ARTICLES

SILENCE IS NOT GOLDEN: PROTECTING LAWYER SPEECH UNDER THE FIRST AMENDMENT

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Restrictions on lawyers' speech are increasingly common. In most high profile cases since the O.J. Simpson criminal trial, judges have imposed gag orders on the attorneys and parties precluding them from speaking with the press. In the civil suit against Simpson, Judge Fujisaki imposed a broad order prohibiting the attorneys and parties from discussing the case in public, even though Judge Ito had refused to impose such a gag order in the earlier criminal prosecution. Similarly, the federal district court judge in the Oklahoma City bombing case imposed an order preventing the lawyers from speaking with the media about that litigation. Judge Matsch issued a sua sponte order prohibiting extrajudicial statements by attorneys and support personnel. He declared: "This case calls for a blanket bar on out of court comments because no lesser restriction would adequately protect against a substantial likelihood of prejudicing the proceedings."

Additionally, new rules have been adopted restricting lawyer speech. California did not have a rule limiting attorneys' speech until the media frenzy surrounding the Simpson criminal trial. Following that case, California adopted a version of Model Rule 3.6, which prohibits attorneys from making statements

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that have a "substantial likelihood of materially prejudicing an adjudicatory proceeding."\(^2\)

At the same time, attorneys often find themselves the subject of disciplinary action for their speech critical of judges.\(^3\) In January 1998, the United States District Court for the Central District of California propounded an astounding proposed local rule that would make attorneys subject to discipline for any false statement impugning a judge.\(^4\) The rule, if adopted, would put the burden of showing the statement was true on the lawyer who made it and create strict liability for an attorney making a false statement.

Not surprisingly, all of these efforts to restrict lawyer speech come at a time when there is an increased demand for attorneys to talk to the press. The 1990s have seen a succession of high profile cases: the two trials of the officers for beating Rodney King; the prosecution of the Menendez brothers; the Susan Smith murder case; the two Oklahoma City bombing trials; and, of course, the O.J. Simpson criminal and civil trials. Although media attention to cases is nothing new, no trial in history received as much coverage as the Simpson criminal prosecution. Never before had a national network broadcast a preliminary hearing live, gavel-to-gavel, as all did in the Simpson case. Never before had a national network broadcast opening and closing arguments live, as all did in the Simpson case. Three separate television networks—CNN, E!, and Court TV—broadcast the entire case live. Never before were daily programs devoted to analyzing the events of the case.

The lessons the media learned from the O.J. Simpson case are that trials make great television and that there is a large audience for high publicity cases. As the media, both print and broadcast, increasingly follow high profile cases, there is ever greater pressure on lawyers to talk with the press. Judges and bar disciplinary authorities are responding by cracking down and trying to limit lawyer speech. The public and the bench, rightly or wrongly, regarded the


\(^3\) See, e.g., In re Anderson, No. 89-O-11498, 1997 WL 701359 (Cal. Bar Ct. Nov. 6, 1997) (holding an attorney may be disciplined for making false statements that impugn the honesty or integrity of the court if those statements are either knowingly false or made with reckless disregard of their truth or falsity); In re Palmisano, 70 F.3d 483 (7th Cir. 1995) (upholding disbarment of attorney for slandering a judge); Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (overturning discipline of attorney for sharply criticizing judge).

\(^4\) United States Dist. Ct. for the Cent. Dist. of Ca., Proposed R. 1.2.2(B).
Simpson case as a spectacle not to be repeated, and the result has been ever increasing efforts to limit attorney speech.

Much has been written about this topic, most of it critical of lawyer speech and supportive of greater restrictions.\footnote{See, e.g., Kevin Cole & Fred C. Zacharias, The Agony of Victory and the Ethics of Lawyer Speech, 69 S. CAL. L. REV. 1627 (1996); Eileen A. Minnison, Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants, 30 U.S.F. L. REV. 95 (1995); Gerald F. Uelmen, Leaks, Gags and Shields: Taking Responsibility, 37 SANTA CLARA L. REV. 943 (1997).} I wish to challenge this approach and defend the desirability of lawyers speaking to the press. My conclusion is that lawyers should be prohibited only from making statements that they know to be false or that are made with reckless disregard of the truth. In other words, the \textit{New York Times v. Sullivan}\footnote{376 U.S. 254 (1964).} test, that limits recovery for defamation in suits by public officials or public figures, should be used as the only restriction on speech about pending cases. False speech serves little First Amendment purpose and there is no reason to constitutionally protect expression that is uttered with knowledge that it is false. Otherwise, however, all attorney speech about pending cases should be unregulated, both by rules of professional conduct and by court orders.

This Article is divided into three major parts. First, I argue that lawyer speech is desirable. Lawyers have First Amendment rights and requiring attorneys to relinquish them as a condition of membership in the bar should be viewed as an unconstitutional condition. More importantly, a lawyer’s duty to zealously represent a client often is best served by the attorney speaking to the press. Indeed, what generally has been overlooked is how attorney speech about pending cases can advance the interests of the client and the justice system. My conclusion is that attorney speech about pending cases and about courts should be regarded as political speech protected by the core of the First Amendment. Restrictions should be tolerated only if strict scrutiny is met.

Second, I contend that current rules and gag orders limiting attorney speech fail strict scrutiny. Model Rule 3.6, approved by the Supreme Court in \textit{Gentile v. State Bar of Nevada},\footnote{501 U.S. 1039 (1991).} cannot be shown to be necessary to achieve the compelling interest of assuring fair trials and, additionally, is unconstitutionally vague. Likewise, the standard used by most courts in imposing gag orders fails strict scrutiny. Speculation about the effects of attorney speech is not sufficient to justify restrictions.
Third, I argue that a preferable approach would be to follow the New York Times v. Sullivan standard. Traditionally, the debate over the appropriate approach to attorney speech has centered on whether the clear and present danger test or some less protective approach should be followed. To my knowledge, no one has advocated that attorneys be subject to discipline only if it is proven, with clear and convincing evidence, that an attorney made a statement knowing it to be false or with reckless disregard of the truth. I suggest that this standard is best because it is the most protective of speech, it is not vague or overbroad, it serves the goal of preventing the speech most likely to cause harm, and it has the virtue of a large body of case law defining it.

