The "Impartial" Jury and Media Overload: Rethinking Attorney Speech Regulations in the 1990s

INTRODUCTION

In addition to appearing before a judge and jury, a lawyer courts public opinion by outlining his case to journalists and, through them, to the people. With each new trial, new questions emerge regarding an attorney's rights to speak about his case, the viability of attempting to restrict attorney speech to preserve an impartial jury, and the future of the jury system in an age of increasing trial publicity.

Restricting an attorney's ability to speak about his case stops the potential flow of information at its source. The results of enforcing regulations of attorney speech extend far beyond the attorney and his client; such rules restrict the pool of information that media outlets can pass along to their viewers or readers. Therefore, attorney speech regulations likewise lessen the amount of information available to potential jurors, which may or may not improve the quality of our legal system.

This Comment examines the rationale behind attorney speech regulations and analyzes the ineffectiveness of the standard that the majority of states apply. More than sixty percent of the states enforce a standard based on Model Rules of Professional Conduct Rule 3.6, which bars an attorney from making statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Part I.A explores the history of regulating attorney speech, including an examination of the Supreme Court's finding that Rule 3.6 is too vague to properly apply. Part I.B outlines the adoption by some states of more liberal standards, including measures that only prohibit remarks that present a "serious and imminent threat to the impartiality of a judge or jury." Parts II.A and II.B examine

2. See infra notes 94-95 for provisions of Model Rules of Professional Conduct Rule 3.6 (1996). See infra note 78 for states that have adopted Rule 3.6 or a similar provision.
3. See, e.g., infra note 84 for District of Columbia standard for attorney speech.
the difficulties in applying the substantial likelihood standard due to its vagueness and overbreadth. Finally, Part III concludes that the media’s growing influence on the judicial system has irrevocably changed the premise of the impartial juror, and that regulations of attorney speech must conform to this new reality of the legal community.

I. REGULATION OF ATTORNEY SPEECH

A. HISTORY

For as long as lawyers have argued in courtrooms, attorneys and First Amendment advocates have championed the rights of lawyers and their clients to speak to the press before or during a trial. As the Supreme Court has acknowledged, America’s founding fathers recognized the need to balance an individual’s right to a fair trial with the "passions of the populace." 4 Noting such historic courtroom battles as the 1807 treason trial of Aaron Burr, in which Burr challenged the appointment of several grand jurors due to their potential bias, 5 the Court has accepted what is becoming increasingly clear to the legal profession and to society at large—a trial’s impact reaches far beyond the courtroom walls and affects the rights of more than its immediate participants. 6

4. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 547 (1976). In the majority opinion reversing the Nebraska state trial judge’s imposition of a gag order on the news media, Chief Justice Burger commented that the drafters of our nation’s Constitution experienced intense tensions between a free press and a defendant’s right to a fair trial. Burger quoted from Thomas Jefferson’s papers: “Our liberty depends on the freedom of the press, and that cannot be limited without being lost . . . .” 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954). Id. at 548.

5. United States v. Burr, 25 F. Cas. 49 (No. 14,692g) (C.C. Va. 1807). Vice president from 1801 to 1805, Burr was accused of sending some 30 armed men in boats down the Ohio and Mississippi Rivers to capture New Orleans. Burr’s plan was to invade Mexico and detach the southwest from the United States to form an independent nation under his rule, and details of Burr’s plot appeared in a Virginia newspaper. Burr faced a jury consisting largely of substituted allies of Burr’s personal and political enemy, President Thomas Jefferson. Fortunately for Burr, Chief Justice John Marshall was himself at odds with the president, and Marshall removed the substituted Jefferson supporters from the jury and replaced them with court bystanders, which was the proper procedure in that time. See Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 38-39 (1994).

6. See, e.g., Connecticut Magazine v. Moraghan, 676 F. Supp. 38, 40 (D. Conn. 1987) (recognizing the standing of a media organization to challenge a judicial order prohibiting an attorney from discussing a case, reasoning that the gag order impairs the organization’s “ability to gather news and thus implicates its First Amendment rights”).
In the years since Burr's trial sparked debate over informing the public about a judicial proceeding and the possible effect on potential jurors, the Supreme Court has acknowledged that regulating trial coverage is a valid way to protect a defendant's right to a fair trial before an untainted jury. In the Court's first review of the standards governing extrajudicial statements, the Court held in 1966 in *Sheppard v. Maxwell* that an affluent Ohio doctor convicted of bludgeoning his pregnant wife to death twelve years earlier was entitled to a new trial because the original judge failed to control the intense media coverage. Upon Sheppard's petition to the Supreme Court on writ of habeus corpus, the Court stated that the judiciary must "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."9

As the Supreme Court struggled in the mid-1960s with the dueling free press-fair trial issues highlighted in *Sheppard*, the legal profession tackled the question of pretrial publicity's impact on a fair trial. The Advisory Committee on Fair Trial and Free Press, having uncovered approximately 100 reported cases between January 1963 and March 1965 in which defendants claimed that pretrial publicity denied them fair hearings, recommended that courts address the issue primarily through the enactment of local rules controlling attorneys and courthouse personnel, and also by controlling conduct during a trial to lessen influences that might prejudice the proceedings.12

Meanwhile, as the legal profession revised its rules, the Supreme Court in 1976 again examined the impact of media coverage on a trial. In

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8. *Id.* In his second trial, Dr. Sheppard was acquitted. For defense attorney F. Lee Bailey's perspective on his client's retrial, see *The Defense Never Rests* 104-113 (Signet 1971).
9. *Id.* at 363. The Supreme Court in *Sheppard* also noted that "unfair and prejudicial news comment on pending trials has become increasingly prevalent," a statement that seems to have held true since 1966. *Id.* at 362.
the Court struck down a state district court judge's order that prevented the media from publishing confessions, admissions or facts "strongly implicative" of the defendant, who was charged with murdering six members of a family in a close-knit rural Nebraska community. While endorsing the judge's powers to curb prejudicial pre-trial publicity and his intent to provide the defendant with an impartial jury, the Court determined that the Nebraska judge failed to meet the heavy burden of demonstrating that the prior restraint was essential to a fair trial.

