

# MEET THE PRESS: DEALING WITH THE MEDIA IN HIGH PROFILE CASES

Ben Raybin

David L. Raybin

E-Mail: [BRAYBIN@HollinsLegal.com](mailto:BRAYBIN@HollinsLegal.com)

E-Mail: [DRAYBIN@HollinsLegal.com](mailto:DRAYBIN@HollinsLegal.com)

Hollins, Raybin & Weissman, P.C.  
Suite 2200  
424 Church Street  
Nashville, Tennessee 37219  
Telephone: 615-256-6666 ext 220

Ben Raybin is an associate at Hollins, Raybin & Weissman, where he focuses on criminal defense and civil rights law. He graduated with honors from the University of Chicago and received his J.D. from Vanderbilt University Law School, where he served as an articles editor of the Vanderbilt Law Review. He clerked for Judges Jane Stranch and Gilbert Merritt, both of the U.S. Court of Appeals for the Sixth Circuit. He has successfully briefed and argued cases in the Tennessee Supreme Court and Court of Appeals, and has appeared several times in local television and print media.

David Raybin has practiced criminal and federal civil rights law in Nashville for forty years. He serves as local counsel for Children's Rights, a non-profit involved in foster care litigation. For over twenty-five years David has represented Nashville police officers through the Fraternal Order of Police. David Raybin served on the Tennessee Sentencing Commission for nine years. He was twice awarded the Justice Joe Henry Award for outstanding legal writing by the Tennessee Bar Association and received the Norman Award from the Nashville Bar Association. He is also the author of the three-volume treatise Tennessee Criminal Practice and Procedure. David Raybin is a 1973 Order of the Coif graduate of the University of Tennessee College of Law. After graduation he served as an Assistant State Attorney General for three years. Then he was hired by Tom Shriver to serve as an Assistant District Attorney for seven years. After his service with the government, David joined what was then Hollins Wagster and Yarbrough. Following the reorganization of the firm, David is now the senior partner of Hollins Raybin and Weissman.

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“In the context of judicial proceedings, an attorney's First Amendment rights are not without limits. Although litigants and lawyers do not check their First Amendment rights at the courthouse door, those rights are often subordinated to other interests inherent in the judicial setting.”

*Bd. of Prof'l Responsibility of Supreme Court of Tennessee v. Slavin*, 145 S.W.3d 538, 549 (Tenn. 2004)



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#### INTRODUCTION

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## INTRODUCTION

### **Basic Rules**

Get your client off Facebook

Get your client's family to refrain from social media.

Be prepared for the Perpetrator Walk ( don't duck and cover !)

Instead of "No Comment," your client can advise that "my lawyer may be in a position to answer your questions."

When you speak to the media do it in sound bites.

Know what you are going to say.

Be accurate.

Be careful about "off the record" comments

If you cannot speak to an issue, refer the media to a colleague who might be able to.



## A. Tennessee Rule of Professional Conduct for Attorneys

West's Tennessee Code Annotated  
State and Local Rules Selected from West's Tennessee Rules of Court  
Rules of the Supreme Court of the State of Tennessee  
Rule 8. Rules of Professional Conduct (Refs & Annos)  
Chapter 3. Advocate

Sup.Ct.Rules, Rule 8, RPC 3.6

Rule 3.6. Trial Publicity

Currentness

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) 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) information contained in a public record;

(3) that an investigation of a 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 investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

### Credits

[Adopted September 29, 2010, effective January 1, 2011.]

### Editors' Notes

#### COMMENT

[1] *It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.*

[2] *Special rules of confidentiality may validly govern proceedings involving juveniles, domestic relations, mental disabilities, and perhaps other types of litigation. RPC 3.4(c) requires compliance with such rules.*

[3] *The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.*

[4] *Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).*

[5] *There are, on the other hand, certain subjects that are 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 in a criminal investigation, or witness; or the identity of a witness; or the expected testimony of a party or witness;*

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

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

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

(5) information 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] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate substantial undue prejudice created by the statements made by others.

[8] See RPC 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

#### **DEFINITIONAL CROSS-REFERENCES**

“Firm” See RPC 1.0(c)

“Knows” See RPC 1.0(f)

“Materially” See RPC 1.0(o)

“Reasonable” See RPC 1.0(h)

“Reasonably should know” See RPC 1.00)

“Substantial” See RPC 1.0(1)

Sup. Ct. Rules, Rule 8, RPC 3.6, TN R S CT Rule 8, RPC 3.6

The state court rules are current with amendments received through July 15, 2015.



111 S.Ct. 2720  
Supreme Court of the United States

Dominic P. GENTILE, Petitioner

v.

STATE BAR OF NEVADA.

No. 89-1836. | Argued April  
15, 1991. | Decided June 27, 1991.

In disciplinary proceeding, the Nevada Supreme Court, 106 Nev. 60, 787 P.2d 386, found that attorney who held press conference after client was indicted on criminal charges violated Nevada Supreme Court rule prohibiting lawyer from making extrajudicial statements to press that he knows or reasonably should know have “substantial likelihood of materially prejudicing” adjudicative proceeding. Certiorari was granted. The Supreme Court, per Justice Kennedy, held that: (1) as interpreted by Nevada Supreme Court, rule was void for vagueness, and per Chief Justice Rehnquist, that (2) “substantial likelihood of material prejudice” test applied by Nevada satisfied First Amendment.

Reversed.

Justices Marshall, Blackmun and Stevens joined in Justice Kennedy's opinion.

Chief Justice Rehnquist delivered opinion dissenting in part in which Justices White, Scalia and Souter joined.

Justice O'Connor filed opinion concurring in Justice Kennedy's opinion in part and in Chief Justice Rehnquist's opinion in part.

**\*\*2721 \*1030 Syllabus \***

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Petitioner Gentile, an attorney, held a press conference the day after his client, Sanders, was indicted on criminal charges under Nevada law. Six months later, a jury acquitted Sanders. Subsequently, respondent State Bar of Nevada filed a complaint against Gentile, alleging that statements he made

during the press conference violated Nevada Supreme Court Rule 177, which prohibits a lawyer from making extrajudicial statements to the press that he knows or reasonably should know will have a “substantial likelihood of materially prejudicing” an adjudicative proceeding, 177(1), which lists a number of statements that are “ordinarily ... likely” to result in material prejudice, 177(2), and which provides that a lawyer “may state without elaboration ... the general nature of the ... defense” “[n]otwithstanding subsection 1 and 2(a-f),” 177(3). The Disciplinary Board found that Gentile violated the Rule and recommended that he be privately reprimanded. The State Supreme Court affirmed, rejecting his contention that the Rule violated his right to free speech.

*Held:* The judgment is reversed.

**\*\*2722** 106 Nev. 60, 787 P.2d 386 (1990), reversed.

Justice KENNEDY delivered the opinion of the Court with respect to Parts III and VI, concluding that, as interpreted by the Nevada Supreme Court, Rule 177 is void for vagueness. Its safe harbor provision, Rule 177(3), misled Gentile into thinking that he could give his press conference without fear of discipline. Given the Rule's grammatical structure and the absence of a clarifying interpretation by the state court, the Rule fails to provide fair notice to those to whom it is directed and is so imprecise that discriminatory enforcement is a real possibility. By necessary operation of the word “notwithstanding,” the Rule contemplates that a lawyer describing the “general” nature of the defense without “elaboration” need fear no discipline even if he knows or reasonably should know that his statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Both “general” and “elaboration” are classic terms of degree which, in this context, have no settled usage or tradition of interpretation in law, and thus a lawyer has no principle for determining when his remarks pass from the permissible to the forbidden. A review of the press conference—where Gentile made only a brief opening statement and declined to answer reporters' **\*1031** questions seeking more detailed comments—supports his claim that he thought his statements were protected. That he was found in violation of the Rules after studying them and making a conscious effort at compliance shows that Rule 177 creates a trap for the wary as well as the unwary. Pp. 2731-2732.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding that the “substantial likelihood of material prejudice” test applied by Nevada

and most other States satisfies the First Amendment. Pp. 2740-2745.

(a) The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the “clear and present danger” of actual prejudice or imminent threat standard established for regulation of the press during pending proceedings. See, e.g., *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683. A lawyer's right to free speech is extremely circumscribed in the courtroom, see, e.g., *Sacher v. United States*, 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717, and, in a pending case, is limited outside the courtroom as well, see, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600. Cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17. Moreover, this Court's decisions dealing with a lawyer's First Amendment right to solicit business and advertise have not suggested that lawyers are protected to the same extent as those engaged in other businesses, but have balanced the State's interest in regulating a specialized profession against a lawyer's First Amendment interest in the kind of speech at issue. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810. Pp. 2740-2745.

(b) The “substantial likelihood of material prejudice” standard is a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials. Lawyers in such cases are key participants in the criminal justice system, and the State may demand some adherence to that system's precepts in regulating their speech and conduct. Their extrajudicial statements pose a threat to a pending proceeding's fairness, since they have special access to information through discovery and client communication, and since their statements are likely to be received as especially authoritative. The standard is designed to protect the integrity and fairness of a State's judicial system and imposes only narrow and necessary limitations on lawyers' speech. Those limitations are aimed at comments that are likely to influence a trial's outcome or prejudice the jury venire, even if an untainted panel is ultimately found. Few interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and the State has a substantial interest in preventing officers of the court from imposing costs on the judicial system and litigants arising from measures, such as a change of venue, to ensure a fair trial. The restraint on speech is narrowly tailored to achieve these objectives, since it applies

only to speech that is substantially likely to have a materially prejudicial effect, is neutral to points of view, and merely postpones the lawyer's comments until after the trial. Pp. 2745.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III and VI, in which MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Parts I, II, IV, and V, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, C.J., delivered the opinion of the Court with respect to Parts I and II, in which WHITE, O'CONNOR, SCALIA, and SOUTER, JJ., joined, and a dissenting opinion with respect to Part III, in which WHITE, SCALIA, and SOUTER, JJ., joined, *post*, p. 2738. O'CONNOR, J., filed a concurring opinion, *post*, p. 2748.