It is not surprising that there is a large public demand for restrictions on lawyer speech and that judges are quick to impose controls. It is difficult to assess whether lawyers or the media rank lower in public esteem, so lawyers talking to the press are an easy target. Judges understandably want to control the cases before them and wish that all else would go away. Gag orders give them at the least the sense of more control. But all of this ignores the First Amendment and the strong presumption that more speech is better, that rarely is the public interest served by government-enforced silence, and that the best remedy usually is more speech not less.8

I. Attorneys' Speech About Pending Cases Should Be Restricted Only if Strict Scrutiny is Met

Under current constitutional doctrines, the analysis of restrictions on speech depends very much on the level of scrutiny used. If attorney speech is regarded as of low value or even unprotected by the First Amendment, restrictions will have little difficulty meeting constitutional muster. I contend, however, that restrictions on lawyer speech must be subjected to strict scrutiny. Initially, in subsection A, I suggest that traditional First Amendment principles warrant the application of strict scrutiny because government restrictions are content-based limits on political speech. Although the First Amendment requires strict scrutiny for regulation of such expression without any attention to its social value, I argue in subsection B that lawyer speech about pending cases often advances important values such as zealous representation of clients and the guarantee of fair trials.

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A. Content-Based Restrictions on Political Speech Must Meet Strict Scrutiny

Although there are disputes about countless aspects of free speech law, there is no doubt that political speech—speech about government and government officials—is protected by the very core of the First Amendment. In *New York Times v. Sullivan*, Justice Brennan wrote eloquently of a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

Thus, it is clearly established that the government may restrict speech about government and government officials only if strict scrutiny is met.

Obviously, courts are a part of the government; therefore, court proceedings are government action. In *Shelley v. Kramer*, the Court explained that “the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment.” It is not just the actions of the judge in court that constitute government action; in holding that the discriminatory use of peremptory challenges by attorneys representing private parties in civil cases and even criminal defense attorneys are impermissible, the Court made it clear that court proceedings are government actions.

Therefore, unquestionably, attorney speech about what is pending or occurring in a court is political speech. Any speech about a judge or a judge’s rulings fits squarely within *New York Times v. Sullivan*’s conception of the speech that is central to the First Amendment. Moreover, in the criminal context, speech by defense attorneys often concerns the activities of other government officers, such as prosecutors and police officers. By itself, this demonstrates that strict scrutiny is appropriate in evaluating any regulation of attorney speech about pending cases.

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10 376 U.S. at 270.


12 334 U.S. 1 (1948).

13 Id. at 14.

In addition, strict scrutiny is appropriate because regulations, whether as rules of professional conduct or as gag orders, are content-based restrictions on speech. Model Rule 3.6 is explicitly content-based. It provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.\footnote{Model Rules of Professional Conduct, Rule 3.6.}

By its very terms, the rule limits speech only if its content is deemed likely to be prejudicial. Moreover, the content-based nature of the rule is evident in its many exceptions, such as that a "lawyer may state the claim, offense, or defense involved...; information contained in the public record; that an investigation is in progress;... [and] a warning of danger concerning the behavior of the person involved."\footnote{Model Rules of Professional Conduct, Rule 3.6(b).} Speech is allowed under the rule if its content fits within the exceptions, otherwise it is prohibited. A content-based restriction on speech could not be clearer.

Similarly, court orders on attorneys limiting speech in particular cases are content-based because their application depends entirely on the topic of the speech. Also, restrictions are imposed only on the ability of the trial participants to speak about the pending case. Attorneys and witnesses are free to speak about any other subject, just not the litigation.

It is firmly established that content-based restrictions on expression must meet strict scrutiny. The Court has declared that "[c]ontent-based regulations are presumptively invalid."\footnote{R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).}

In \textit{Turner Broadcasting System v. FCC},\footnote{512 U.S. 222 (1994).} the Court said that the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulation only need meet intermediate scrutiny. Justice Kennedy, writing for the Court, explained that "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."\footnote{Id. at 641.} Justice Kennedy thus noted: "For these reasons, the First
Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.\textsuperscript{20} Hence, the Court endorsed a two-tier system of review. The Court uses "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."\textsuperscript{21} But, "[i]n contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."\textsuperscript{22}

There is no doubt that a restriction on the ability of individuals to discuss specific topics is a content-based restriction on speech. \textit{Carey v. Brown}\textsuperscript{23} is illustrative. That case concerned Chicago's adoption of an ordinance prohibiting all picketing in residential neighborhoods unless it was labor-related picketing connected to a place of employment.\textsuperscript{24} The Supreme Court held this regulation unconstitutional.\textsuperscript{25} The Court explained that the law was an impermissible content-based restriction because it allowed speech if it was about the subject of labor, but not otherwise.\textsuperscript{26} Likewise, court orders on trial participants restrict their ability to speak about the subject matter of the case, but not otherwise.

Another case illustrating the unconstitutionality of content-based restrictions on speech, more closely related to limits on trial participants, is \textit{Simon & Schuster v. Members of the New York State Crime Victims Board}.\textsuperscript{27} In \textit{Simon & Schuster}, the Court declared unconstitutional a state law that prevented an accused or convicted criminal from profiting from selling the story of his or her crime to the media.\textsuperscript{28} The so-called "Son of Sam Law" placed any funds received from works describing the crime into an escrow account that was used for restitution to victims of the crime and for paying the criminal's other creditors.\textsuperscript{29} The New York law did not prohibit any speech; it only prevented individuals from keeping profits from selling the tales of their criminal activity. Nonetheless, the Supreme Court found that the law violated the First Amendment. The Court stressed that the state law was content-based: "It

\textsuperscript{20} Id.
\textsuperscript{21} Id. at 641-42.
\textsuperscript{22} Id. at 642.
\textsuperscript{23} 447 U.S. 455 (1980).
\textsuperscript{24} Id. at 457-58.
\textsuperscript{25} Id. at 470-71.
\textsuperscript{26} Id.
\textsuperscript{28} Id. at 123.
\textsuperscript{29} Id. at 108-10.
singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content.\textsuperscript{30} The Court thus applied strict scrutiny and concluded that while compensating crime victims was a compelling interest, the state could achieve that goal through a means less restrictive of speech.

Therefore, both rules of professional conduct regulating attorney speech and gag orders on lawyers should be allowed only if strict scrutiny is met. Moreover, gag orders should also merit strict scrutiny because they are a prior restraint on speech. The Supreme Court has stated that “prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.”\textsuperscript{31} “The First Amendment was, in part, a reaction against the licensing requirements for publication that had existed in England. It was this legacy that prompted Blackstone to declare that “the liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published.”\textsuperscript{32} Although it is clear that “the prohibition of laws abridging the freedom of speech is not confined to previous restraints,”\textsuperscript{33} there is no doubt that prior restraints are regarded as a particularly undesirable way of regulating speech.