The Court used an analysis first set forth by Learned Hand, in which the justices determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The Supreme Court reviewed the facts that the trial judge faced in deciding to impose a restraining order. After weighing the possibility that pre-trial news reports would affect potential jurors, the Court concluded: "We cannot say on this record that the alternatives to a prior restraint . . . would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary."

As the Supreme Court debated Stuart, the legal community continued its analysis of attorney speech regulations. Based on the recommendations of the Advisory Committee on Fair Trial and Free Press, Disciplinary Rule 7-107 was created, and courts immediately struggled in attempting to

14. Id. at 542.
15. Id. at 555. The Court noted that in cases such as this, the trial judge's responsibility lies not only in curbing his or her public statements regarding the case but to "mitigate the effects of pretrial publicity . . . ." Id.
16. A prior restraint is "any scheme which gives public officials the power to deny use of a forum in advance of its actual expression." BLACK'S LAW DICTIONARY 1194 (6th ed. 1990).
17. 427 U.S. at 570. In his majority opinion, Chief Justice Burger called prior restraints on speech and publication "the most serious and least tolerable infringement on First Amendment rights." Id. at 559.
18. Id. at 562 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951)).
19. 427 U.S. at 562. Chief Justice Burger's opinion further explained that the court looks at the evidence upon which the trial judge based his order, including the nature of trial coverage, the possibility of options less restrictive than quieting attorneys to lessen the effects of trial publicity, and how effectively a restraining order would prevent the threatened danger. Id.
20. Id.
21. Id. at 569.
22. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980).
apply the rule’s provisions. In response, the American Bar Association created a Special Commission on Evaluation of Professional Standards to assess the feasibility of the Code of Professional Responsibility and study the court opinions that challenged the rule’s constitutionality. The resulting standards, the ABA Model Rules of Professional Conduct, govern attorney speech today through their adoption in whole or in part by the states.

Model Rule 3.6 improved upon its predecessor, DR 7-107, in two significant respects. Rule 3.6 promulgated a narrower regulation of attorney speech by adopting a "substantial likelihood of material prejudice" standard as opposed to restricting speech under a broader reasonable likelihood measure. Further, Rule 3.6 prohibited statements that are likely to materially prejudice a judicial proceeding, as opposed to DR 7-107's provision barring statements reasonably likely to interfere with trial.

In 1991, the Supreme Court in Gentile v. State Bar of Nevada took its first look at Rule 3.6, and two majorities sent vastly different messages. Chief Justice Rehnquist’s opinion upheld the restrictions imposed by Rule 3.6.

Outlines acceptable and unacceptable extrajudicial speech in a manner similar to Model Rule 3.6. See infra notes 94-95.


24. Hazard & Hodes, supra note 23, at lxvii.

25. Id.


27. See infra notes 78, 81, 83 and 84 for the differing versions of Rule 3.6 that the states have adopted.


29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980).

30. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).


33. As argued later in this Comment, the combined opinions of the justices in Gentile endorse restrictions on attorney speech while also acknowledging that attorneys would struggle to apply Rule 3.6.
by Nevada Supreme Court Rule 177 on the remarks of criminal defense attorney Dominic Gentile at a press conference after his client’s indictment. Pointing to the Court’s decision in *Stuart*, Gentile argued that the First Amendment mandates a more stringent standard: a danger of “actual prejudice or an imminent threat.”

Writing for the majority that held Nevada’s rule did not violate Gentile’s rights under the First Amendment, Justice Rehnquist recounted the roots of attorney speech regulations in the Advisory Committee on Fair Trial and Free Press and the legal profession’s subsequent review of attorney speech regulations. Justice Rehnquist relied on *Sheppard* and on the “officer of the court” doctrine discussed in *In re Sawyer* in holding that attorney speech is held to a higher standard than regular speech under the First Amendment. In prior cases regarding attorney speech, Rehnquist noted that the Court has balanced “the state’s interest in the regulation of a specialized profession against a lawyer’s First Amendment interest” in

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34. Justices White, Scalia, Souter and O’Connor joined the Chief Justice’s opinion; Justice O’Connor also joined Justice Kennedy’s opinion to create two 5-4 majorities. 501 U.S. at 1032.

35. Nevada Supreme Court Rule 177, which Gentile claimed was unconstitutional on its face, is virtually identical to Rule 3.6. Rule 177 prohibits an attorney from making extrajudicial statements to the press that he or she knows or reasonably should know will have a “substantial likelihood of materially prejudicing an adjudicative proceeding.” Rule 177(2) lists statements that are “ordinarily . . . likely” to result in material prejudice. Rule 177(3) delineates safe harbor provisions, listing subjects that the attorney can safely address. *Id.* at 1033.

36. *Id.* at 1062-63. Gentile claimed that a Las Vegas police detective stole drugs and travelers’ checks that Gentile’s client stood accused of taking. *Id.* at 1042. Gentile called the press conference after having monitored the press coverage of the trial and tallied at least 17 articles in major Las Vegas newspapers and numerous local television stories. *Id.* at 1041-42.

37. 501 U.S. at 1069.

38. U.S. CONST. amend. I. (“Congress shall make no law abridging the freedom of speech . . . ”)

39. 501 U.S. at 1067. Chief Justice Rehnquist observed that the Sheppard trial highlighted the “need for, and appropriateness of, a rule regarding the disclosure of information regarding criminal proceedings.” *Id.* At the time of *Gentile*, Nevada was one of 31 states that used Rule 3.6 as a basis for formulating disciplinary guidelines on attorney speech. *Id.* at 1068.


41. 360 U.S. 622 (1959). In *Sawyer*, the Supreme Court rejected an order that would suspend an attorney from practice following her attack on the fairness and impartiality of a judge. Dissenting justices Frankfurter, Clark, Harlan and Whitaker argued for enforcing the sanction, stating that a lawyer is “an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.” *Id.* at 666, 668.

42. 501 U.S. at 1071-72.
the speech at issue. The state’s interest in maintaining a fair judicial system justifies the enforcement of Nevada Supreme Court Rule 177, which Rehnquist said is "designed to protect the integrity and fairness of a state’s judicial system" and "imposes only narrow and necessary limitations on lawyers’ speech."