### Attorneys and Law Firms

*Michael E. Tigar* argued the cause for petitioner. With him on the briefs were *Samuel J. Buffone*, *Terrance G. Reed*, and *Neil G. Galatz*.

*Robert H. Klonoff* argued the cause for respondent. With him on the brief were *Donald B. Ayer* and *John E. Howe*.\*

\*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Leon Friedman*, *Steven R. Shapiro*, *John A. Powell*, and *Elliot Minchberg*; and for the American Newspaper Publishers Association et al. by *Alice Neff Lucan*, *Harold W. Fuson, Jr.*, *Jane E. Kirtley*, *David M. Olive*, *Deborah R. Linfield*, *W. Terry Maguire*, *René P. Milam*, *Bruce W. Sanford*, *J. Laurent Scharff*, *Richard M. Schmidt, Jr.*, and *Barbara Wartelle Wall*.

*Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Stephen J. Marzen* filed a brief for the United States as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Bar Association by *John J. Curtin, Jr.*, and *George A. Kuhlman*; for the National Association of Criminal Defense Lawyers by *William J. Genego*; and for Nevada Attorneys for Criminal Justice by *Kevin M. Kelly*.

### Opinion

Justice KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III

and VI, and an opinion with respect to Parts I, II, IV, and V in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join.

\*1033 Hours after his client was indicted on criminal charges, petitioner Gentile, who is a member of the Bar of the State of Nevada, held a press conference. He made a prepared statement, which we set forth in Appendix A to this opinion, and then he responded to questions. We refer to most of those questions and responses in the course of our opinion.

Some six months later, the criminal case was tried to a jury and the client was acquitted on all counts. The State Bar of Nevada then filed a complaint against petitioner, alleging a violation of Nevada Supreme Court Rule 177, a rule governing pretrial publicity almost identical to ABA Model Rule of Professional Conduct 3.6. We set forth the full text of Rule 177 in Appendix B. Rule 177(1) prohibits an attorney from making “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.” Rule 177(2) lists a number of statements that are “ordinarily ... likely” to result in material prejudice. Rule 177(3) provides a safe harbor for the attorney, listing a number of statements that can be made without fear of discipline notwithstanding the other parts of the Rule.

Following a hearing, the Southern Nevada Disciplinary Board of the State Bar found that Gentile had made the statements in question and concluded that he violated Rule 177. The board recommended a private reprimand. Petitioner appealed to the Nevada Supreme Court, waiving the confidentiality of the disciplinary proceeding, and the Nevada court affirmed the decision of the board.

Nevada's application of Rule 177 in this case violates the First Amendment. Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws. Furthermore, the Rule's safe harbor provision, Rule 177(3), appears \*1034 to permit the speech in question, and Nevada's decision to discipline petitioner \*\*2724 in spite of that provision raises concerns of vagueness and selective enforcement.

## I

The matter before us does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a “substantial likelihood of materially prejudicing an adjudicative proceeding,” but is limited to Nevada's interpretation of that standard. On the other hand, one central point must dominate the analysis: this case involves classic political speech. The State Bar of Nevada reprimanded petitioner for his assertion, supported by a brief sketch of his client's defense, that the State sought the indictment and conviction of an innocent man as a “scapegoat” and had not “been honest enough to indict the people who did it; the police department, crooked cops.” See *infra*, Appendix A. At issue here is the constitutionality of a ban on political speech critical of the government and its officials.

## A

Unlike other First Amendment cases this Term in which speech is not the direct target of the regulation or statute in question, see, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (ban on nude barroom dancing); *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991) (sales tax on cable and satellite television), this case involves punishment of pure speech in the political forum. Petitioner engaged not in solicitation of clients or advertising for his practice, as in our precedents from which some of our colleagues would discern a standard of diminished First Amendment protection. His words were directed at public officials and their conduct in office.

There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information \*1035 relating to alleged governmental misconduct, which only last Term we described as “speech which has traditionally been recognized as lying at the core of the First Amendment.” *Butterworth v. Smith*, 494 U.S. 624, 632, 110 S.Ct. 1376, 1381, 108 L.Ed.2d 572 (1990).

The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829,

838-839, 98 S.Ct. 1535, 1541-1542, 56 L.Ed.2d 1 (1978). “[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S.Ct. 2814, 2826, 65 L.Ed.2d 973 (1980). Public vigilance serves us well, for “[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.... Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.” *In re Oliver*, 333 U.S. 257, 270-271, 68 S.Ct. 499, 506-507, 92 L.Ed. 682 (1948). As we said in *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), limits upon public comment about pending cases are

“likely to fall not only at a crucial time but upon the most important topics of discussion....

“No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.” *Id.*, at 268-269, 62 S.Ct., at 196-197.

In *Sheppard v. Maxwell*, 384 U.S. 333, 350, 86 S.Ct. 1507, 1515, 16 L.Ed.2d 600 (1966), we reminded that “[t]he press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes \*\*2725 to extensive public scrutiny and criticism.”

Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption, see *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 606, 96 S.Ct. 2791, 2825, 49 L.Ed.2d 683 (1976) (Brennan, J., concurring in judgment) (“[C]ommentary \*1036 on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern”), or where, as is also the present circumstance, the criticism questions the judgment of an elected public prosecutor. Our system grants prosecutors vast discretion at all stages of the criminal process, see *Morrison v. Olson*, 487 U.S. 654, 727-728, 108 S.Ct. 2597, 2637-2638, 101 L.Ed.2d 569 (1988) (SCALIA, J., dissenting). The public has an interest in its responsible exercise.

## B

We are not called upon to determine the constitutionality of the ABA Model Rule of Professional Conduct 3.6 (1981), but

only Rule 177 as it has been interpreted and applied by the State of Nevada. Model Rule 3.6's requirement of substantial likelihood of material prejudice is not necessarily flawed. Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm. A rule governing speech, even speech entitled to full constitutional protection, need not use the words “clear and present danger” in order to pass constitutional muster.

“Mr. Justice Holmes' test was never intended ‘to express a technical legal doctrine or to convey a formula for adjudicating cases.’ *Pennekamp v. Florida*, 328 U.S. 331, 353 [66 S.Ct. 1029, 1040, 90 L.Ed. 1295] (1946) (Frankfurter, J., concurring). Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.” *Landmark Communications, Inc. v. Virginia, supra*, 435 U.S., at 842-843, 98 S.Ct., at 1543-1544.

\*1037 The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test. See ABA Annotated Model Rules of Professional Conduct 243 (1984) (“formulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality”; citing *Landmark Communications, supra*, at 844, 98 S.Ct., at 1544; *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); and *Bridges v. California, supra*, 314 U.S., at 273, 62 S.Ct., at 198, for guidance in determining whether statement “poses a sufficiently serious and imminent threat to the fair administration of justice”); G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 397 (1985) (“To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)”; *In re Hinds*, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982) (substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger).

The difference between the 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. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application. Under those principles, nothing inherent in Nevada's formulation fails First Amendment review; but as this case demonstrates, **\*\*2726** Rule 177 has not been interpreted in conformance with those principles by the Nevada Supreme Court.

## II

Even if one were to accept respondent's argument that lawyers participating in judicial proceedings may be subjected, consistent with the First Amendment, to speech restrictions that could not be imposed on the press or general public, the judgment should not be upheld. The record does **\*1038** not support the conclusion that petitioner knew or reasonably should have known his remarks created a substantial likelihood of material prejudice, if the Rule's terms are given any meaningful content.

We have held that “in cases raising First Amendment issues ... an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’ ” *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286, 84 S.Ct. 710, 728-729, 11 L.Ed.2d 686 (1964)).

Neither the disciplinary board nor the reviewing court explains any sense in which petitioner's statements had a substantial likelihood of causing material prejudice. The only evidence against Gentile was the videotape of his statements and his own testimony at the disciplinary hearing. The Bar's whole case rests on the fact of the statements, the time they were made, and petitioner's own justifications. Full deference to these factual findings does not justify abdication of our responsibility to determine whether petitioner's statements can be punished consistent with First Amendment standards.

Rather, this Court is

“compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the

First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.” *Pennkamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946).

“ ‘Whenever the fundamental rights of free speech ... are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually **\*1039** did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.’ ” *Landmark Communications, Inc. v. Virginia*, 435 U.S., at 844, 98 S.Ct., at 1544 (quoting *Whitney v. California*, 274 U.S. 357, 378-379, 47 S.Ct. 641, 649-650, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring)).

Whether one applies the standard set out in *Landmark Communications* or the lower standard our colleagues find permissible, an examination of the record reveals no basis for the Nevada court's conclusion that the speech presented a substantial likelihood of material prejudice.

Our decision earlier this Term in *Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), provides a pointed contrast to respondent's contention in this case. There, the community had been subjected to a barrage of publicity prior to Mu'Min's trial for capital murder. News stories appeared over a course of several months and included, in addition to details of the crime itself, numerous items of prejudicial information inadmissible at trial. Eight of the twelve individuals seated on Mu'Min's jury admitted some exposure to pretrial publicity. We held that the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity. In light of that holding, the Nevada court's conclusion **\*\*2727** that petitioner's abbreviated, general comments six months before trial created a “substantial likelihood of materially prejudicing” the proceeding is, to say the least, most unconvincing.