Prior restraints are regarded as particularly undesirable because they prevent speech from ever occurring. The Court explained that “[b]ehind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.”\textsuperscript{34} Inevitably, prior restraints could be imposed based on predictions of danger that would not actually materialize and thus would not be the basis for subsequent punishments.\textsuperscript{35} Moreover, prior restraints are worse than other ways of regulating speech because of the collateral bar rule: a person violating an unconstitutional law may not be punished, but a person violating an unconstitutional prior restraint generally may be punished. Specifically, the collateral bar rule provides that “a court order must be obeyed until it is set aside, and that persons subject to the order who disobey it may not defend

\textsuperscript{30} Id. at 116.
\textsuperscript{31} Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
\textsuperscript{32} 4 William Blackstone, Commentaries *151-52.
\textsuperscript{33} Schenck v. United States, 249 U.S. 47, 51 (1919).
\textsuperscript{34} Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).
against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional.\textsuperscript{36}

There is no doubt that court orders limiting speech are a classic form of prior restraint. In \textit{Alexander v. United States},\textsuperscript{37} the Court stated that "[t]he term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communication are to occur.'"\textsuperscript{38} In cases such as \textit{Near v. Minnesota},\textsuperscript{39} \textit{New York Times v. United States},\textsuperscript{40} and \textit{Nebraska Press v. Stuart},\textsuperscript{41} the Court unequivocally held that court orders prohibiting speech are prior restraints and must meet the highest level of scrutiny.

\textbf{B. Speech by Attorneys About Pending Cases Has Important Social Value}

The Supreme Court's First Amendment decisions do not require analysis of the value of the speech before applying strict scrutiny to content-based restrictions on speech or to prior restraints. The above analysis unquestionably is sufficient to warrant the application of strict scrutiny to regulations and court orders restricting attorney speech. However, the need for protection of such speech is best appreciated if the value of the speech is recognized.

The common public perception is that attorney speech about pending cases serves little, if any, useful purpose and that it likely is just a reflection of the lawyer's desire to use the case for personal fame and profit.\textsuperscript{42} Indeed one prominent expert on legal ethics flatly declared that lawyers "need not say anything to the press to represent their clients effectively."\textsuperscript{43}

I disagree and contend that there are times that effective representation of a client requires statements to the press. In other words, I wish to challenge the conventional wisdom that lawyer speech is, at best, sometimes permissible;


\textsuperscript{37} 509 U.S. 544 (1993).

\textsuperscript{38} \textit{Id.} at 550 (citation omitted).

\textsuperscript{39} 283 U.S. 697 (1931).

\textsuperscript{40} 403 U.S. 713 (1971).

\textsuperscript{41} 427 U.S. 539 (1976).

\textsuperscript{42} See Fred C. Zacharias, \textit{Reconceptualizing Ethical Roles}, 65 GEO. WASH. L. REV. 169, 181-82 (1997) (acknowledging other purposes, but stating that lawyers often speak to the press to "posture for their own reputations, posture for their clients' reputations, enhance the value of publication rights for themselves or their clients, or simply bask in the limelight").

\textsuperscript{43} \textit{Id.} at 182.
rather, a lawyer who is zealously representing a client, at times, should be making statements to the media.

First, countering adverse publicity in the media often may require statements to the media. In Part II, I argue that it is uncertain and likely unknowable whether media publicity affects juries. Although from a First Amendment perspective there is too much uncertainty to justify regulation, a lawyer cannot take the chance that media publicity has no impact and should counter adverse publicity concerning his or her client. In other words, the First Amendment and an individual attorney should be operating from opposite premises; the First Amendment can tolerate restrictions of speech only if the harm of the expression is proven, while the attorney should always speak out and counter potentially harmful publicity unless the harm is clearly trivial.

If there is no gag order and one side is speaking to the press, the other should be able to counter. For example, soon after O.J. Simpson was arrested, Los Angeles District Attorney Gil Garcetti said on national television that he thought that Simpson might soon plead guilty. The defense needed to speak out to preserve the presumption of innocence in the public's mind. Throughout the case, each side made statements to the press which warranted reply. Indeed, so long as both sides had equal access to the media—and in the Simpson case they clearly did—there was little reason to fear that lawyer speech would distort the process in favor of either side.

The response to my argument is that the better approach would be to silence both sides, as judges have done in most of the high profile cases since the Simpson prosecution. As argued above, this violates the First Amendment unless strict scrutiny is met. Moreover, it does not solve the problem because gagging attorneys does not prevent publicity that might be adverse to one side or the other. Leaks of information are frequent in high profile cases. In the Simpson case, for example, there were constant leaks of information from the prosecution or police of evidence damaging to Simpson. In fact, it often seemed that any time the defense had a good day in court, the newspapers the next day would be filled with accounts of some new powerful evidence against Simpson.\(^\text{44}\)

Such leaks are virtually impossible to stop. In the World Trade Center bombing case there were leaks that clearly came from the police.\(^\text{45}\) The judge


\(^{45}\) Larry Olmstead, In Trade Center Bombing Case, Two Rights Collide, N.Y. Times, Apr. 29, 1993, at B3.
brought each police officer on the case to the witness stand and each denied, under oath, being the source of the leaks. The identity of the source was never discovered.

Even if no attorney or participant in the case ever spoke to the media, there would still be intense coverage of high profile cases. The constant publicity concerning the Oklahoma City bombing case illustrates this. Such media publicity can be adverse to one side or the other and may include false, damaging information. Unless the adverse speech can be answered, there is danger of the public having a false and unfair impression. In such circumstances, attorneys can and should speak out on behalf of their clients.

In the Oklahoma City bombing case, Judge Matsch expressly rejected a defense request that it be permitted to reply publicly to statements in the media that could not be answered in court. He said that such an exception to his order was "an impossibility."46 Although he was correct that it would be unfair to allow one side, but not the other to use the press, he was wrong that the best solution was to silence both, particularly when it meant that statements in the media damaging to the defense would be unanswered.