Restraining an attorney’s attempt to publicly comment on a case directly preserves a pool of untainted jurors, Justice Rehnquist argued. In addition, Rehnquist wrote, the substantial likelihood standard is properly limited to restrain only speech that is likely to have a materially prejudicial effect, ensures that all attorneys will be restrained equally, is neutral between points of view and merely postpones attorneys’ comments until after the trial.

In contrast to Justice Rehnquist’s conservative approach, Justice Kennedy wrote for a different 5-4 majority and framed Gentile more broadly. Describing Nevada’s rule as "void for vagueness," Kennedy viewed the case as not involving the constitutionality of regulating attorney speech, but instead encompassing "the constitutionality of a ban on political speech critical of the government and its officials." Noting that the public has an interest in the judicial system’s fair operation, Justice Kennedy noted that the river of public opinion that accompanies each trial provides

43. Id. at 1073.
44. See supra note 35 for provisions of Nevada Supreme Court Rule 177.
45. 501 U.S. at 1075. Rehnquist reasoned that the rule limits two types of remarks: comments likely to influence the trial's outcome and comments likely to prejudice the jury pool. Id.
46. Id. "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial jurors,' and an outcome affected by extrajudicial statements would violate that fundamental right," the Chief Justice wrote. Id.
47. Id. at 1076. In contrast to Rehnquist's view, legal theorists have argued that criminal defense attorneys should be allowed more latitude in pre-trial speech, contending that Rule 3.6’s restraints burden defense attorneys more than prosecutors and limit the public’s right of access to criminal proceedings. See, e.g., Joel H. Swift, Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity, 1984 B.U. L. REV. 1003 (1984).
49. 501 U.S. at 1048. "A lawyer seeking to avail himself of (the rule's) protection must guess at its contours," Justice Kennedy wrote. Id.
50. Id. at 1034. Justice Kennedy later rejected a balancing test between Gentile’s speech and the state’s interest as inappropriate in the context of Gentile’s statements alleging prosecutorial and police misconduct. Id. at 1052.
a needed restraint on potential official misconduct. Gentile's charges of police corruption struck squarely at the need for an open forum of public awareness and criticism, Kennedy argued.

Even if, as an attorney, Gentile was held to a higher standard of conduct (as the Rehnquist majority deemed proper), Justice Kennedy contended that the Nevada Supreme Court's finding against Gentile should not be upheld. "The record does not support the conclusion that [Gentile] knew or reasonably should have known his remarks created a substantial likelihood of material prejudice," Kennedy wrote. Furthermore, the rule leaves attorneys to play a guessing game in interpreting the provision's general language, Justice Kennedy argued. In response to the argument that attorneys' statements inappropriately influence potential jurors, Kennedy cited studies that revealed no tangible effects of extensive pretrial publicity. The First Amendment freedoms of Dominic Gentile, a citizen as well as an attorney, were infringed more than was necessary to safeguard the government's interest in a fair trial, Kennedy concluded.

In a two-paragraph opinion, Justice O'Connor sided with both Justices Rehnquist and Kennedy. O'Connor agreed with the Chief Justice that the substantial likelihood standard "passes constitutional muster." However, she also stated that Nevada Supreme Court Rule 177 "provides insufficient guidance" to attorneys such as Gentile and "fails to give fair notice to those it is intended to deter."

Gentile, decided in 1991 and much-debated since, spawned federal and

51. Id. at 1035.
52. Id. at 1035-36. Justice Kennedy stated later in his opinion: "The instant case is a poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statements about ongoing judicial proceedings." Id. at 1057.
54. Id. at 1037-38. Justice Kennedy's opinion examined the pre-indictment publicity, the content of the press conference itself, and the events following the press conference. At trial, neither party sought a change of venue or a continuance or were forced to excuse an inordinate number of jurors due to the jurors' knowledge of the case. Id. at 1047.
55. Id. at 1048-49. Specific troubling phrases that Justice Kennedy examined were the lawyer's right to describe the "general nature of the defense" and to do so "without elaboration." He noted: "These terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." See infra note 94.
56. Id. at 1055. Pretrial publicity and a more lenient standard for attorney speech are discussed infra in Parts II and III.
58. Id. at 1082 (O'Connor, J., concurring).
59. Id. The language of the Nevada rule is almost identical to Model Rule 3.6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).
state opinions attempting to apply the Supreme Court's slippery standards. In 1995, two cases sent different messages regarding the weight to be given attorneys' remarks and the consideration of options to reduce potentially damaging trial publicity. In *United States v. Cutler*, the Court of Appeals for the Second Circuit affirmed the probation sentence of attorney Bruce Cutler following Cutler's vehement remarks to the media regarding the government's case against his client, reputed underworld crime boss John Gotti. Despite repeated reprimands to remain silent, Cutler's characterization of the "publicity-hungry" prosecutors determined to frame Gotti appeared in four New York City newspapers, and Cutler reiterated his opinion on ABC's "Prime Time Live" and CBS' "60 Minutes." The applicable local rule prohibits lawyers from releasing or authorizing the release of information "if there is a reasonable likelihood that such dissemination will interfere with a fair trial."

Applying that rule, the Court of Appeals held that the specificity of the judge's warnings and the content of Cutler's remarks worked against