### A.

*Pre-Indictment Publicity.* On January 31, 1987, undercover police officers with the Las Vegas Metropolitan Police Department (Metro) reported large amounts of cocaine (four kilograms) and travelers' checks (almost \$300,000) missing from a safety deposit vault at Western Vault Corporation. The drugs and money had been used as part of an undercover **\*1040** operation conducted by Metro's Intelligence Bureau.

Petitioner's client, Grady Sanders, owned Western Vault. John Moran, the Las Vegas sheriff, reported the theft at a press conference on February 2, 1987, naming the police and Western Vault employees as suspects.

Although two police officers, Detective Steve Scholl and Sergeant Ed Schaub, enjoyed free access to the deposit box throughout the period of the theft, and no log reported comings and goings at the vault, a series of press reports over the following year indicated that investigators did not consider these officers responsible. Instead, investigators focused upon Western Vault and its owner. Newspaper reports quoted the sheriff and other high police officials as saying that they had not lost confidence in the "elite" Intelligence Bureau. From the beginning, Sheriff Moran had "complete faith and trust" in his officers. App. 85.

The media reported that, following announcement of the cocaine theft, others with deposit boxes at Western Vault had come forward to claim missing items. One man claimed the theft of his life savings of \$90,000. *Id.*, at 89. Western Vault suffered heavy losses as customers terminated their box rentals, and the company soon went out of business. The police opened other boxes in search of the missing items, and it was reported they seized \$264,900 in United States currency from a box listed as unrented.

Initial press reports stated that Sanders and Western Vault were being cooperative; but as time went on, the press noted that the police investigation had failed to identify the culprit and through a process of elimination was beginning to point toward Sanders. Reports quoted the affidavit of a detective that the theft was part of an effort to discredit the undercover operation and that business records suggested the existence of a business relation between Sanders and the targets of a Metro undercover probe. *Id.*, at 85.

The deputy police chief announced the two detectives with access to the vault had been "cleared" as possible suspects. \*1041 According to an unnamed "source close to the investigation," the police shifted from the idea that the thief had planned to discredit the undercover operation to the theory that the thief had unwittingly stolen from the police. The stories noted that Sanders "could not be reached for comment." *Id.*, at 93.

The story took a more sensational turn with reports that the two police suspects had been cleared by police investigators after passing lie detector tests. The tests were administered

by one Ray Slaughter. But later, the Federal Bureau of Investigation (FBI) arrested Slaughter for distributing cocaine to an FBI informant, Belinda Antal. It was also reported that the \$264,900 seized from the unrented safety deposit box at Western Vault had been stored there in a suitcase owned by one Tammy Sue Markham. Markham was "facing a number of federal drug-related charges" in Tucson, Arizona. Markham reported items missing from three boxes she rented at Western Vault, as did one Beatrice Connick, who, according to press reports, was a Colombian national living in San Diego and "not facing any drug related charges." (As it turned out, petitioner impeached Connick's credibility at trial with the existence of a money laundering conviction.) Connick also was reported to have taken and passed a lie detector \*\*2728 test to substantiate her charges. *Id.*, at 94-97. Finally, press reports indicated that Sanders had refused to take a police polygraph examination. *Id.*, at 41. The press suggested that the FBI suspected Metro officers were responsible for the theft, and reported that the theft had severely damaged relations between the FBI and Metro.

## B.

*The Press Conference.* Petitioner is a Las Vegas criminal defense attorney, an author of articles about criminal law and procedure, and a former associate dean of the National College for Criminal Defense Lawyers and Public Defenders. *Id.*, at 36-38. Through leaks from the police department, he \*1042 had some advance notice of the date an indictment would be returned and the nature of the charges against Sanders. Petitioner had monitored the publicity surrounding the case, and, prior to the indictment, was personally aware of at least 17 articles in the major local newspapers, the Las Vegas Sun and Las Vegas Review-Journal, and numerous local television news stories which reported on the Western Vault theft and ensuing investigation. *Id.*, at 38-39; see Respondent's Exhibit A, before Disciplinary Board. Petitioner determined, for the first time in his career, that he would call a formal press conference. He did not blunder into a press conference, but acted with considerable deliberation.

## 1.

*Petitioner's Motivation.* As petitioner explained to the disciplinary board, his primary motivation was the concern that, unless some of the weaknesses in the State's case were made public, a potential jury venire would be poisoned

by repetition in the press of information being released by the police and prosecutors, in particular the repeated press reports about polygraph tests and the fact that the two police officers were no longer suspects. App. 40-42. Respondent distorts Rule 177 when it suggests this explanation admits a purpose to prejudice the venire and so proves a violation of the Rule. Rule 177 only prohibits the dissemination of information that one knows or reasonably should know has a “substantial likelihood of materially prejudicing an adjudicative proceeding.” Petitioner did not indicate he thought he could sway the pool of potential jurors to form an opinion in advance of the trial, nor did he seek to discuss evidence that would be inadmissible at trial. He sought only to counter publicity already deemed prejudicial. The Southern Nevada Disciplinary Board so found. It said petitioner attempted

**\*1043** “(i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) ... to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case.” App. 3-4.

Far from an admission that he sought to “materially prejudic[e] an adjudicative proceeding,” petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community.

Petitioner gave a second reason for holding the press conference, which demonstrates the additional value of his speech. Petitioner acted in part because the investigation had taken a serious toll on his client. Sanders was “not a man in good health,” having suffered multiple open-heart surgeries prior to these events. *Id.*, at 41. And prior to indictment, the mere suspicion of wrongdoing had caused the closure of Western Vault and the loss of Sanders' ground lease on an Atlantic City, New Jersey, property. *Ibid.*

An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced **\*\*2729** with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment

or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

**\*1044 2.**

*Petitioner's Investigation of Rule 177.* Rule 177 is phrased in terms of what an attorney “knows or reasonably should know.” On the evening before the press conference, petitioner and two colleagues spent several hours researching the extent of an attorney's obligations under Rule 177. He decided, as we have held, see *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), that the timing of a statement was crucial in the assessment of possible prejudice and the Rule's application, accord, *Stroble v. California*, 343 U.S. 181, 191-194, 72 S.Ct. 599, 604-606, 96 L.Ed. 872 (1952). App. 44.

Upon return of the indictment, the court set a trial date for August 1988, some six months in the future. Petitioner knew, at the time of his statement, that a jury would not be empaneled for six months at the earliest, if ever. He recalled reported cases finding no prejudice resulting from juror exposure to “far worse” information two and four months before trial, and concluded that his proposed statement was not substantially likely to result in material prejudice. *Ibid.*

A statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process. See ABA Annotated Model Rules of Professional Conduct 243 (1984) (timing of statement a significant factor in determining seriousness and imminence of threat). As turned out to be the case here, exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date.

In 1988, Clark County, Nevada, had population in excess of 600,000 persons. Given the size of the community from which any potential jury venire would be drawn and the length of time before trial, only the most damaging of information could give rise to any likelihood of prejudice. The innocuous content of petitioner's statements reinforces my conclusion.

**\*1045 3.**

*The Content of Petitioner's Statements.* Petitioner was disciplined for statements to the effect that (1) the evidence demonstrated his client's innocence, (2) the likely thief was a police detective, Steve Scholl, and (3) the other victims were not credible, as most were drug dealers or convicted money launderers, all but one of whom had only accused Sanders in response to police pressure, in the process of "trying to work themselves out of something." Appendix A, *infra*, at 2736. App. 2-3 (Findings and Recommendation of the State Bar of Nevada, Southern Nevada Disciplinary Board). He also strongly implied that Steve Scholl could be observed in a videotape suffering from symptoms of cocaine use. Of course, only a small fraction of petitioner's remarks were disseminated to the public, in two newspaper stories and two television news broadcasts.

The stories mentioned not only Gentile's press conference but also a prosecution response and police press conference. See App. 127-129, 131-132; Respondent's Exhibit A, before Disciplinary Board.<sup>1</sup> The chief \*\*2730 deputy district attorney was \*1046 quoted as saying that this was a legitimate indictment, and that prosecutors cannot bring an indictment to court unless they can prove the charges in it beyond a reasonable doubt. App. 128-129. Deputy Police Chief Sullivan stated for the police department: " 'We in Metro are very satisfied our officers (Scholl and Sgt. Ed Schaub) had nothing to do with this theft or any other. They are both above reproach. Both are veteran police officers who are dedicated to honest law enforcement.' " *Id.*, at 129. In the context of general public awareness, these police and prosecution statements were no more likely to result in prejudice than were petitioner's statements, but given the repetitive publicity from the police investigation, it is difficult to come to any conclusion but that the balance remained in favor of the prosecution.

<sup>1</sup> The sole summary of television reports of the press conference contained in the record is as follows:

"2-5-88:

"GENTILE NEWS CONFERENCE STORY. GENTILE COMPARES THE W. VAULT BURGLARY TO THE FRENCH CONNECTION CASE IN WHICH THE BAD GUYS WERE COPS. GENTILE SAYS THE EVIDENCE IS CIRCUMSTANTIAL AND THAT THE COPS SEEM THE MORE LIKELY CULPRITS, THAT DET. SCHOLL HAS SHOWN SIGNS OF DRUG USE, THAT THE OTHER CUSTOMERS WERE PRESSURED INTO COMPLAINING BY METRO, THAT THOSE CUSTOMERS ARE KNOWN DRUG

DEALERS, AND THAT OTHER AGENCIES HAVE OPERATED OUT OF W. VAULT WITHOUT HAVING SIMILAR PROBLEMS.