Similarly, at times attorneys must speak out to protect their clients' reputations. Professor Uelman has forcefully argued that

[a] client who is never prosecuted, or who is prosecuted and acquitted, may have been ill-served by a lawyer who allowed public speculation about his guilt to go unchallenged. Security guard Richard Jewell, for example, was subjected to intense media speculation regarding F.B.I. suspicions of his involvement in the bombing at Atlanta's... Olympic Games.47

Second, attorney speech to the media may help to gather crucial evidence. Police and prosecutors may want to speak to the press to gain public assistance in locating witnesses and other evidence.48 Defense lawyers also often benefit from the public coming forward in response to media publicity. For example, in the Menendez case, discrepancies in the testimony regarding the gun purchase were brought to light by a person following the media coverage.49

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47 Uelman, supra note 5, at 951-52.
48 Id. at 950.
An even more powerful illustration of this occurred in the Simpson case. Kathleen Bell, a key witness who testified that she heard Mark Fuhrman utter racial epithets, contacted the defense the day Johnnie Cochran announced in the media his participation in the case.\textsuperscript{50} It was a result of Bell’s affidavit that Judge Ito decided to allow Mark Fuhrman to be cross-examined about his use of racial epithets. This, of course, later led to the famous tapes where Fuhrman was using the exact words that he denied having spoken. Although the ultimate impact of Fuhrman’s testimony on the trial cannot be known, there is no doubt that the Simpson defense was enormously helped.

Third, attorney statements to the media might help encourage settlement. If an attorney or a surrogate point out weaknesses in the other side’s case, settlement might become more likely. Prominent civil rights attorney Gloria Allred has suggested that “the press . . . provides leverage in cases that are publicly embarrassing to the opposition.”\textsuperscript{51} Allred remarked: “By convincing the defense that the matter will be on the front page many more times, a plaintiff’s lawyer can raise a case’s settlement value’ and hasten its conclusion.”\textsuperscript{52} There is an important public benefit to such private gains. The Supreme Court has emphasized the great benefit to the legal system of settlements and the avoidance of trials.\textsuperscript{53}

Fourth, often clients have interests that transcend a particular case. They seek to use the legal system to reform the law. A plaintiff may bring a lawsuit to challenge an abusive practice. Publicity can be crucial in bringing the abuses to light. More generally, a client may want to use the media attention to educate the public about an issue. William Colby, the attorney who represented the Cruzan family in the famous “right to die case,”\textsuperscript{54} explained:

[T]he public discourse surrounding the cases quickly took on a life of its own. The true legacy of the two cases is that they caused [the country] to talk about death, dying, living wills, hospital ethics committees, and the withdrawal of futile medical treatment and who should make that decision. This nationwide discussion very quickly outgrew the individual lawsuits of two young girls involved in car

\textsuperscript{51} Weider, supra note 49, at 545 (paraphrasing attorney Gloria Allred).
\textsuperscript{52} Id. (quoting attorney Gloria Allred).
accidents. Both families are extremely proud that this good could grow from their tragedies.\textsuperscript{55}

Such public discussion of important social issues has obvious benefits. Attorney speech can foster and direct the dialogue. The legal system often is and should be used to reform society, and publicity can help further the client’s cause and the public’s interest.

Finally, at times, attorneys should speak out to generate media interest in their cases with the hope that the public scrutiny will cause judges to be more careful and fair. Max Stern and fellow attorneys organized a publicity campaign in the case of a black man in Boston accused of raping four white women because “[t]hey believed that in a racially divided city such as Boston, their client would face unfair prejudice in the courtroom without such a ‘public defense.’”\textsuperscript{56} Stern later stated that he felt that the campaign paid off and significantly influenced the trial judges by making them “extremely conscious of public scrutiny and of being and appearing to be fair and even-handed. The public focus of the defense reinforced this tendency and thus helped ensure that the defendant would receive his share of discretionary rulings.”\textsuperscript{57}

The point is that attorney speech often serves to advance the interests of the client and the interests of society. The former explains why attorney speech, at times, is part of the duty of zealous representation. The latter helps to explain why attorney speech is protected by the First Amendment.

C. Is Less Than Strict Scrutiny Warranted Because Attorneys Are Officers of the Court?

The primary argument for applying less than strict scrutiny is the view that attorneys are officers of the court and thereby are entitled to less free speech protection than others in society. Mark Stabile has argued, for example, that gag orders are “particularly justified when applied to lawyers and court personnel.”\textsuperscript{58} He argues that officers of the court have a fiduciary responsibility not to prejudice fair trials because they have special access to information and a

\textsuperscript{56} Note, Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion, 95 COLUM. L. REV. 1811, 1837 (1995).
professional responsibility not to thwart a fair judicial process. Stable finds support for his view in the Supreme Court’s statement in Sheppard v. Maxwell,59 that “[c]olaboration between counsel and the press as to information affecting the fairness of criminal trials is not only subject to regulation but is highly censurable and worthy of disciplinary measures.”60

The argument that restrictions on lawyers should receive less than strict scrutiny also has support in the language of some Supreme Court opinions. For instance, Justice Brennan, in a concurring opinion in Nebraska Press61 said that “[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will rebound to the detriment of the accused or that will obstruct the fair administration of justice.”62 Likewise, Chief Justice Rehnquist, writing in Gentile v. State Bar of Nebraska,63 stated that “[t]he State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs [referring to the adverse effects of pretrial publicity] on the judicial system and on the litigants.”64 Seventh Circuit Judge Frank Easterbrook held that attorneys can be subjected to discipline for criticizing judges because “the Constitution does not give attorneys the same freedom as participants in a political debate.”65

However, there are many serious problems with the argument that less than strict scrutiny is required because attorneys are officers of the court. First, the descriptive statement that attorneys are officers of the court does not justify the normative conclusion that a lesser standard of constitutional review should be used in reviewing restrictions on attorney speech. Even accepting the characterization that lawyers are officers of the court, that says nothing about the duties which are attendant to this role.

Put another way, the descriptive role of attorneys in a judicial system does not resolve the normative constitutional question as to when prior restraints on speech should be allowed. In fact, Justice Kennedy argued that the unique position of lawyers, if anything, justifies more protection for their speech. In Gentile, Justice Kennedy wrote:

60 Id. at 363.
62 Id. at 601 n.27 (Brennan, J., concurring).
64 Id. at 1075.
65 In re Palmisano, 70 F.3d 483 (7th Cir. 1995).
To the extent the press and public rely upon attorneys for information because attorneys are well-informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent.\footnote{Gentile, 501 U.S. at 1056-57.}

Second, attorneys’ duties to the court always must be assessed in the context of the lawyers’ duties to their clients. As explained above, an attorney’s clients may be best served by their attorney speaking to the media. Unless there is proof that the court will be harmed by such attorney speech, the duty to clients deserves priority. Phrased slightly differently, the argument that attorneys deserve less protection of speech because they are officers of the court rests on the assumption that lawyers’ speech is in some way damaging to the judiciary. Yet, as argued in Part II, that assumption is unsupported. Indeed, there is a circular nature to this basis for regulating attorney speech. It is said that attorneys are officers of the court and are thus less deserving of free speech, assuming that lawyer speech is harmful; restrictions are then approved based on a lower level of scrutiny and with little proof of harm. The damage to the legal system from attorney speech remains asserted but never proven.