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61. 58 F.3d at 825.
62. *Id.* at 828. Gotti, no stranger to murder charges and a frequent target of government prosecutors, was accused in this case of racketeering and the related death of Paul Castellano, whom the *Cutler* opinion describes as "a rival mobster." *Id.*
64. *Id.* at 828, 830. "60 Minutes," the 30-year-old stalwart of CBS News' division, is regarded as the industry standard for serious news and public affairs programs. "Prime Time Live," though much younger and usually less staid, is considered a legitimate news show, as opposed to more tabloid fare such as "Hard Copy" or "A Current Affair."
65. E.D.N.Y. Crim R. 7(a).
66. 58 F.3d at 828-29. The Rule prohibits attorneys from releasing the accused's prior criminal record or commenting upon the accused's character or reputation, releasing information regarding the identity and testimony of prospective witnesses and stating "any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case," among other provisions. *Id.*
67. Cutler's repeated remarks to the press brought him before Judge I. Leo Glasser on four separate occasions, the final appearance following Glasser's issuance of an order to show cause why Cutler should not be held in criminal contempt. *Id.* at 829-33.
68. In addition to his remarks to the New York papers, Cutler spoke at length to Interview Magazine, where he raised claims of government vendettas and accused the government of subornation of perjury, which results when one takes a false oath. *Id.* at 830.
the attorney. The judge clearly and repeatedly warned Cutler that contempt proceedings would result if he made a comment that the rule prohibited.69 Applying the reasonable likelihood standard to the defendant’s statements, the Court of Appeals held the district court correctly determined that Cutler’s remarks violated the court’s order.70 In response to Cutler’s argument that his comments should be allowed because they represented only a fraction of the case’s media coverage,71 the court stated that Cutler’s statements should be given more weight, not less, in an analysis of the media treatment of a pending court proceeding.72

In contrast, a Kansas federal district court judge in 1995 denied defendant Raymond Walker’s motion for a gag order on the U.S. attorney and his assistants, law enforcement officials and "any other persons associated" with the case against Walker for possession with intent to distribute cocaine.73 The judge determined that no evidence existed to show the government intended to make further statements about the case, and the high standard the Supreme Court set in Gentile required Walker to show a greater threat to his fair trial rights.74 The judge in Walker reasoned that less restrictive means existed to shield potential jurors from prejudicial statements, including intense jury questioning and proper jury instruction.75

Judge Glasser’s contempt order cited twenty-five instances of unacceptable commentary by Cutler, most significantly the attorney’s vehement defense of Gotti on "9 Broadcast Plaza." On the program, Cutler described his client as "a good man" and "an honorable man" and charged the prosecutors with conducting "a witch hunt" and with using false evidence. Id. at 830-31.

69. Id. at 835.
70. Id. at 838.
71. Id. at 836.
72. Id. at 836-37. The Court of Appeals adhered to Chief Justice Rehnquist’s recognition in Gentile of the "officer of the court" doctrine and the effects of lawyers’ statements as opposed to the remarks of others about the case. Id. at 836.
74. Id.
75. Id. The Walker opinion also noted the Supreme Court’s words in Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 554 (1976): "Although often appearing unfair in the eyes of the public, pretrial publicity, even pervasive, adverse publicity, does not inevitably lead to an unfair trial," But see United States v. Davis, 902 F.Supp. 98 (D. La. 1995) (upholding an order prohibiting attorneys and parties on both sides from publicly discussing a case outside of general statements similar to those in the Rule 3.6 safe-harbor provision). In Davis, in which the New Orleans Times-Picayune newspaper was allowed to intervene, charges of drug conspiracy and weapons violations against nine members of the city’s police department had already prompted national and local editorials and stories. Id. at 100. However, this did not prevent U.S. District Judge Martin Feldman from finding that jurors needed to be prevented from hearing this information and that attorney speech restrictions
Cutler illustrates the most extreme violation of the rule, a circumstance in which a judge could hardly fail to find an attorney has overstepped his bounds. In contrast, Walker shows how the freedom of speech of attorneys and other individuals outweighs the potential effect of any statements on jurors, which the court concluded could be properly remedied by less restrictive means.

B. THE STATES' CURRENT ATTORNEY SPEECH REGULATIONS

The cases discussed above are made somewhat clearer by studying the attorney speech regulations presently enforced. As the Supreme Court and lower courts have stated, attorney speech regulations have long been developed and endorsed as a viable exercise of power over lawyers and a method of maintaining a controlled trial atmosphere and impartial potential jurors.

Thirty-three states now follow Rule 3.6, which prohibits an attorney from making statements that he or she knows or should know "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Justice Kennedy's opinion in Gentile that the Nevada Rule, as

were the best method to accomplish this. "The Court will not and, constitutionally, cannot allow the trial of this emotion-charged case to occur outside the courtroom," Feldman stated in his opinion. Id. at 103. Feldman did not hesitate to close the barn door after the horse had already escaped.

76. To hold Cutler in contempt, the government needed to show that the court's order was specific, Cutler knew of the order, and that Cutler willfully violated that order. United States v. Cutler, 58 F.3d 825, 834 (2d Cir. 1995). On the facts of Cutler, it would be difficult to argue that a contempt order was not warranted.

77. 890 F. Supp. at 957.

78. See infra notes 94-95. The following states have adopted Rule 3.6 verbatim or with slight variations: Alabama, Ala. Rules of Prof. Conduct Rule 3.6; Alaska, Alaska Rules of Prof. Conduct Rule 3.6; Arizona, Arizona Rules of Prof. Conduct Rule 3.6; Arkansas, Arkansas Rules of Prof. Conduct Rule 3.6; Connecticut, Conn. Rules of Prof. Conduct Rule 3.6; Delaware, Del. Rules of Prof. Conduct Rule 3.6; Florida, Fla. St. Ann. Bar Rule 4-3.6 (added "due to [a statement's] creation of an imminent and substantial detrimental effect on that proceeding"), Hawaii, Hawaii Rules of Prof. Conduct Rule 3.6; Idaho (rule designates that it governs Idaho federal courts) Indiana, Indiana State Rules of Prof. Conduct Rule 3.6 (rule was amended in February 1996 to create a rebuttable presumption that an extrajudicial statement has a "substantial likelihood of materially prejudicing an adjudicative proceeding" when the statement is related to a list of topics similar to those in note 95 of this paper; Kansas, Kansas Rules of Prof. Conduct Rule 226; Kentucky, Kentucky Supreme Court Rule 3.130 (3.6); Louisiana, La. St. Bar Art. 16, Rules of Prof. Conduct Rule 3.6; Maryland, Md. Ct. Admin. Rule 1230; Michigan, Mich. Rules of Prof. Conduct Rule 3.6 (adopted only subsection (a) which states "substantial likelihood standard" and then listed subsection (b) safe-harbor provisions in comments section for guidance); Mississippi, Miss. Rules of Prof.
applied by the Nevada Supreme Court, was void for vagueness led the ABA to amend Rule 3.6 in August 1994, deleting the words "without elaboration" and "general" from the safe-harbor provisions.