"2-5-88: METRO NEWS CONFERENCE IN WHICH CHIEF SULLIVAN EXPLAINS THAT THE OFFICERS INVOLVED HAVE BEEN CLEARED BY POLYGRAPH TESTS. STORY MENTIONS THAT THE POLYGRAPHER WAS RAY SLAUGHTER, UNUSUAL BECAUSE SLAUGHTER IS A PRIVATE EXAMINER, NOT A METRO EXAMINER. REPORTER DETAILS SLAUGHTER'S BACKGROUND, INCLUDING HIS TEST OF JOHN MORAN REGARDING SPILOTRO CONTRIBUTIONS. ALSO MENTIONS SLAUGHTER'S DRUG BUST, SPECULATES ABOUT WHETHER IT WAS A SETUP BY THE FBI. QUOTES GENTILE AS SAYING THE TWO CASES ARE DEFINITELY RELATED." App. 131-132 (emphasis added).

Much of the information provided by petitioner had been published in one form or another, obviating any potential for prejudice. See ABA Annotated Model Rules of Professional Conduct 243 (1984) (extent to which information already circulated significant factor in determining likelihood of prejudice). The remainder, and details petitioner refused to provide, were available to any journalist willing to do a little bit of investigative work.

Petitioner's statements lack any of the more obvious bases for a finding of prejudice. Unlike the police, he refused to comment on polygraph tests except to confirm earlier reports that Sanders had not submitted to the police polygraph; he mentioned no confessions and no evidence from searches or test results; he refused to elaborate upon his charge that the other so-called victims were not credible, except to explain his general theory that they were pressured to testify in an attempt to avoid drug-related legal trouble, and that some of \*1047 them may have asserted claims in an attempt to collect insurance money.

### C.

*Events Following the Press Conference.* Petitioner's judgment that no likelihood of material prejudice would result from his comments was vindicated by events at trial. While it is true that Rule 177's standard for controlling pretrial publicity must be judged at the time a statement is made, *ex post* evidence can have probative value in some cases. Here, where the Rule purports to demand, and the



Constitution requires, consideration of the character of the harm and its heightened likelihood of occurrence, the record is altogether devoid of facts one would expect to follow upon any statement that created a real likelihood of material prejudice to a criminal jury trial.

The trial took place on schedule in August 1988, with no request by either party for a venue change or continuance. The jury was empaneled with no apparent difficulty. The trial judge questioned the jury venire about publicity. Although many had vague recollections of reports that cocaine stored at Western Vault had been stolen from a police undercover operation, and, as petitioner had feared, one remembered that the police had been cleared of suspicion, not a single juror indicated any recollection of petitioner or his press conference. App. 48-49; Respondent's Exhibit B, before Disciplinary Board.

At trial, all material information disseminated during petitioner's press conference was admitted in evidence before the jury, including information questioning the motives and credibility of supposed victims who testified against Sanders, and Detective Scholl's ingestion of drugs in the course of \*\*2731 undercover operations (in order, he testified, to gain the confidence of suspects). App. 47. The jury acquitted petitioner's client, and, as petitioner explained before the disciplinary board,

\*1048 “when the trial was over with and the man was acquitted the next week the foreman of the jury phoned me and said to me that if they would have had a verdict form before them with respect to the guilt of Steve Scholl they would have found the man proven guilty beyond a reasonable doubt.” *Id.*, at 47-48.

There is no support for the conclusion that petitioner's statements created a likelihood of material prejudice, or indeed of any harm of sufficient magnitude or imminence to support a punishment for speech.

### III

[1] As interpreted by the Nevada Supreme Court, the Rule is void for vagueness, in any event, for its safe harbor provision, Rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline. Rule 177(3) (a) provides that a lawyer “may state without elaboration ... the general nature of the ... defense.” Statements under this provision are protected “[n]otwithstanding subsection

1 and 2(a-f).” By necessary operation of the word “notwithstanding,” the Rule contemplates that a lawyer describing the “general nature of the ... defense” “without elaboration” need fear no discipline, even if he comments on “[t]he character, credibility, reputation or criminal record of a ... witness,” and even if he “knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”

Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide “ ‘fair notice to those to whom [it] is directed.’ ” *Grayned v. City of Rockford*, 408 U.S. 104, 112, 92 S.Ct. 2294, 2301, 33 L.Ed.2d 222 (1972). A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the “general” nature of the defense without “elaboration” provides insufficient guidance because “general” and “elaboration” are both classic \*1049 terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Petitioner testified he thought his statements were protected by Rule 177(3), App. 59. A review of the press conference supports that claim. He gave only a brief opening statement, see Appendix A, *infra*, p. 2736-2737, and on numerous occasions declined to answer reporters' questions seeking more detailed comments. One illustrative exchange shows petitioner's attempt to obey the rule:

“QUESTION FROM THE FLOOR: Dominick, you mention you question the credibility of some of the witnesses, some of the people named as victims in the government indictment.

“Can we go through it and *elaborate* on their backgrounds, interests-

“MR. GENTILE: *I can't because ethics prohibit me from doing so.*

“Last night before I decided I was going to make a statement, I took a good close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?

“I can't name which of the people have the drug backgrounds. I'm sure you guys can find that by doing just

a little bit of investigative work.” App. to Pet. for Cert. 11a (emphasis added).<sup>2</sup>

2

Other occasions are as follows:

“QUESTION FROM THE FLOOR: Do you believe any other police officers other than Scholl were involved in the disappearance of the dope and-

“MR. GENTILE: Let me say this: What I believe and what the proof is are two different things. Okay? I'm reluctant to discuss what I believe because I don't want to slander somebody, but I can tell you that the proof shows that Scholl is the guy that is most likely to have taken the cocaine and the American Express traveler's checks.

“QUESTION FROM THE FLOOR: What is that? What is that proof?

“MR. GENTILE: It'll come out; it'll come out.” App. to Pet. for Cert. 9a.

“QUESTION FROM THE FLOOR: I have seen reports that the FBI seems to think sort of along the lines that you do.

“MR. GENTILE: Well, I couldn't agree with them more.

“QUESTION FROM THE FLOOR: Do you know anything about it?

“MR. GENTILE: Yes, I do; but again, Dan, I'm not in a position to be able to discuss that now.

“All I can tell you is that you're in for a very interesting six months to a year as this case develops.” *Id.*, at 10a.

“QUESTION FROM THE FLOOR: Did the cops pass the polygraph?

“MR. GENTILE: Well, I would like to give you a comment on that, except that Ray Slaughter's trial is coming up and I don't want to get in the way of anybody being able to defend themselves.

“QUESTION FROM THE FLOOR: Do you think the Slaughter case-that there's a connection?

“MR. GENTILE: Absolutely. I don't think there is any question about it, and-

“QUESTION FROM THE FLOOR: What is that?

“MR. GENTILE: Well, it's intertwined to a great deal, I think.

“I know that what I think the connection is, again, is something I believe to be true. I can't point to it being true and until I can I'm not going to say anything.

“QUESTION FROM THE FLOOR: Do you think the police involved in this passed legitimate-legitimately passed lie detector tests?

“MR. GENTILE: I don't want to comment on that for two reasons:

“Number one, again, Ray Slaughter is coming up for trial and it wouldn't be right to call him a liar if I didn't think that it were true.

“But, secondly, I don't have much faith in polygraph tests.

“QUESTION FROM THE FLOOR: Did [Sanders] ever take one?

“MR. GENTILE: The police polygraph?

“QUESTION FROM THE FLOOR: Yes.

“MR. GENTILE: No, he didn't take a police polygraph.

“QUESTION FROM THE FLOOR: Did he take one with you?

“MR. GENTILE: I'm not going to disclose that now.” *Id.*, at 12a-13a.

**\*\*2732 \*1050** Nevertheless, the disciplinary board said only that petitioner's comments “went beyond the scope of the statements permitted by SCR 177(3),” App. 5, and the Nevada Supreme **\*1051** Court's rejection of petitioner's defense based on Rule 177(3) was just as terse, App. to Pet. for Cert. 4a. The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary.

[2] The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, *Kolender v. Lawson*, 461 U.S. 352, 357-358, 361, 103 S.Ct. 1855, 1858-1859, 1860, 75 L.Ed.2d 903 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 1246-1247, 39 L.Ed.2d 605 (1974), for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

#### IV

The analysis to this point resolves the case, and in the usual order of things the discussion should end here. Five Members of the Court, however, endorse an extended discussion which concludes that Nevada may interpret its requirement of

substantial likelihood of material prejudice under a standard more deferential than is the usual rule where speech is concerned. It appears necessary, therefore, to set forth my objections to that conclusion and to the reasoning which underlies it.

Respondent argues that speech by an attorney is subject to greater regulation than **\*\*2733** speech by others, and restrictions on an attorney's speech should be assessed under a balancing test that weighs the State's interest in the regulation of a **\*1052** specialized profession against the lawyer's First Amendment interest in the kind of speech that was at issue. The cases cited by our colleagues to support this balancing, *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978); and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), involved either commercial speech by attorneys or restrictions upon release of information that the attorney could gain only by use of the court's discovery process. Neither of those categories, nor the underlying interests which justified their creation, were implicated here. Petitioner was disciplined because he proclaimed to the community what he thought to be a misuse of the prosecutorial and police powers. Wide-open balancing of interests is not appropriate in this context.