Third, applying a lower level of scrutiny to restrictions of attorneys’ speech would be an unconstitutional condition on bar membership. Lawyers would be forced to relinquish First Amendment rights in exchange for their ticket to practice law.\footnote{See Michael E. Swartz, Trial Participant Speech Restrictions: Gagging First Amendment Rights, 90 Colum. L. Rev. 1411, 1426 (1990) (arguing that the officer of the court rationale constitutes an impermissible unconstitutional condition).} The unconstitutional condition doctrine is the principle that the government cannot condition a benefit on the requirement that a person forego a constitutional right. The central idea is that the “government may not deny a benefit to a person because he exercises a constitutional right.”\footnote{Regan v. Taxation with Representation of Washington, 461 U.S. 540, 545 (1983) (citation omitted).}

\textit{Speiser v. Randall}\footnote{357 U.S. 513 (1958).} is a classic example of the application of the unconstitutional condition doctrine. That case concerned a California law providing that in order for an individual to receive a veterans’ property tax exemption he or she had to sign a declaration disavowing a belief in overthrowing the United States...
government by force or violence. The Court said that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."\textsuperscript{70}

Conditioning a benefit on a requirement that individuals give up their First Amendment rights obviously pressures individuals to forego constitutionally protected speech. The \textit{Speiser} Court explained that the condition "will have the effect of coercing the claimants to refrain from the proscribed speech."\textsuperscript{71} Put another way, the unconstitutional condition doctrine prevents the government from penalizing those who exercise their constitutional rights by withholding a benefit that otherwise would be available.\textsuperscript{72} In \textit{Perry v. Sindermann},\textsuperscript{73} the Court, in explaining that the government could not deny employment to a person for exercising First Amendment rights, declared: "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.'"\textsuperscript{74}

Applying a lower level of scrutiny to content-based restrictions on attorney speech, as compared with the standard applied to content-based restraints on everyone else's speech, would create an unconstitutional condition on the practice of law. Attorneys would be required to relinquish their speech rights in exchange for the ability to practice law. In sum, strict scrutiny should be applied to limits on lawyers' speech just as strict scrutiny is applied to all content-based restraints.

\textbf{II. CURRENT STANDARDS ARE UNCONSTITUTIONAL}

Part I explained why strict scrutiny should be used in evaluating restrictions of lawyer speech. Part II explains why strict scrutiny is not met and why current limits on attorney speech are unconstitutional. Subsection A briefly describes the current standards concerning regulation of attorney speech. Subsection B

\textsuperscript{70} \textit{Id.} at 518.

\textsuperscript{71} \textit{Id.} at 519.


\textsuperscript{73} 468 U.S. 593 (1972).

\textsuperscript{74} \textit{Id.} at 597 (quoting \textit{Speiser}, 357 U.S. at 526).
explains why these standards fail strict scrutiny and violate the First Amendment. Subsection C responds to likely counter-arguments.

A. The Current Standards

There are two primary restrictions on attorney speech: rules of professional conduct and gag orders. Each is discussed in turn.

1. Rules of Professional Conduct

The vast majority of states have adopted some form of the American Bar Association’s Model Rules of Professional Conduct. 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 a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.\(^75\)

The Supreme Court upheld the constitutionality of this rule in *Gentile v. State Bar of Nevada.*\(^76\) In *Gentile*, the Court held that attorney speech about pending cases is protected by the First Amendment, but that it can be punished if it poses a substantial likelihood of materially prejudicing an adjudicatory proceeding. In that case a criminal defense attorney, Dominic Gentile, gave a press conference in which he said that his client was an innocent “scapegoat” who was the victim of “crooked cops.”\(^77\) After the client was acquitted, Nevada brought disciplinary proceedings against Gentile for violating the state’s code of professional responsibility. Nevada had adopted a provision based on the American Bar Association’s Model Rules of Professional Conduct that prohibits attorney speech that has a “substantial likelihood of materially prejudicing an adjudicatory proceeding.”\(^78\)

Gentile argued that an attorney should be subjected to discipline only if there is a “clear and present danger” to the fair administration of justice; he contended that the “substantial likelihood” test did not sufficiently protect speech. The Supreme Court, in a 5-4 decision, rejected this argument and upheld Nevada’s

\(^{75}\) *Model Rules of Professional Conduct*, Rule 3.6(a).


\(^{77}\) *Id.* at 1034.

\(^{78}\) *Nev. Sup. Ct. Rule 177.*
ethical rule. The Court explained that attorneys are officers of the Court and thus are more subject to regulation of their speech than others. The Court also noted that speech by attorneys could pose a greater risk to the fair administration of justice. Chief Justice Rehnquist, writing for the Court, said: "Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative."79 The Court thus concluded: "We agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."80

2. Gag Orders

The other key form of restrictions on attorney speech are court orders preventing attorneys in a pending case from speaking publicly about it. The Supreme Court has not yet addressed the constitutionality of gag orders on lawyers and parties. However, in Nebraska Press Association v. Stuart,81 the Court considered the constitutionality of prior restraints on the press to protect a fair trial. The only mention in Nebraska Press of gag orders on attorneys was a passing reference in a long list of alternatives to prior restraints on the press. The Court recited many alternatives to gag orders on the press, including, changing venue, postponing the trial to allow public attention to subside, searching questioning of prospective jurors to screen out those with fixed opinions as to guilt or innocence, clear instructions to the jury as to what may be considered in reaching a verdict, and sequestration of jurors.82 The list of possibilities did include orders limiting speech by attorneys, but this obviously is just dicta because Nebraska Press did not involve such a gag order and the Court did not appraise its constitutionality.