Seven states have adopted a more restrictive reasonable likelihood of prejudice standard or a similar reasonable likelihood measure based on Disciplinary Rule 7-107. Nine states and the District of Columbia have approved a range of standards less restrictive than Rule 3.6 and Disciplinary Rule 7-107, allowing attorneys to speak with less fear of censure by the courts. These provisions impose a clear and present danger or serious and imminent threat standard, or use similar language to restrict attorney speech, while others only limit speech that refers to criminal or jury

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80. See infra note 99.
82. See infra notes 83-84.
83. Maine prohibits speech with a "substantial danger of interference." Colorado's standard restricts speech that imposes a "grave danger of imminent and substantial harm" to an adjudicative proceeding. Colorado State Rules of Prof. Conduct Rule 3.6. Illinois has adopted a similar provision, prohibiting speech that poses a "serious and imminent threat to the fairness of an adjudicative proceeding." Illinois Rules of Prof. Conduct Rule 3.6. North Dakota and Oregon have approved standards like Illinois', which, respectively, bar speech by attorneys whose comments cause "serious and imminent threat of material prejudice" and a "serious and imminent threat to the fact-finding process in an adjudicative proceeding and (the attorney) acts with indifference to that effect." North Dakota Rules of Prof. Conduct
The most recent adoption of an attorney speech standard has come in California—a state that previously lacked a rule regarding trial publicity—in the wake of media coverage of the O.J. Simpson trial. In September 1995, after the California legislature had passed Senate Bill 254, which demanded that the State Bar of California develop an ethical rule to curb attorneys' statements outside the courtroom, the State Bar initially proposed a rule less restrictive of attorney speech than Rule 3.6. The Bar's narrow rule sought to prohibit speech that had a clear and present danger of prejudicing a criminal or civil trial, as opposed to the broader substantial likelihood and adjudicative proceeding provisions of Rule 3.6. The

Rule 3.6; Oregon Code of Prof. Responsibility Disciplinary Rule 7-107.

84. Texas' provision states that the "likelihood of a violation increases if the adjudication is ongoing or imminent." Texas Rules of Prof. Conduct Rule 3.07. New Mexico enforces a "clear and present danger" standard, but limits that rule to criminal proceedings. New Mexico Rules of Prof. Conduct Rule 16-306. Minnesota restricts attorneys from making comments that materially prejudice a pending criminal jury trial. Minnesota Rules of Prof. Conduct Rule 3.6. Virginia's standard prohibits speech that has a "clear and present danger of interfering with the fairness of a trial by jury." Virginia Code of Prof. Responsibility Disciplinary Rule 7-106. The District of Columbia has adopted perhaps the most pragmatic standard, which bars speech that poses a "serious and imminent threat to the impartiality of the judge or jury." District of Columbia Rule 3.6.

85. Hugh Dellios, U.S. Justice System Hit by Simpson Trial Fallout, CHI. TRIB., Sept. 18, 1995, at A1, 10. Dellios' article also noted that the flood of information and debate about legal evidence such as DNA samples has raised jurors' expectations of what attorneys present in court. Id.

86. 11 Laws. Man. on Prof. Conduct (ABA/BNA) No. 2, at 39 (Feb. 22, 1995); see also Philip Hager, Crackdown on Commentary: Is the Solution to Out-of-Court Comment Worse than the Problem?, 15 CAL. LAW. 35 (1995). In counterpoint to a standard for attorney speech, Hager quotes Richard A. Zitrin, an attorney and a law professor and specialist on ethics and jury selection, as saying pretrial publicity has a minimal effect on jurors. "It's like something they [the jurors] heard on 'Oprah,' " Zitrin said. "They heard it. It's interesting. But they don't really believe it." Id.

87. Douglas E. Mirell, The Latest Threat to Free Speech: California's Proposed Bar Rules, 13 COMM. LAW. 13, 13-14 (1995). As Mirell explains, the State Bar's Board of Governors sent the rule to the California Supreme Court with a formal message from State Bar President Donald R. Fischbach noting the Bar's belief that the regulation is "problematic and may also be unnecessary, given the existing availability of gag orders." Id. at 14 (citing Letter from Donald R. Fischbach to Robert F. Wandruff, 1-2 (Feb. 15, 1995)).

The California Supreme Court then sent the drafted rule back to the Bar with a request that the Bar either propose a version of Rule 5-120 of which it approves or explain its objections to the submitted rule. Id.

The Bar, in turn, responded with a five-page letter indicating that it opposes the adoption of the submitted rule on six policy grounds, including, "There is no evidence that attorney speech has had an adverse effect on the right to a fair trial" and "[t]he rule will be difficult
legislature passed and the state Supreme Court eventually approved a substantial likelihood standard mirroring Rule 3.6.\(^{88}\)

California’s endorsement of a rule regulating attorney speech has led lawyers and media representatives to reiterate their distaste for rules restricting attorneys’ out-of-court comments. Critics of attorney speech restrictions point out that police, public officials and “expert” lawyers who interpret the court proceedings for the public continue to speak freely,\(^ {89}\) with their potential effects on jurors going unmeasured.

The varying state standards and the ABA’s recent revisions leave room for debate as to which extreme is better: a sterile environment where attorneys are barred from speaking before a trial for the preservation of an impartial jury, or an arena in which all information is brought out into the open. These standards must be analyzed in light of other indisputable trial factors in the 1990s, including pervasive media coverage of courtroom proceedings and the public’s growing sophistication regarding the legal system.

II. ANALYSIS

A. VAGUENESS OF THE STANDARD

The logical starting point for analysis is the language of Rule 3.6. When studying the boundaries of the rule’s provisions, an attorney’s paramount concern is when his or her comments cross the seemingly invisible line from acceptable to offensive. In cases such as Cutler, where the judge warned John Gotti’s defense attorney several times specifically about violating the local rule regarding trial publicity,\(^ {90}\) a lawyer can hardly complain about being unaware of the restrictions placed upon his speech. However, although most attorneys are cognizant of the existence of their

88. Dellios, supra note 85, at 10. For a full account of the debate between the State Bar of California and the state’s Supreme Court regarding the wording of the proposed Rule 5-120 of the California Rules of Professional Conduct, see Mirrell, supra note 87, at 13.