#### A

Respondent would justify a substantial limitation on speech by attorneys because "lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations," and so lawyers' statements "are likely to be received as especially authoritative." Brief for Respondent 22. Rule 177, however, does not reflect concern for the attorney's special access to client confidences, material gained through discovery, or other proprietary or confidential information. We have upheld restrictions upon the release of information gained "only by virtue of the trial court's discovery processes." *Seattle Times Co. v. Rhinehart*, *supra*, 467 U.S., at 32, 104 S.Ct., at 2207. And *Seattle Times* would prohibit release of discovery information by the attorney as well as the client. Similar rules require an attorney to maintain client confidences. See, e.g., ABA Model Rule of Professional Conduct 1.6 (1981).

This case involves no speech subject to a restriction under the rationale of *Seattle Times*. Much of the information in **\*1053** petitioner's remarks was included by explicit reference or fair inference in earlier press reports. Petitioner could not have learned what he revealed at the press conference through the discovery process or other special access afforded to attorneys, for he spoke to the press on the day of indictment, at the outset of his formal participation in the criminal proceeding. We have before us no complaint from the prosecutors, police, or presiding judge that petitioner misused information to which he had special access. And there is no claim that petitioner revealed client confidences, which may be waived in any event. Rule 177, on its face and as applied here, is neither limited to nor even directed at preventing release of information received through court proceedings or special access afforded attorneys. Cf. *Butterworth v. Smith*, 494 U.S., at 632-634, 110 S.Ct., at 1381-1382. It goes far beyond this.

#### B

Respondent relies upon *obiter dicta* from *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), for the proposition that an attorney's speech about ongoing proceedings must be subject to pervasive regulation in order to ensure the impartial adjudication of criminal proceedings. *In re Sawyer* involved general comments about Smith Act prosecutions rather than the particular proceeding in which the attorney was involved, conduct which we held not sanctionable under the applicable ABA Canon of Professional Ethics, quite apart from any resort to First Amendment principles. *Nebraska Press Assn.* considered a challenge to a court **\*\*2734** order barring the press from reporting matters most prejudicial to the defendant's Sixth Amendment trial right, not information released by defense counsel. In *Sheppard v. Maxwell*, we overturned a conviction after a trial that can only be described as a circus, with the courtroom taken over by the press and jurors turned into media stars. The prejudice to Dr. Sheppard's fair trial right can be traced in principal **\*1054** part to police and prosecutorial irresponsibility and the trial court's failure to control the proceedings and the courthouse environment. Each case suggests restrictions upon information release, but none confronted their permitted scope.

At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. See, e.g., *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *Bates v. State Bar of Arizona*, *supra*. We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.

## V

Even if respondent is correct, and as in *Seattle Times* we must balance “whether the ‘practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression’ and whether ‘the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.’” *Seattle Times*, *supra*, 467 U.S., at 32, 104 S.Ct., at 2207 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974)), the Rule as interpreted by Nevada fails the searching inquiry required by those precedents.

## A

Only 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 \*1055 and base their verdict upon the evidence presented in court. See generally Simon, Does the Court's Decision in *Nebraska Press Association* Fit the Research Evidence on the Impact on Jurors of News Coverage?, 29 Stan.L.Rev. 515 (1977); Drechsel, An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue, 18 Hofstra L.Rev. 1 (1989). *Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial. All of these factors weigh in favor of affording an attorney's speech about ongoing

proceedings our traditional First Amendment protections. Our colleagues' historical survey notwithstanding, respondent has not demonstrated any sufficient state interest in restricting the speech of attorneys to justify a lower standard of First Amendment scrutiny.

Still less justification exists for a lower standard of scrutiny here, as this speech involved not the prosecutor or police, but a criminal defense attorney. Respondent and its *amici* present not a single example where a defense attorney has managed by public statements to prejudice the prosecution of the State's case. Even discounting the obvious reason for a lack of appellate decisions on the topic—the difficulty of appealing a verdict of acquittal—the absence of anecdotal or survey evidence in a much-studied area of the law is remarkable.

\*\*2735 The various bar association and advisory commission reports which resulted in promulgation of ABA Model Rule of Professional Conduct 3.6 (1981), and other regulations of attorney speech, and sources they cite, present no convincing case for restrictions upon the speech of defense attorneys. See Swift, Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity, 64 B.U.L.Rev. 1003, 1031-1049 (1984) (summarizing studies and concluding there is no empirical or anecdotal evidence of a need for restrictions on defense publicity); see also Drechsel, *supra*, at 35 (“[D]ata \*1056 showing the heavy reliance of journalists on law enforcement sources and prosecutors confirms the appropriateness of focusing attention on those sources when attempting to control pre-trial publicity”). The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant, many of which are not within the scope of Rule 177 or any other regulation. By contrast, a defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel for the sole purpose of countering prosecution statements. These factors underscore my conclusion that blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny.

## B

Respondent uses the “officer of the court” label to imply that attorney contact with the press somehow is inimical to the attorney’s proper role. Rule 177 posits no such inconsistency between an attorney’s role and discussions with the press. It permits all comment to the press absent “a substantial likelihood of materially prejudicing an adjudicative proceeding.” Respondent does not articulate the principle that contact with the press cannot be reconciled with the attorney’s role or explain how this might be so.

Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases. “Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion.” *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (CA7 1975). To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the \*1057 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.

One may concede the proposition that an attorney’s speech about pending cases may present dangers that could not arise from statements by a nonparticipant, and that an attorney’s duty to cooperate in the judicial process may prevent him or her from taking actions with an intent to frustrate that process. The role of attorneys in the criminal justice system subjects them to fiduciary obligations to the court and the parties. An attorney’s position may result in some added ability to obstruct the proceedings through well-timed statements to the press, though one can debate the extent of an attorney’s ability to do so without violating other established duties. A court can require an attorney’s cooperation to an extent not possible of nonparticipants. A proper weighing of dangers might consider the harm that occurs when speech about ongoing proceedings forces the court to take burdensome steps such as sequestration, continuance, or change of venue.

\*\*2736 If as a regular matter speech by an attorney about pending cases raised real dangers of this kind, then a substantial governmental interest might support additional regulation of speech. But this case involves the sanction of

speech so innocuous, and an application of Rule 177(3)’s safe harbor provision so begrudging, that it is difficult to determine the force these arguments would carry in a different setting. 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 adjudicative proceedings. At the very least, however, we can say that the Rule which punished petitioner’s statements represents a limitation of First Amendment freedoms greater than is necessary \*1058 or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood.

The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though cost and delays undermine it in all too many cases, the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them deserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases. And in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts. It cannot be said that petitioner’s conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment.<sup>3</sup>

3 Petitioner argues that Rule 177(2) is a categorical speech prohibition which fails First Amendment analysis because of overbreadth. Petitioner interprets this subsection as providing that particular statements are “presumptively prohibited regardless of the circumstances surrounding the speech.” Brief for Petitioner 48. Respondent does not read Rule 177(2)’s list of statements “ordinarily likely” to create material prejudice as establishing an evidentiary presumption, but rather as intended to “assist a lawyer” in compliance. Brief for Respondent 28, n. 27. The opinions of the Disciplinary Board and the Nevada Supreme Court do not address this point, though petitioner’s reading is plausible, and at least one treatise supports petitioner’s reading. See G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 398-399 (1985) (analogous subsection (b) of ABA Model Rule 3.6 creates a presumption of prejudice). Given the lack of any

discussion in the lower court opinion, and the other difficulties we find, we do not address these arguments.

## VI

The judgment of the Supreme Court of Nevada is

*Reversed.*

### \*1059 APPENDIX TO OPINION OF KENNEDY, J.

#### Appendix A

##### *Petitioner's Opening Remarks at the Press Conference of February 5, 1988. App. to Pet. for Cert. 8a-9a.*

"MR. GENTILE: I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of the sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases-at least two cases there-have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.

"When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl.

\*\*2737 "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

"And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office.

"Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two-four of them are known drug dealers and convicted money launderers and drug dealers; three of

whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

\*1060 "Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.

"Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' c[h]ecks were missing.

"Many of the contracts that these people had show on the face of the contract that there is \$100,000 in insurance for the contents of the box.

"If you look at the indictment very closely, you're going to see that these claims fall under \$100,000.

"Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of '87, that being the date that Metro said that there was something missing from their box.

"And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box.

"That's about all that I have to say."

[Questions from the floor followed.]

#### Appendix B

##### *Nevada Supreme Court Rule 177, as in effect prior to January 5, 1991.*

"Trial Publicity

"1. A lawyer 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.

**\*1061** “2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

“(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

“(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

“(c) the performance or results of any examination or test or the refusal or failure **\*\*2738** of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

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

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

“(f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

“3. Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

“(a) the general nature of the claim or defense;

**\*1062** “(b) the information contained in a public record;

“(c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

“(d) the scheduling or result of any step in litigation;

“(e) a request for assistance in obtaining evidence and information necessary thereto;

“(f) 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

“(g) in a criminal case:

“(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 investigating and arresting officers or agencies and the length of the investigation.”

Chief Justice REHNQUIST delivered the opinion of the Court with respect to Parts I and II, and delivered a dissenting opinion with respect to Part III, in which Justice WHITE, Justice SCALIA, and Justice SOUTER join.

Petitioner was disciplined for making statements to the press about a pending case in which he represented a criminal defendant. The state bar, and the Supreme Court of Nevada on review, found that petitioner knew or should have known that there was a substantial likelihood that his statements would materially prejudice the trial of his client. Nonetheless, petitioner contends that the First Amendment to the United States Constitution requires a stricter standard to be met before such speech by an attorney may be disciplined: **\*1063** there must be a finding of “actual prejudice or a substantial and imminent threat to fair trial.” Brief for Petitioner 15. We conclude that the “substantial likelihood of material prejudice” standard applied by Nevada and most other States satisfies the First Amendment.