79 Gentle, 501 U.S. at 1074.
80 Id. at 1074. However, the Court also found that a particular provision in the Nevada rule was unconstitutional. The Court's decision upholding the substantial likelihood test was by a 5-4 margin. Justice O'Connor, who was part of the majority on that issue, joined with the dissenters to comprise a majority declaring that the "safe harbor" provisions of the law were impermissibly vague. For example, one exception said that lawyers could make statements about the nature of the defense. Justice Kennedy, writing for the Court on this issue, found that this safe harbor provision did not provide sufficient guidance as to what speech was allowed and what was protected.
82 Id. at 564.
In the absence of guidance from the Supreme Court, lower courts have adopted several different standards for when gag orders on lawyers and parties are constitutionally permissible. For example, some courts have said that such gag orders are allowed so long as they seem reasonably related to achieving a fair trial. The Fourth Circuit has taken this approach. In re Russell, the court of appeals approved a district court gag order on potential witnesses in a criminal case against alleged members of the Ku Klux Klan. The defendants were implicated in the shooting deaths of five individuals, and the judge felt that the "proscription of certain extrajudicial communications by prospective witnesses was necessary in order to protect the rights of the defendants to a fair trial based 'solely on admissible evidence.'" The court of appeals approved the gag order because of the "reasonable likelihood that [due to the prejudicial news prior to trial] the defendants would be denied a fair trial." The court concluded that "the tremendous publicity attending this trial, the potentially inflammatory and highly prejudicial statements that could reasonably be expected from petitioners ..., and the relative ineffectiveness of the considered alternatives, dictated the 'strong measure' of suppressing speech of potential witnesses to ensure a fair trial."

Likewise, the Tenth Circuit has approved gag orders on trial participants based on this relaxed reasonable likelihood standard. In United States v. Tijerina, the Tenth Circuit held that a gag order on trial participants is constitutional if there is a "reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial." The district court had issued an order which prohibited the attorneys, defendants, and witnesses from

mak[ing] or issu[ing] any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or the rulings of the Court.

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83 726 F.2d 1007 (4th Cir. 1984).
84 Id. at 1009.
85 Id. at 1010.
86 Id.
87 412 F.2d 661, 666 (10th Cir. 1969).
88 Id. at 663.
The court of appeals upheld this order and expressly rejected use of the clear and present danger test. The court said that the reasonable likelihood standard was appropriate in order to ensure a fair trial.\textsuperscript{89}

At the opposite end of the continuum, some courts of appeals have articulated strict scrutiny as the appropriate test for gag orders on trial participants. In the consolidated legal proceedings arising from the killing of students by the National Guard during the demonstration at Kent State on May 4, 1970, the district court had entered a gag order which prohibited all parties to the litigation, as well as their relatives, friends, and associates from discussing "in any manner whatsoever these cases with the news media or the public."\textsuperscript{90} The Sixth Circuit, in \textit{CBS, Inc. v. Young}, held that direct prior restraints such as a court order "must be subjected . . . to the closest scrutiny,"\textsuperscript{91} and found that the order was an "extreme example of a prior restraint upon freedom of speech and expression."\textsuperscript{92}

The court explained that the gag order "seal[ed] the lips of all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates . . . from discussing in any manner whatsoever these cases with members of the news media or the public."\textsuperscript{93} In addition to expressing concern for the First Amendment rights of these individuals, the court also explained that the order impaired the First Amendment right of the press to gather information.\textsuperscript{94} The court thus concluded that "[t]o justify imposition of a prior restraint, [statements] must pose a clear and present danger, or a serious or imminent threat to a protected competing interest" and "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms."\textsuperscript{95}

The Sixth Circuit reaffirmed this test in \textit{United States v. Ford}.\textsuperscript{96} In this highly publicized case involving mail and bank fraud charges against United States Congressman Harold Ford of Tennessee, the district court entered an order which prohibited Ford from making any "extrajudicial statements that a reasonable person would expect to be disseminated by means of public

\textsuperscript{89} \textit{Id. at 667}.
\textsuperscript{90} \textit{See CBS, Inc. v. Young, 522 F.2d 234, 236 (6th Cir. 1975)}.
\textsuperscript{91} \textit{Id. at 238}.
\textsuperscript{92} \textit{Id. at 240}.
\textsuperscript{93} \textit{Id. at 239}.
\textsuperscript{94} \textit{Id. (citation omitted)}.
\textsuperscript{95} \textit{Id. at 238}.
\textsuperscript{96} \textit{830 F.2d 596 (6th Cir. 1987)}.
communication."97 The court said that the *Nebraska Press* test which concerns gag orders on the press should apply to gag orders on trial participants. The court explained that "any restrictive order involving a prior restraint upon First Amendment freedoms is presumptively void and may be upheld only on the basis of a clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial."98 For such a prior restraint to be valid, the speech must pose a ""serious and imminent threat of a specific nature, the remedy for which can be narrowly tailored in an injunctive order."99 The court also noted that there must be a finding that "less burdensome alternatives of voir dire, sequestration, or change of venue" will not suffice to protect a fair trial.100

The Second Circuit has applied a similar test when gag orders are challenged by trial participants.101 In *United States v. Salameh*,102 the Second Circuit considered a gag order in the prosecutions arising from the bombing of the World Trade Center in New York City. To avoid the feared prejudicial effects of expected extensive pretrial publicity, the trial court judge issued an order barring counsel for all parties to the action from publicly discussing any aspect of the case.103

The court of appeals recognized that the gag order was a prior restraint and held that three conditions had to be met in order for such an order to be constitutional. First, "the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial."104 Second, the trial court must explore "whether other available remedies would effectively mitigate the prejudicial publicity."105 Third, the trial court must give proper notice to all parties restrained and give each party the opportunity to be heard.

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97 Id. at 597.
98 Id. at 599 (citation omitted).
99 Id. at 600 (citation omitted).
100 Id.
101 Interestingly, the Second Circuit has ruled that the less protective reasonable likelihood test should be applied when the challenge to a gag order is brought by the media rather than by an individual covered by the court's order. See *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988).
102 992 F.2d 445 (2d Cir. 1993).
103 Id. at 446.
104 Id. at 447 (citation omitted).
105 Id.
The Ninth Circuit has adopted a very similar approach to that articulated by the Second Circuit. In *Levine v. United States*, the court of appeals upheld a gag order that the trial court had imposed on lawyers and the defendant in the Richard Miller spying case. The court found that a prior restraint on speech by parties may be upheld only if three requirements are met. First, the activity restrained must pose a clear and present danger or a serious and imminent threat to a protected competing interest. Second, the order must be narrowly drawn. Finally, there must not be less restrictive alternatives available. However, the Ninth Circuit, like the Second Circuit, uses a less protective test if the challenge to the gag order is brought by the press rather than by the participants covered by the court’s order.

Some lower courts have rejected the argument that gag orders on trial participants should be regarded as prior restraints. In *United States v. Davis*, the court ordered all parties associated with the case to refrain from making any extrajudicial statements concerning the case to the media. The district court rejected the claim that this was a prior restraint because it did not involve a restriction on the dissemination of information by the press; it only limited the gathering of information by limiting the ability of the press to receive statements from lawyers. The crucial flaw in this conclusion is that it focuses solely on the institutional press and ignores that gag orders directed at lawyers and parties are a prior restraint on their speech.

