipline.<sup>53</sup> The rule's imprecision, however — its vagueness — made it, as Justice Kennedy wrote, "a trap for the wary as well as the unwary."<sup>54</sup> Gentile's case, as I see it, gives both sides reason to pause — lawyers to consider whether they are pushing too hard to gain real, enduring favor for their clients, and disciplinary authorities to consider whether media reports on a case are so exorbitant that a lawyer's impulse to answer back, in defense of her client, becomes irresistible.<sup>55</sup>

#### CONCLUDING STATEMENT

With the expectation that the Conference for which you have gathered will prove extraordinary in quality, may I add only these parting

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48. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 393 (1990).

49. *See, e.g., United States v. Lumumba*, 794 F.2d 806 (2d Cir.) (affirming order holding defense attorney in contempt for disruptive conduct during trial), *cert. denied*, 479 U.S. 855 (1986).

50. 501 U.S. 1030 (1991).

51. *See id.* at 1033 (quoting Nev. S. Ct. R. 177(1) (1991)).

52. *Id.* at 1036–37.

53. *See id.* at 1033, 1048–51, 1061–62.

54. *Id.* at 1051.

55. After *Gentile*, the American Bar Association amended its model rule to allow a lawyer to make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

words: If ethics essentially means good behavior in representing the people a system of justice exists to serve,<sup>56</sup> my general impression is that lawyers in the United States would not fare badly in a comparative evaluation. Lawyers in our system are perhaps more vigorous and venturesome than their counterparts in less adversarial systems and more highly regulated societies. But our lawyers are also, it seems to me, more broad-gauged and more public-spirited, as gatherings like this bear witness.

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56. In using the term "good behavior," I am borrowing in part from Article III of the U.S. Constitution ("The Judges . . . shall hold their Offices during good Behavior . . ."), and in part from an expression, *God advokatsed* (literally, good advocate mores), used in the Swedish Code of Judicial Procedure to describe the responsibilities and obligations of the ethical practitioner. See Ruth Bader Ginsburg & Anders Bruzelius, *CIVIL PROCEDURE IN SWEDEN* 66-67 & n.80 (1965).