## I

Petitioner's client was the subject of a highly publicized case, and in response to adverse publicity about his client, Gentile held a press conference on the day after **\*\*2739** Sanders was indicted. At the press conference, petitioner made, among others, the following statements:

“When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' checks, is Detective Steve Scholl.

“There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

.....

“... the so-called other victims, as I sit here today I can tell you that one, two-four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

“Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who \*1064 are going to say now that you can believe them.” App. to Pet. for Cert. 8a-9a.

The following statements were in response to questions from members of the press:

“... because of the stigma that attaches to merely being accused-okay-I know I represent an innocent man.... The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case would be dismissed and it was. Okay?

“I don't take cheap shots like this. I represent an innocent guy. All right?

.....

“[The police] were playing very fast and loose.... We've got some video tapes that if you take a look at them, I'll tell you what, [Detective Scholl] either had a hell of a cold or he should have seen a better doctor.” *Id.*, at 12a, 14a.

Articles appeared in the local newspapers describing the press conference and petitioner's statements. The trial took place

approximately six months later, and although the trial court succeeded in empaneling a jury that had not been affected by the media coverage and Sanders was acquitted on all charges, the state bar disciplined petitioner for his statements.

The Southern Nevada Disciplinary Board found that petitioner knew the detective he accused of perpetrating the crime and abusing drugs would be a witness for the prosecution. It also found that petitioner believed others whom he characterized as money launderers and drug dealers would be called as prosecution witnesses. Petitioner's admitted purpose for calling the press conference was to counter public opinion which he perceived as adverse to his client, to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and to publicly present his client's side of the case. The board found that in light of the \*1065 statements, their timing, and petitioner's purpose, petitioner knew or should have known that there was a substantial likelihood that the statements would materially prejudice the Sanders trial.

The Nevada Supreme Court affirmed the board's decision, finding by clear and convincing evidence that petitioner “knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case.” 106 Nev. 60, 62, 787 P.2d 386, 387 (1990). The court noted that the case was “highly publicized”; that the press conference, held the day after the indictment and the same day as the arraignment, was “timed to have maximum impact”; and that \*\*2740 petitioner's comments “related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses.” *Ibid.* The court concluded that the “absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice.” *Ibid.*

## II

Gentile asserts that the same stringent standard applied in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), to restraints on press publication during the pendency of a criminal trial should be applied to speech by a lawyer whose client is a defendant in a criminal proceeding. In that case, we held that in order to suppress press commentary on evidentiary matters, the State would have to show that “further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty



to render a just verdict exclusively on the evidence presented in open court.” *Id.*, at 569, 96 S.Ct., at 2807. Respondent, on the other hand, relies on statements in cases such as *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), which sharply distinguished between restraints on the press and restraints on lawyers whose clients are parties to the proceeding:

**\*1066** “Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.” *Id.*, at 363, 86 S.Ct., at 1522.

To evaluate these opposing contentions, some reference must be made to the history of the regulation of the practice of law by the courts.

[3] In the United States, the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards. “Membership in the bar is a privilege burdened with conditions,” to use the oft-repeated statement of Cardozo, J., in *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917), quoted in *Theard v. United States*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957).

More than a century ago, the first official code of legal ethics promulgated in this country, the Alabama Code of 1887, warned attorneys to “Avoid Newspaper Discussion of Legal Matters,” and stated that “[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation ... tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice.” H. Drinker, *Legal Ethics* 23, 356 (1953). In 1908, the American Bar Association promulgated its own code, entitled “Canons of Professional Ethics.” Many States thereafter adopted the ABA Canons for their own jurisdictions. Canon 20 stated:

“Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference

to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.”

**\*1067** In the last quarter century, the legal profession has reviewed its ethical limitations on extrajudicial statements by lawyers in the context of this Court’s cases interpreting the First Amendment. ABA Model Rule of Professional Responsibility 3.6 resulted from the recommendations of the Advisory Committee on Fair Trial and Free Press (Advisory Committee), created in 1964 upon the recommendation of the Warren Commission. The Warren Commission’s report on the assassination **\*\*2741** of President Kennedy included the recommendation that

“representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.”

Report of the President’s Commission on the Assassination of President Kennedy (1964), quoted in Ainsworth, “Fair Trial-Free Press,” 45 F.R.D. 417 (1968). The Advisory Committee developed the ABA Standards Relating to Fair Trial and Free Press, comprehensive guidelines relating to disclosure of information concerning criminal proceedings, which were relied upon by the ABA in 1968 in formulating Rule 3.6. The need for, and appropriateness of, such a rule had been identified by this Court two years earlier in *Sheppard v. Maxwell*, *supra*, 384 U.S., at 362-363, 86 S.Ct. at 1522-1523. In 1966, the Judicial Conference of the United States authorized a “Special Subcommittee to Implement *Sheppard v. Maxwell*” to proceed with a study of the necessity of promulgating guidelines or taking other corrective action to shield federal juries from prejudicial publicity. See Report of the Committee on the Operation of the Jury System on the “Free Press-Fair Trial” Issue, 45 F.R.D. 391, 404-407 (1968). Courts, responding to the recommendations in this report, proceeded to enact local rules incorporating these standards, and thus the “reasonable likelihood of prejudicing a fair trial” test was used by a majority of courts, **\*1068** state and federal, in the years following *Sheppard*. Ten years later, the

ABA amended its guidelines, and the “reasonable likelihood” test was changed to a “clear and present danger” test. ABA Standards for Criminal Justice 8-1.1 (as amended 1978) (2d ed. 1980, Supp.1986).

When the Model Rules of Professional Conduct were drafted in the early 1980's, the drafters did not go as far as the revised fair trial-free press standards in giving precedence to the lawyer's right to make extrajudicial statements when fair trial rights are implicated, and instead adopted the “substantial likelihood of material prejudice” test. Currently, 31 States in addition to Nevada have adopted-either verbatim or with insignificant variations-Rule 3.6 of the ABA's Model Rules.<sup>1</sup> Eleven States have adopted Disciplinary Rule 7-107 of the ABA's Code of Professional Responsibility, which is less protective of lawyer speech than Model Rule 3.6, in that it applies a “reasonable likelihood of prejudice” standard.<sup>2</sup> Only one State, Virginia, has explicitly adopted a clear and present danger standard, while four States and the District of Columbia have adopted standards that arguably approximate “clear and present danger.”<sup>3</sup>

<sup>1</sup> Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Wyoming have adopted Model Rule 3.6 verbatim. Delaware, Florida, Louisiana, Montana, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Texas, and Wisconsin have adopted Model Rule 3.6 with minor modifications that are irrelevant to the issues presented in this case. Michigan and Washington have adopted only subsection (a) of Model Rule 3.6, and Minnesota has adopted only subsection (a) and limits its application to “pending criminal jury trial [s].” Utah adopted a version of Model Rule 3.6 employing a “substantial likelihood of materially influencing” test.

<sup>2</sup> Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, Ohio, Tennessee, and Vermont have adopted Disciplinary Rule 7-107 verbatim. North Carolina also uses the “reasonable likelihood of ... prejudic[e]” test. Rule of Professional Conduct 7.7 (1991).

<sup>3</sup> Illinois Rule of Professional Conduct 3.6 (1990) (“serious and imminent threat to the fairness of an adjudicative proceeding”); Maine Bar Rule of Professional Responsibility 3.7(j) (1990) (“substantial danger of interference with the administration of justice”); North Dakota Rule of Professional Conduct

3.6 (1990) (“serious and imminent threat of materially prejudicing an adjudicative proceeding”); Oregon DR 7-107 (1991) (“serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect”); and the District of Columbia DR 7-101 (Supp.1991) (“serious and imminent threat to the impartiality of the judge or jury”).

**\*\*2742 \*1069** Petitioner maintains, however, that the First Amendment to the United States Constitution requires a State, such as Nevada in this case, to demonstrate a “clear and present danger” of “actual prejudice or an imminent threat” before any discipline may be imposed on a lawyer who initiates a press conference such as occurred here.<sup>4</sup> He relies on decisions such as *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), *Pennkamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946), and *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), to support his position. In those cases we held that trial courts might not constitutionally punish, through use of the contempt power, newspapers and others for publishing editorials, cartoons, and other items critical of judges in particular cases. We held that such punishments could be imposed only if there were a clear and present danger of “some serious substantive evil which they are designed to avert.” *Bridges v. California, supra*, 314 U.S., at 270, 62 S.Ct., at 197. Petitioner also relies on **\*1070** *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962), which held that a court might not punish a sheriff for publicly criticizing a judge's charges to a grand jury.

<sup>4</sup> We disagree with Justice KENNEDY's statement that this case “does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a ‘substantial likelihood of materially prejudicing an adjudicative proceeding,’ but is limited to Nevada's interpretation of that standard.” *Ante*, at 2724. Petitioner challenged Rule 177 as being unconstitutional on its face in addition to as applied, contending that the “substantial likelihood of material prejudice” test was unconstitutional, and that lawyer speech should be punished only if it violates the standard for clear and present danger set forth in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). See Brief for Petitioner 27-31. The validity of the rules in the many States applying the “substantial likelihood of material prejudice” test has, therefore, been called into question in this case.