Indeed, several courts have enforced gag orders on lawyers via criminal contempt proceedings for violations. In *United States v. Cutler*, Bruce Cutler, John Gotti’s defense lawyer, was convicted of criminal contempt for his statements to the media about the case. After the United States Attorney held a press conference following the indictment in which he called Gotti a “murderer, not a folk hero” and boasted about the strength of the government’s case, Cutler defended his client to the press. He said that the prosecutors were publicity hungry and had a vendetta against Gotti and emphatically denied that Gotti was a mob boss. For these and other comments made throughout the trial, Cutler was convicted of criminal contempt and sentenced to three years probation.

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106 764 F.2d 590 (9th Cir. 1985).
107 *Id.* at 595 (citation omitted).
108 *Id.*
109 *Id.*
110 *See* Radio & Television News v. District Court, 781 F.2d 1443 (9th Cir. 1986).
112 *Id.* at 566.
113 58 F.3d 825 (2d Cir. 1995).
days of house arrest, a 180 day suspension from practice in the Eastern District of New York, and 600 hours of non-legal community service. The United States Court of Appeals for the Second Circuit upheld the conviction and the sentence. This is striking because, as discussed above, the Second Circuit purports to use strict scrutiny in evaluating gag orders on lawyer speech.\textsuperscript{114}

Thus, the law is unsettled as to when gag orders on trial participants are constitutional. This uncertainty is likely to remain until the Supreme Court addresses the issue and articulates a standard.

\textbf{B. The Unconstitutionality of the Current Approach}

The key question is whether these restrictions on lawyer speech meet strict scrutiny. Under strict scrutiny, the burden is on the government to prove that its action is necessary to achieve a compelling purpose.\textsuperscript{115} The justification for the regulation on attorney speech is the need to ensure fair trials. There is no doubt that there is a compelling government interest in providing fair trials in both criminal and civil cases. In criminal cases, the Sixth Amendment, of course, guarantees defendants a right to a fair trial with an impartial jury. Moreover, due process requirements apply in both criminal and civil cases.

However, strict scrutiny cannot be met because restrictions on lawyer speech are not necessary to provide a fair trial. First, there is not sufficient evidence to prove that attorney speech jeopardizes fair trials so as to justify either the rules of professional conduct or gag orders. It is extremely unlikely that it ever can be shown that lawyer statements will pose a serious risk to a fair trial. There is little evidence that pretrial publicity actually jeopardizes fair trials and even less that attorney speech endangers fair judicial proceedings. Justice Kennedy observed that “[o]nly the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court.”\textsuperscript{116} One recent commentator, after reviewing the studies, concluded:

There is, however, very little hard evidence that demonstrates that juries are prejudiced by trial publicity. In fact, most tests and studies that have examined the prejudicial effect of trial publicity on juries have been quite inconclusive: Scientific research has not revealed a

\textsuperscript{114} See, supra notes 101-05 and accompanying text.
strong connection between trial publicity of any sort and jury prejudice.\textsuperscript{117}

Although empirical studies of various sorts have been attempted in measuring the impact of publicity on juries,\textsuperscript{118} it likely will never be possible to prove that media coverage prevents a fair trial. Obviously, it is impossible to try the same case to two juries, one which has been exposed to publicity and one that has been totally shielded. Thus, it is difficult to see how it ever can be demonstrated that attorney speech in a particular case will threaten a fair trial.

The experience of recent high profile cases belies the conclusion that extensive publicity makes an acquittal more difficult for the defense. In many recent cases that received extensive publicity, defendants were acquitted despite predictions that juries would be prejudiced against the defense by the media coverage. For instance, there was pretrial publicity in the McMartin preschool case, the William Kennedy Smith rape trial, and the O.J. Simpson prosecution. In all of these, juries acquitted the defendants. It cannot be assumed either that publicity precludes convictions. The prosecutions of Oliver North, Stacey Koon and Lawrence Powell for beating Rodney King, and the Menendez brothers all ended in convictions even though there was extensive media coverage. Most recently, both Oklahoma City bombing prosecutions ended in conviction despite constant media coverage. The cases might be seen as an indicator that juries decide based on what occurs at trial and not what is reported in the press. At a minimum, the cases show the difficulty in drawing any conclusions about the effects of pretrial publicity on the outcome of cases.

Thus, my basic disagreement with commentators and judges who endorse gag orders on trial participants is that I do not share their perception that publicity is likely to endanger a fair trial. Eileen Minnecor, for instance, argues for gag orders by concluding:

The potential harm from a gag order’s temporary limit on trial participants’ free speech rights is much less serious than the immediate injury resulting from the denial of a criminal defendant’s

\textsuperscript{117} Comment, ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity, 43 UCLA L. REV. 1521, 1565 (1996).

right to a fair trial, which may lead to an unwarranted deprivation of the defendant’s liberty or even his or her death.119

The unsupported assumption in this statement is that the lawyers’ statements pose a risk of denying a criminal defendant’s right to a fair trial. First Amendment rights should not be compromised based on such conjecture.

Yet, lawyers repeatedly are disciplined based solely on such conjecture. For instance, in United States v. Bingham, criminal defense attorneys representing defendants charged with gang activities including murder and kidnapping were sanctioned for criticizing court rulings.120 Even though the court admitted that a fair and impartial jury was selected, the defense lawyers were found to have created a "serious and imminent threat of interference with the fair administration of justice."121 The lawyers were punished for their speech criticizing the government, specifically for disagreeing with a court ruling in a pending case. There was not a shred of evidence that the speech interfered with a fair trial; yet sanctions nonetheless were imposed.

Second, to meet strict scrutiny it must be determined that no alternatives short of the restrictions on speech can succeed in providing a fair trial. The Court has recognized that there are countless ways of enhancing the likelihood of a fair trial including: changing venue, postponing the trial to allow public attention to subside, searching questioning of prospective jurors, clear instructions to the jury as to what may be considered in reaching a verdict, and sequestration of jurors. It is difficult to imagine the situation where all of these alternatives to the gag order can be demonstrated to be inadequate. In Nebraska Press,122 the Supreme Court emphasized that all of these alternatives must be demonstrated to be inadequate before a gag order can be imposed on the press. The same standard should be met before a gag order is imposed on anyone.