89. Hager, supra note 86; see also Lawyers’ Use of Media Debated at ABA Meeting, 10 Laws. Man. on Prof. Conduct (ABA/BNA) No. 16, at 261 (Sept. 7, 1994), in which Laurie Levenson, a professor at Loyola University in Los Angeles, observed that no standards exist for the remarks of attorneys commenting upon a case. Fred Graham, a correspondent for Court TV, noted that restricting attorney speech is an ineffective way to address the problem because many of the statements regarding a case are unattributed. Hager, supra note 86.

90. Cutler, 58 F.3d at 835.
state's rule, many find they are incapable of policing their remarks to fit the standard's wavering confines, a circumstance that has led many attorneys to argue that the rule violates due process by not clearly stating what attorneys are prohibited from discussing in public.

The Supreme Court has held that a rule is void for vagueness "if its prohibitions are not clearly defined." The rule's vagueness forced the ABA to delineate specific categories of speech as acceptable and unacceptable. Reviewing the list of statements in Rule 3.6 that attorneys

91. In *Gentile*, for example, Justice Kennedy's opinion addressed doubts about attorney Gentile's ability to determine "when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." 501 U.S. at 1049.

92. See *Mirrell*, supra note 87.

93. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (addressing the constitutionality of an anti-noise ordinance and an anti-picketing ordinance on equal protection grounds). The Court upheld the anti-noise ordinance because it was written to apply specifically to protests on school grounds, and it "gives fair notice to those to whom [it] is directed." *Id.* at 112 (alteration in original).

94. Section (b) of the latest version of the Rule states:

Notwithstanding paragraph (a), a lawyer may state:
(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of the investigating and arresting officers or agencies and the length of the investigation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(b) (1996).

95. Rule 3.6 prohibits attorneys from making statements that the "lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1996). Section 5 of the comments following the Rule states six categories of remarks "more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
(1) the character, credibility, reputation or criminal record of a party, suspect or witness, the identity of a witness, or the expected testimony of a party or witness;
(2) in a criminal case or proceeding that could result in incarceration, the possibility
are barred from making.\textsuperscript{96} immediate questions arise about how attorneys are expected to follow these mandates.

To illustrate the difficulty of applying the rule, assume an attorney, in attempting to outline his case to a reporter, either states directly or makes a statement from which the public can conclude that the defendant has been charged with first-degree murder. Further assume that the attorney fails to include in his comments the prescribed statement that the charge is an accusation and the defendant is innocent until proven guilty.\textsuperscript{97} In the more than thirty states that have adopted Rule 3.6, that attorney has violated Rule 3.6 by making a statement that he or she believed was a simple factual statement about the case\textsuperscript{98} – the statement that the defendant has been charged with a crime, which is a fact that potential jurors most likely would learn anyway before they would be called to jury duty. In a state such as Illinois, which has adopted a less restrictive standard,\textsuperscript{99} that attorney's statement might or might not be allowed, depending upon how Illinois courts interpreted the statement's impact on a judicial proceeding.\textsuperscript{100}

of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

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

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

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

(6) the fact that the defendant has been charged with a crime, unless it is accompanied with a statement that the charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty.

\textbf{MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1996).}

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} A possible reason for the attorney's omission is his assumption that the reporters and the public understand this basic feature of American jurisprudence.

\textsuperscript{98} See supra note 95 ("the fact that the defendant has been charged with a crime").

\textsuperscript{99} See supra note 83 ("serious and imminent threat to the fairness of an adjudicative proceeding").

\textsuperscript{100} In a previous version of the rule, the following factors had been deemed relevant in determining the likelihood and degree of prejudice that a statement poses: the nature of the proceeding (attorney statements regarding jury trials are more likely to be restricted), timing of the statement (immediate pre-trial statements are seen as more prejudicial than those made in months following the trial), the extent of the previous circulation of the information (reporting facts that are not already well-known, such as by being in a public record, is more likely to have a prejudicial effect), and the attorney's intent. \textbf{MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1992).}
To complicate matters further, the attorney’s remark might fall under one of the Rule 3.6 safe-harbor provisions, for example, as being related to the nature of the claim or the defense or as information contained in a public record. From the rule’s wording, the fact that the information was contained in a public record, for example, would therefore supersede the fact that it was a statement that the rule prohibited, and the statement would be allowable. The rationale behind this result seems circular; the rule appears to provide that a statement is unacceptable except for when the statement is acceptable.

The policy rationale of the public record exception, for example, appears to be that if the information is included in a public record, the juror has constructive notice of the information. Therefore, if the attorney states the information, it is already a fact available to the public and the attorney has done nothing wrong. However, the boundaries of the remaining safe-harbor provisions raise more complex questions. What is a statement that involves the “claim, offense or defense involved”? Doesn’t the issue of the “scheduling or result of any step in litigation” sometimes include a statement of “the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement”? These dilemmas make it difficult for attorneys to effectively speak about their case to the media for fear of violating the rule. The situation becomes increasingly difficult for attorneys in high-profile cases, facing a crush of reporters. Although lawyers can reasonably be expected to not speak wildly and make rash misstatements about their opponents or the court proceedings, Rule 3.6 prohibits much more – it prevents attorneys from merely educating the public, including potential jurors, about the progress of the case.

B. OVERBREADTH OF THE STANDARD

In addition to the difficulty of applying Rule 3.6, Justice Kennedy’s opinion in Gentile clearly leaves room for debate about the content of a substantial likelihood limit on attorney speech. The difference between the

101. See supra note 94.
102. Id.
103. Id. These are only two of a long list of possibilities.
105. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (b)(4) (1996).
106. See supra note 95.
107. The need to shield jurors from information about a case is debated in Part II.B.
requirement of "serious and imminent threat" found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics," he wrote. 108 Justice Kennedy's opinion in Gentile and the differing lower court opinions following that case, along with the broader standards adopted by nearly forty percent of the states, 109 are strong evidence of the overbreadth of the substantial likelihood standard.