Respondent State Bar of Nevada points out, on the other hand, that none of these cases involved lawyers who represented

parties to a pending proceeding in court. It points to the statement of Holmes, J., in *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 463, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907), that “[w]hen a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied.” Respondent also points to a similar statement in *Bridges, supra*, 314 U.S., at 271, 62 S.Ct., at 197:

“The very word ‘trial’ connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”

These opposing positions illustrate one of the many dilemmas which arise in the course of constitutional adjudication. The above quotes from *Patterson* and *Bridges* epitomize the theory upon which our criminal justice system is founded: The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

At the same time, however, the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system. The way most of them acquire information is from the media. The First Amendment protections of speech and press have been held, in the cases cited above, to require a showing of **\*\*2743** **\*1071** “clear and present danger” that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial. The question we must answer in this case is whether a lawyer who represents a defendant involved with the criminal justice system may insist on the same standard before he is disciplined for public pronouncements about the case, or whether the State instead may penalize that sort of speech upon a lesser showing.

**[4]** **[5]** It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to “free speech” an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. *Sacher v. United States*, 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717 (1952) (criminal trial); *Fisher v. Pace*, 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949) (civil trial). Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. There, the Court had before it an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. The plurality opinion, which found the discipline improper, concluded that the comments had not in fact impugned the judge's integrity. Justice Stewart, who provided the fifth vote for reversal of the sanction, said in his separate opinion that he could not join any possible “intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct.” *Id.*, at 646, 79 S.Ct., at 1388. He said that “[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.” *Id.*, at 646-647, 79 S.Ct., at 1388-1389. The four dissenting Justices who would have sustained the discipline said:

**\*1072** “Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer.

.....

“He 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, 79 S.Ct., at 1398, 1399 (Frankfurter, J., dissenting, joined by Clark, Harlan, and Whittaker, JJ.).

Likewise, in *Sheppard v. Maxwell*, where the defendant's conviction was overturned because extensive prejudicial pretrial publicity had denied the defendant a fair trial, we held that a new trial was a remedy for such publicity, but

“we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*” 384 U.S., at 363, 86 S.Ct., at 1522 (emphasis added).

We expressly contemplated that the speech of *those participating before the courts* could be limited.<sup>5</sup> This distinction \*1073 between \*\*2744 participants in the litigation and strangers to it is brought into sharp relief by our holding in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). There, we unanimously held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery. In that case we said that “[a]lthough litigants do not ‘surrender their First Amendment rights at the courthouse door,’ those rights may be subordinated to other interests that arise in this setting,” *id.*, at 32-33, n. 18, 104 S.Ct., at 2207-2208, n. 18 (citation omitted), and noted that “on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant.” *Ibid.*

<sup>5</sup> The Nevada Supreme Court has consistently read all parts of Rule 177 as applying only to lawyers in pending cases, and not to other lawyers or nonlawyers. We express no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made. We note that of all the cases petitioner cites as supporting the use of the clear and present danger standard, the only one that even arguably

involved a nonthird party was *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962), where a county sheriff was held in contempt for publicly criticizing instructions given by a judge to a grand jury. Although the sheriff was technically an “officer of the court” by virtue of his position, the Court determined that his statements were made in his capacity as a private citizen, with no connection to his official duties. *Id.*, at 393, 82 S.Ct., at 1374. The same cannot be said about petitioner, whose statements were made in the course of, and in furtherance of, his role as defense counsel.

Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). In each of these cases, we engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue. These cases \*1074 recognize the long-established principle stated in *In re Cohen*, 7 N.Y.2d 488, 495, 199 N.Y.S.2d 658, 661, 166 N.E.2d 672, 675 (1960):

“Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was ‘an officer of the court, and, like the court itself, an instrument ... of justice....’” (quoted in *Cohen v. Hurley*, 366 U.S. 117, 126, 81 S.Ct. 954, 959, 6 L.Ed.2d 156 (1961)).

[6] We think that the quoted statements from our opinions in *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), and *Sheppard v. Maxwell*, *supra*, rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and the cases which preceded it. Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in *Nebraska Press*,

which was joined by Justices Stewart and MARSHALL, “[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.” *Id.*, at 601, n. 27, 96 S.Ct., at 2823, n. 27. Because lawyers have special access to information \*\*2745 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. See, e.g., *In re Hinds*, 90 N.J. 604, 627, 449 A.2d 483, 496 (1982) (statements by attorneys of record relating to the case “are likely to be considered knowledgeable, reliable and true” because of attorneys' unique access to information); *In re Rachmiel*, 90 N.J. 646, 656, 449 A.2d 505, 511 (N.J.1982) (attorneys' role as advocates \*1075 gives them “extraordinary power to undermine or destroy the efficacy of the criminal justice system”). 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.

[7] [8] [9] When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. See, e.g., *Seattle Times*, *supra*, 467 U.S. at 32, 104 S.Ct., at 2207. The “substantial likelihood” test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. 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. See, e.g., *Sheppard*, 384 U.S., at 350-351, 86 S.Ct., at 1515-1516; *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424 (1965) (evidence in criminal trial must come solely from witness stand in public courtroom with full evidentiary protections). Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread

media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

\*1076 The restraint on speech is narrowly tailored to achieve those objectives. The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

### III

To assist a lawyer in deciding whether an extrajudicial statement is problematic, Rule 177 sets out statements that are likely to cause material prejudice. Contrary to petitioner's contention, these are not improper evidentiary presumptions. Model Rule 3.6, from which Rule 177 was derived, was specifically designed to avoid the categorical prohibitions of attorney speech contained in ABA Model Code of Professional Responsibility Disciplinary Rule 7-107 (1981). See ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct, Notes and Comments 143-144 (Proposed \*\*2746 Final Draft, May 30, 1981) (Proposed Final Draft). The statements listed as likely to cause material prejudice closely track a similar list outlined by this Court in *Sheppard*:

“The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action.... Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity....

“More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, \*1077 witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any

statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State v. Van Dwyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements." 384 U.S., at 361, 86 S.Ct., at 1521.

Gentile claims that Rule 177 is overbroad, and thus unconstitutional on its face, because it applies to more speech than is necessary to serve the State's goals. The "overbreadth" doctrine applies if an enactment "prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). To be unconstitutional, overbreadth must be "substantial." *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 485, 109 S.Ct. 3028, 3037, 106 L.Ed.2d 388 (1989). Rule 177 is no broader than necessary to protect the State's interests. It applies only to lawyers involved in the pending case at issue, and even those lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding. The fact that Rule 177 applies to bench trials does not make it overbroad, for a substantial likelihood of prejudice is still required before the Rule is violated. That test will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it. For these reasons Rule 177 is constitutional on its face.

Gentile also argues that Rule 177 is void for vagueness because it did not provide adequate notice that his comments were subject to discipline. The void-for-vagueness doctrine is concerned with a defendant's right to fair notice and adequate \*1078 warning that his conduct runs afoul of the law. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 1246-1247, 39 L.Ed.2d 605 (1974); *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972). Rule 177 was drafted with the intent to provide "an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice." Proposed Final Draft 143. The Rule provides sufficient notice of the nature of the prohibited conduct. Under the circumstances of his case, petitioner cannot complain about lack of notice, as he has admitted that his primary objective in holding the press conference was the violation of Rule 177's core prohibition-to prejudice the

upcoming trial by influencing potential jurors. Petitioner was clearly given notice that such conduct was forbidden, and the list of conduct likely to cause prejudice, while only advisory, certainly gave notice that the statements made would violate the Rule if they had the intended effect.

The majority agrees with petitioner that he was the victim of unconstitutional vagueness in the regulations because of the relationship between subsection 3 and subsections \*\*2747 1 and 2 of Rule 177 (see *ante*, at 2724-2725). Subsection 3 allows an attorney to state "the general nature of the claim or defense" notwithstanding the prohibition contained in subsection 1 and the examples contained in subsection 2. It is of course true, as the majority points out, that the word "general" and the word "elaboration" are both terms of degree. But combined as they are in the first sentence of subsection 3, they convey the very definite proposition that the authorized statements must not contain the sort of detailed allegations that petitioner made at his press conference. No sensible person could think that the following were "general" statements of a claim or defense made "without elaboration": "the person that was in the most direct position to have stolen the drugs and the money ... is Detective Steve Scholl"; "there is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being"; "[Detective \*1079 Scholl] either had a hell of a cold, or he should have seen a better doctor"; and "the so-called other victims ... one, two-four of them are known drug dealers and convicted money launderers." Section 3, as an exception to the provisions of subsections 1 and 2, must be read in the light of the prohibitions and examples contained in the first two sections. It was obviously not intended to negate the prohibitions or the examples wholesale, but simply intended to provide a "safe harbor" where there might be doubt as to whether one of the examples covered proposed conduct. These provisions were not vague as to the conduct for which petitioner was disciplined; "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 33, 83 S.Ct. 594, 598, 9 L.Ed.2d 561 (1963).

Petitioner's strongest arguments are that the statements were made well in advance of trial, and that the statements did not in fact taint the jury panel. But the Supreme Court of Nevada pointed out that petitioner's statements were not only highly inflammatory-they portrayed prospective government witnesses as drug users and dealers, and as money launderers-

but the statements were timed to have maximum impact, when public interest in the case was at its height immediately after Sanders was indicted. Reviewing independently the entire record, see *Pennekamp v. Florida*, 328 U.S., at 335, 66 S.Ct., at 1031, we are convinced that petitioner's statements were "substantially likely to cause material prejudice" to the proceedings. While there is evidence pro and con on that point, we find it persuasive that, by his own admission, petitioner called the press conference for the express purpose of influencing the venire. It is difficult to believe that he went to such trouble, and took such a risk, if there was no substantial likelihood that he would succeed.