Third, even if there is a showing of substantial likelihood of prejudice without restrictions, and even if it is demonstrated that no alternative will suffice, the limits on lawyer speech are permissible only if it is determined that they would be a workable and effective method of securing a fair trial. Initially, it must be questioned whether the restrictions are enforceable. The practical reality is that leaks seem inevitable and there will be no way to identify the

119 Minefor, supra note 5, at 139–40.
121 Id. at 1045 (citation omitted).
source of statements, especially in states that have reporter shield laws that protect confidential sources for the press.

More importantly, if there is such extensive publicity as to warrant a gag order, it is then questionable whether the additional statements by the lawyer really would make any difference. For example, in the civil suits against O.J. Simpson, after all that was said and written about the case, it is unthinkable that anything new could have been said by the lawyers that would have jeopardized a fair trial.

In fact, in a case receiving extensive media coverage, a gag order on lawyers might be counter-productive in that it deprives the press of an accurate source of information. Attorneys and parties covered by a gag order often will still speak to the press, but only on background or with assurances that their identity will be kept confidential. Such statements are much more likely to be inaccurate because they are quotations without attribution. If lawyers and parties do not speak openly to the press, reporters will have to rely on secondary and tertiary sources of information that are far less likely to be accurate.

III. A BETTER APPROACH

Much of the debate over how to regulate attorney speech has centered on whether the clear and present danger test or a lesser standard should be applied. Yet, both standards, and especially the approach of the Model Rules, share a common flaw: they require attorneys to speculate in advance as to the impact of speech. Indeed, the speculation required is much greater than that: attorneys must speculate as to how disciplinary authorities will later appraise the impact of their speech. The disciplinary bodies then have to guess as to the effect of the speech on a case where the result undoubtedly was a product of many different and complex factors.

In other words, under the Model Rules, a lawyer must guess as to how a disciplinary authority later will guess as to whether the speech had a substantial likelihood of materially prejudicing an adjudicatory preceding. Even under a clear and present danger test, which is obviously superior in safeguarding speech, lawyers must speculate as to how, after the fact, their speech will be

123 This, for example, was the debate between the majority and dissent in Gentile.

The loss of such speech has potentially profound effects. As argued in Part I, often attorneys should speak publicly about pending cases so as to best serve the interests of their clients. Often lawyer speech has important public benefits. I contend that a better approach would be to apply the Supreme Court’s test from \textit{New York Times v. Sullivan}.\footnote{\textit{Id.} at 270.} In \textit{New York Times v. Sullivan}, the Court held that the First Amendment limited the ability of states to allow recovery for defamation in actions brought by public officials. Justice Brennan, writing for the Court, began by stating that the case was considered “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”\footnote{\textit{Id.} at 271-72 (citation omitted).} Justice Brennan noted that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.” \textit{Id.} at 276.

Accordingly, the Court said that it was not enough that truth was a defense under Alabama’s libel law because requiring that defendants prove the truth of their statements would chill speech. The Court thus concluded that the First Amendment prevents a “public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”\footnote{\textit{Id.} at 279-80.}

Applying \textit{New York Times v. Sullivan} to lawyer speech would create three requirements. First, those seeking to regulate attorney speech must prove their case with clear and convincing evidence. The usual standard in civil cases, preponderance of the evidence, is not enough. In \textit{New York Times v. Sullivan}, the Court said that the plaintiff had the burden of proving the falsity of the statement...
and actual malice with "convincing clarity." The Court subsequently termed this standard as a requirement for "clear and convincing evidence." Second, the regulating authority must prove the falsity of the statements. At the very least, this means that the attorney cannot be forced to prove the truth of the statements. Finally, there must be proof of actual malice; that is, the defendant must have known that the statement was false or acted with reckless disregard of the truth. The Court has explained that this requires proof that the statements were made with "a high degree of awareness of their probable falsity." The Court has said that actual malice is a "term of art denoting deliberate or reckless falsification."

In St. Amant v. Thompson, the Supreme Court said that actual malice requires that the defendant "in fact entertained serious doubts as to the truth of his publication." In St. Amant, a candidate for public office made highly critical statements about the conduct of the sheriff. The Supreme Court overturned defamation liability and emphasized that actual malice could not be proven by showing that the defendant failed to verify the accuracy of facts or even investigate. Actual malice requires that the defendant have a subjective awareness of probable falsity; that there be proof that the defendant had serious doubts about the accuracy of the statements before making them. Applying this approach to attorney speech, a lawyer would be subjected to discipline only if it could be proven, with clear and convincing evidence, that the attorney's statements were false and uttered with actual malice. Why is this a superior approach to regulating lawyer speech? The approach provides maximum protection of speech without safeguarding that which has the least value and is most likely to be harmful.

False speech adds little to the public's understanding of a pending case. None of the benefits from attorney speech described in Part I are gained when

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129 Id. at 285-86.
133 390 U.S. 727 (1968).
134 Id. at 731.
135 Id. at 731. In Herbert v. Lando, 441 U.S. 153 (1979), the Court held that a defamation plaintiff may have discovery as to the knowledge of a defendant and his decision-making processes concerning publication as part of proving actual malice. The Court explained that the subjective nature of the actual malice standard requires that such discovery be available. Herbert involved a defamation action against the television show 60 Minutes for a story it did on the plaintiff's alleged participation in atrocities during the Viet Nam War.
an attorney knowingly makes false statements to the press. At the same time, the *New York Times* v. *Sullivan* approach safeguards all other speech and thus allows attorneys to serve their clients’ and society’s interests.

Second, the *New York Times* approach avoids the need for speculation inherent to the standard contained in the Model Rules. A lawyer need not guess as to how a disciplinary authority will later speculate as to whether the speech had a substantial likelihood of prejudicing an adjudicatory proceeding. The attorney knows that he or she is precluded from speaking only if the statement is false or made with reckless disregard of the truth. There is a large body of caselaw giving content to the *New York Times* test, further lessening any uncertainty as to its meaning.

Third, the *New York Times* standard is preferable to gag orders on lawyer speech because it is not a prior restraint. As discussed above, the Supreme Court repeatedly has condemned prior restraints as the worst form of government regulation of speech. The *New York Times* standard creates after the fact liability, not a prior restraint.

**CONCLUSION**

The media has always been in the courtroom, and lawyers have long realized that their clients’ interests are often served by publicity. In addition, attempts to restrict attorney speech are not unique to the 1990s. Nonetheless, the 1990s have seen an unprecedented degree of media attention to the courts, and, not surprisingly, the response has been unparalleled efforts to control lawyer speech.

My conclusion is that current restrictions on lawyer speech, both through rules of professional conduct and gag orders, are unconstitutional. A better approach would be to limit lawyers only from making statements about pending cases that they know to be false or that are made with reckless disregard for the truth.