A leading justification for attorney speech regulations, as Chief Justice Rehnquist stated in Gentile, is to protect the "integrity and fairness of a State's judicial system . . . ." 110 According to Rehnquist, such rules achieve both a broad objective and a narrow one: limiting comments likely to influence a trial's outcome, and limiting comments likely to affect the group of citizens from which a jury would eventually be selected. 111

Although regulations of attorney speech have long been upheld as necessary to preserve a defendant's right to a fair trial, 112 the reasons for the regulations must be reassessed. Justice Rehnquist's analysis rests squarely on the long-recognized presumption that an impartial jury is a better jury, a view reflected in today's legal system but in contrast to traditional American jurisprudence. The historic convention of being tried by a "local jury," composed of citizens familiar with the facts of the case and with relevant local customs, 113 dominated the American judicial system during the founding of this country. Now, more than two hundred years after the Constitution, the impartial juror has replaced the informed

109. Seventeen states and the District of Columbia have adopted standards that place fewer restrictions on attorney speech than the "substantial likelihood of material prejudice" standard of Rule 3.6. See supra notes 81, 83-84.
110. 501 U.S. at 1075.
111. Id. Resting his argument on the principle that a defendant has a fundamental right to a fair trial before impartial jurors, Rehnquist stated that extrajudicial statements would infringe upon that right. Although Rehnquist's opinion acknowledges that extensive jury questioning cannot remove all the effects of pre-trial publicity, the Chief Justice fails to indicate how his two objectives differ - that is, how comments likely to influence a trial's outcome differ from comments likely to affect potential jurors. Rehnquist also notes that the rule merely postpones attorneys' comments until after the trial. Id. at 1076.
112. A defendant's right to a fair trial before an impartial jury has long been raised as the central justification for regulating attorney speech. See, e.g., Gentile, 501 U.S. 1030, 1073 (1991) ("on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant") (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (alteration in original)).
113. Abramson, supra note 5, at 17-18. Abramson contends that local jurors are better able to render fair determinations of a defendant's guilt or innocence based on the community's standards of behavior and morals. Id. at 18.
a trade-off that author Jeffrey Abramson calls "one of the central dilemmas of modern jury selection."115

Jurors need not be treated like unthinking robots incapable of selectively filtering the information they receive through the course of a trial and logically weighing the evidence offered during a trial with their previous knowledge.116 If an attorney's statement regarding the guilt or innocence of his client might sway a potential juror, the statement should not be prohibited for those reasons. An attorney is paid, either by his client or by the state, to advocate his client's position, and preventing a lawyer from voicing his views does little to preserve jury impartiality.117

Restricting attorney speech is not necessary to ensure a fair jury verdict, because keeping jurors in a vacuum is not a viable option to preserve a defendant's right to a fair trial. Jurors inevitably bring their own biases and

114. Id. at 18. An impartial juror is selected for his lack of knowledge regarding the accused and the crime, whereas the informed juror is expected to cast his vote based on a deeper understanding of the defendant's personal history and the community's opinion about the crime committed.

115. Id.

116. See, e.g., Mu'Min v. Virginia, 500 U.S. 415 (1991) (holding that a defendant's Sixth Amendment right to an impartial jury was not violated when the trial judge did not question jurors about the specific content of pre-trial publicity). The Supreme Court considered that much of the pretrial publicity focused on the Department of Corrections and the criminal justice system, as opposed to details of the defendant's criminal record. Id. at 429.

The merits of allowing the public to hear as much as possible about a case were debated in a 1995 Supreme Court decision involving attorney advertising. In Florida Bar v. Went for It, Inc., 115 S. Ct. 2371, 2381 (1995), the majority, led by Justice O'Connor, upheld the Florida Bar's rule that that state's attorneys must wait thirty days following an accident to send direct-mail solicitations to accident victims and their relatives. Although Florida Bar involves commercial speech, which is subject to greater restrictions than an attorney's remarks regarding his case, some common conclusions can be reached.

In his dissent, Justice Kennedy argued that the majority's concern about the repulsion of victims and their families upon receiving attorneys' mailings is irrelevant. Id. at 2383 (Kennedy, J., dissenting). "(W)e do not allow restrictions on speech to be justified on the ground that the expression might offend the listener," he wrote. Id. Justice Kennedy therefore recognizes that impartial jurors are not always better jurors, and that the mere presentation of information to an individual, such as a juror, does not end the analysis; their individual reactions and the effects of the information also must be considered.

117. See, e.g., Eric M. Freedman, The First Amendment Also Applies to Lawyers, NAT'L L.J., Sept. 11, 1995, at A21, A23. Freedman labels Chief Justice Rehnquist's opinion in Gentile as a "heroic attempt to defend" the notion that attorneys' speech is subject to higher standards than other citizens. The author also discounts Rehnquist's claim that attorneys' statements are given more value because of attorneys' "special access to information through discovery and client communications," noting that the Chief Justice fails to cite any statistical or legal support for this claim. Id. at A23.
assumptions to the courtroom, some of which are detected through voir dire and addressed via peremptory challenges or, in extreme cases, a change of venue.\textsuperscript{118} The best that judges and attorneys ever could hope for was to ferret from a jury pool those who had not admitted that they had formed an opinion about the case.\textsuperscript{119} To treat a juror as automatically considering knowledge that he learns via attorney speech before a trial denies the juror the opportunity to think for himself.\textsuperscript{120}

It is also important to consider the nature of the court proceeding at hand. Four states and the District of Columbia prohibit attorneys' statements that refer to ongoing trials, jury trials or criminal proceedings,\textsuperscript{121} suggesting that jurors in those cases should walk into the courtroom with an empty mind, to be filled only by evidence presented in court. Rule 3.6 and its substantial likelihood standard therefore uses an overinclusive regulation to "remedy" the instances in which jurors could learn about a case—a consequence that actually would improve the jury system. If juror impartiality is an acceptable goal, then limiting the regulation of attorney speech to ongoing trials or criminal proceedings draws a better connection between the objective of preserving an untainted jury and recognizing the circumstances in which trial publicity has the greatest potential to affect a jury.

III. BRINGING RULE 3.6 INTO THE 1990s—AT LAST

Proponents of attorney speech regulations paint Rule 3.6 as a justifiable

\begin{itemize}
\item \textsuperscript{118} The honesty of jurors' answers to voir dire inquiries was also debated in \textit{Mu'Min}, where Justice O'Connor observed, "credibility determinations of this kind [by the trial judge] are entitled to 'special deference'. . . and will be reversed only for 'manifest error.'" \textit{Mu'Min}, 500 U.S. at 433 (O'Connor, J., concurring) (quoting Patton v. Yount, 467 U.S. 1025, 1031-32, 1038 (1984)).
\item \textsuperscript{119} In \textit{Irwin v. Dowd}, 366 U.S. 717 (1961), the Supreme Court held that knowledge of the facts and issues of a case alone does not disqualify an individual from jury service. "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in its vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case," wrote Justice Clark. \textit{Id.} at 722.
\item \textsuperscript{120} See Newton N. Minow & Fred H. Cate, \textit{Who is an Impartial Juror in an Age of Mass Media?}, 40 Am. U. L. Rev. 631 (1991) (concluding that jurors need not be uninformed to be impartial); cf. \textit{J.E.B. v. Alabama ex rel. T.B.}, 114 S. Ct. 1419 (1994) (holding that a state prosecutor's gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment because they presume that a juror of one gender is predisposed to favor the party of their same gender).
\item \textsuperscript{121} See \textit{supra} note 84.
\end{itemize}
attempt to retain credibility and to control an increasingly independent generation of attorneys. However, the regulations must be lessened for two reasons. First, attorney speech regulations do not effectively bar the flow of information regarding a case. Greater forces are at work in the legal community than an attorney and his client, and an attorney is often forced to speak out not of his own volition, but to counter adverse publicity. By adding a section to Rule 3.6 that acknowledges this, the ABA acknowledged the new reality: third parties play significant roles in today's legal publicity game. The revision to Rule 3.6 correctly acknowledges that by preventing attorneys from speaking, courts are only solving part of the problem. Attorneys should be able to speak freely to counter these statements; that is their duty to their clients and their proper role in the legal system.

Second, decreased regulation of attorney speech—such as the adoption by more states of the stricter standards of serious and imminent threat or clear and present danger—is necessary. A revised rule would recognize that today's jurors are very different from those of only a few decades ago, and that the importance of preventing attorneys from speaking to preserve the impartial jury has waned with the times. When news traveled more slowly—by word of mouth or written communication—attempts to prevent information from reaching jurors were reasonable. The idea was to directly stop or lessen the flow of news, and attorneys were the origin of that information. Today, attorneys themselves are far from the sole sources of information. Therefore, regulations of attorney speech should be lessened to allow attorneys to fulfill their duty to advocate for their client without fear of stepping on a mine hidden within Rule 3.6.

Fewer and more specific regulations of attorney speech would properly recognize that jurors are able to understand and interpret such remarks. Despite frequent bemoaning about how the mass media treats citizens as being able to relate to their larger world on only an elementary level, most

122. An attorney may make a statement "that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1996). For example, the publicity to which Rule 3.6(c) refers could originate from an opposing attorney or from an independent media account of the event written without the direct input of either attorney.

123. Examples include legal commentators interpreting the day's events on television news programs and attorneys uninvolved in the actual case at bar, but who wish to make their views on the subject known.

124. See Minow & Cate, supra note 121, at 634-35.

125. See, e.g., Swift, supra note 47.
Americans are gaining more legal exposure, which arguably results in greater legal sophistication. 

Televised trials, interspersed with frequent commentary dissecting each attorney's question and witness' answer, give viewers insight into how the system works. The knowledge of these potential jurors, regardless of whether they have heard an attorney speak about his case, is an important contribution to the judicial process. "If the jury is to perform the many functions assigned to it – safeguarding liberty, protecting citizens against the government, representing the community, preserving social order, and determining guilt or innocence – the jury must be composed of informed citizens who are representative of the community." Educating potential jurors to all facets of a case serves no improper purpose, and Rule 3.6 and future regulations of attorney speech must evolve with this ultimate goal in mind.

CONCLUSION

A new standard for attorney speech is long overdue. The practice of muzzling lawyers to protect the romantic notion of the impartial juror has given way to a social and legal arena in which information flows more freely and jurors are capable of incorporating this information into their verdicts. 

The current substantial likelihood standard adopted by more than sixty percent of the states is unacceptable because it prevents an attorney from freely advocating his or her client's case. The American Bar Association's revision of Rule 3.6 following the Supreme Court's finding in Gentile that the rule was "void for vagueness" failed to clarify the standard for attorneys. The substantial likelihood standard impermissibly restricts attorney speech that poses only an arguable threat to the jury system.

126. Minow & Cate, supra note 121, at 635. The authors also suggest that investigative journalism and more protective libel laws have given the press a greater role in setting the nation's agenda, as opposed to merely reporting it.

127. Id. at 656. See generally Paul Reidinger, People's Court, 81 A.B.A. J. 100 (1995) (reviewing Norman J. Finkel, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995)). Reidinger supports Finkel's argument that jurors routinely disregard jury instructions and use their own internal 'justice systems' to nullify laws with which they disagree by returning a verdict inconsistent with the law, as many would argue occurred in the O.J. Simpson case. Id. While commentators' theories on jury nullification fill the pages of many law reviews and books, the issue is raised here to illustrate the small effect that regulations of attorney speech actually may have on 'impartial' jury verdicts.

The standards imposed by the minority of states, which restrict speech that poses a clear and present danger or serious and imminent threat – while still regulations of attorney speech – would strike a better balance between the freedom of information and the attempted impartiality of the jury system. And regardless of what standards are used, regulations should develop with the recognition that jurors of the 1990s and beyond bring different experiences into the courtroom than those of only a decade ago.

No juror is completely impartial. To attempt to preserve an impartial jury by restricting the speech of an attorney is like trying to quell a fast-moving fire by throwing a blanket over it and walking away.

Katrina M. Kelly