While in a case such as this we must review the record for ourselves, when the highest court of a State has reached a determination "we give most respectful attention to its reasoning \*1080 and conclusion." *Ibid.* The State Bar of Nevada, which made its own factual findings, and the Supreme Court of Nevada, which upheld those findings, were in a far better position than we are to appreciate the likely effect of petitioner's statements on potential members of a jury panel in a highly publicized case such as this. The board and the Nevada Supreme Court did not apply the list of statements likely to cause material prejudice as presumptions, but specifically found that petitioner had intended to prejudice the trial,<sup>6</sup> and that based upon the nature of the statements and their \*\*2748 timing, they were in fact substantially likely to cause material prejudice. We cannot, upon our review of the record, conclude that they were mistaken. See *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-396, 68 S.Ct. 525, 541-542, 92 L.Ed. 746 (1948).

<sup>6</sup> Justice KENNEDY appears to contend that there can be no material prejudice when the lawyer's publicity is in response to publicity favorable to the other side. *Ante*, at 2727-2729. Justice KENNEDY would find that publicity designed to counter prejudicial publicity cannot be itself prejudicial, despite its likelihood of influencing potential jurors, unless it actually would go so far as to cause jurors to be affirmatively biased in favor of the lawyer's client. In the first place, such a test would be difficult, if not impossible, to apply. But more fundamentally, it misconceives the constitutional test for an impartial juror—whether the " 'juror can lay aside his impression or opinion and render a verdict on the evidence presented in court.' " *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961)). A juror who may have been initially swayed from open-mindedness by publicity favorable to the

prosecution is not rendered fit for service by being bombarded by publicity favorable to the defendant. The basic premise of our legal system is that law suits should be tried in court, not in the media. See, e.g., *Bridges v. California*, 314 U.S. 252, 271, 62 S.Ct. 190, 197, 86 L.Ed.2d 192 (1941); *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907). A defendant may be protected from publicity by, or in favor of, the police and prosecution through *voir dire*, change of venue, jury instructions and, in extreme cases, reversal on due process grounds. The remedy for prosecutorial abuses that violate the rule lies not in self-help in the form of similarly prejudicial comments by defense counsel, but in disciplining the prosecutor.

\*1081 Several *amici* argue that the First Amendment requires the State to show actual prejudice to a judicial proceeding before an attorney may be disciplined for extrajudicial statements, and since the board and the Nevada Supreme Court found no actual prejudice, petitioner should not have been disciplined. But this is simply another way of stating that the stringent standard of *Nebraska Press* should be applied to the speech of a lawyer in a pending case, and for the reasons heretofore given we decline to adopt it. An added objection to the stricter standard when applied to lawyer participants is that if it were adopted, even comments more flagrant than those made by petitioner could not serve as the basis for disciplinary action if, for wholly independent reasons, they had no effect on the proceedings. An attorney who made prejudicial comments would be insulated from discipline if the government, for reasons unrelated to the comments, decided to dismiss the charges, or if a plea bargain were reached. An equally culpable attorney whose client's case went to trial would be subject to discipline. The United States Constitution does not mandate such a fortuitous difference.

When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that "I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court ...." Rule 73, Nevada Supreme Court Rules (1991). The First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.

I would affirm the decision of the Supreme Court of Nevada.

Justice O'CONNOR, concurring.

[3] [4] [5] [6] [7] [8] [9] I agree with much of THE CHIEF JUSTICE's opinion. In particular, I agree that a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. Lawyers are officers of the court \*1082 and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. See *In re Sawyer*, 360 U.S. 622, 646-647, 79 S.Ct. 1376, 1388-1389, 3 L.Ed.2d 1473 (1959) (Stewart, J., concurring in result). This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies. I agree with THE CHIEF JUSTICE that the "substantial likelihood of material prejudice" standard articulated in Rule 177 passes constitutional muster. Accordingly, I join Parts I and II of THE CHIEF JUSTICE's opinion.

\*\*2749 [1] [2] For the reasons set out in Part III of Justice KENNEDY's opinion, however, I believe that Nevada's Rule is void for vagueness. Section (3) of Rule 177 is a "safe harbor" provision. It states that "notwithstanding" the prohibitory language located elsewhere in the Rule, "a lawyer involved in the investigation or litigation may state without elaboration ... [t]he general nature of the claim or defense." Gentile made a conscious effort to stay within the boundaries

of this "safe harbor." In his brief press conference, Gentile gave only a rough sketch of the defense that he intended to present at trial-*i.e.*, that Detective Scholl, not Grady Sanders, stole the cocaine and traveler's checks. When asked to provide more details, he declined, stating explicitly that the ethical rules compelled him to do so. *Ante*, at 2731. Nevertheless, the disciplinary board sanctioned Gentile because, in its view, his remarks went beyond the scope of what was permitted by the Rule. Both Gentile and the disciplinary board have valid arguments on their side, but this serves to support the view that the Rule provides insufficient guidance. As Justice KENNEDY correctly points out, a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42, 111 S.Ct. 1032, 1056, 113 L.Ed.2d 1 (1991) (O'CONNOR, J., dissenting). I join Parts III and VI of Justice KENNEDY's opinion reversing the judgment of the Nevada Supreme Court on that basis.

#### All Citations

501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888, 59 USLW 4858



## B. Tennessee Rule of Professional Conduct for Prosecutors

West's Tennessee Code Annotated  
State and Local Rules Selected from West's Tennessee Rules of Court  
Rules of the Supreme Court of the State of Tennessee  
Rule 8. Rules of Professional Conduct (Refs & Annos)  
Chapter 3. Advocate

Sup.Ct.Rules, Rule 8, RPC 3.8

Rule 3.8. Special Responsibilities of a Prosecutor

Currentness

The prosecutor in a criminal case:

- (a) shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) shall not advise an unrepresented accused to waive important pretrial rights;
- (d) shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent employees of the prosecutor's office from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule; and discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

(g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose that evidence to an appropriate authority, or

(2) if the conviction was obtained in the prosecutor's jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in the prosecutor's jurisdiction of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

#### **Credits**

[Adopted September 29, 2010, effective January 1, 2011.]

#### **Editors' Notes**

##### **COMMENT**

[1] *A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost. See State v. Superior Oil, Inc., 875 S.W.2d 658, 661 (Tenn. 1994). For example, prosecutors are expected "to be impartial in the sense that charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals. Yet, at the same time, they are expected to prosecute criminal offenses with zeal and vigor within the bounds of the law and professional conduct." State v. Culbreath, 30 S.W.3d 309, 314 (Tenn. 2000). A knowing disregard of obligations or a systematic abuse of prosecutorial discretion could constitute a violation of RPC 8.4.*

[2] *In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not advise an unrepresented accused to waive the right to a preliminary hearing or other important pretrial rights. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.*

[3] *The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.*

[4] *Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.*

[5] *Paragraph (f) supplements RPC 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with RPC 3.6(b)*

or 3.6(c). Paragraph (f) is only intended to apply prior to the conclusion of a proceeding. A proceeding has concluded when a final judgment in the proceeding has been affirmed on appeal or the time for appeal has passed.

[6] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted outside the prosecutor's jurisdiction of a crime that the person did not commit, paragraph (g) requires prompt disclosure to an appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or to make reasonable efforts to cause another appropriate authority to undertake the necessary investigation.

[7] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that a defendant was convicted in the prosecutor's jurisdiction of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

#### **DEFINITIONAL CROSS-REFERENCES**

“Known” and “knows” See RPC 1.0(f)

“Material” See RPC 1.0(o)

“Reasonable” See RPC 1.0(h)

“Reasonably believes” See RPC 1.0(i)

“Substantial” See RPC 1.0(l)

“Tribunal” See RPC 1.0(m)

Sup. Ct. Rules, Rule 8, RPC 3.8, TN R S CT Rule 8, RPC 3.8

The state court rules are current with amendments received through July 15, 2015.

764 S.W.2d 757

Supreme Court of Tennessee,  
at Nashville.

In re John ZIMMERMANN, An Attorney  
Licensed and Admitted to the Practice of  
Law in Tennessee, Respondent/Appellant,

v.

BOARD OF PROFESSIONAL  
RESPONSIBILITY, Appellant.

Jan. 23, 1989.

On appeal from decision of hearing committee imposing disciplinary action against attorney, the Chancery Court, Davidson County, Aaron Brown, Chancellor, affirmed. Attorney and Board of Professional Responsibility appealed. The Supreme Court, O'Brien, J., held that: (1) prosecutor's action in making extrajudicial statements to press concerning matters not introduced into evidence at preliminary hearing and further extrajudicial statements concerning torture suffered by murder victim prior to sentencing phase of separate case, in violation of Code of Professional Responsibility, warrants private reprimand, and (2) strictures against trial publicity imposed by Disciplinary Rules are not violative of an attorney's freedom of expression rights.

Affirmed.

Drowota, III, J., concurred and dissented and filed opinion.

#### Attorneys and Law Firms

\*758 William M. Leech, Jr., Corabel Alexander, Waller, Lansden, Dortch and Davis, Nashville, for respondent/appellant.

National Dist. Attys. Ass'n, Tennessee Attys. Gen. Conference amici curiae, for respondent/appellant.

Joseph L. Mercer, II, Harold Levinson, pro hac vice Vanderbilt University, Nashville, for appellant.

Tennessee Ass'n of Criminal Defense Lawyers, Nashville, amicus curiae, for appellant.

#### OPINION

O'BRIEN, Justice.

There are appeals by each of the parties in this action which derives from a Board of Professional Responsibility petition for discipline against John Zimmermann who is a duly licensed and practicing attorney in the State of Tennessee. At the time these proceedings were initiated the respondent was a member of the staff of the District Attorney General for Davidson County. A complaint was received from the Metropolitan Public Defender charging that respondent had violated Disciplinary Rule 7-107(B). The petition for discipline requested the Board to appoint a hearing panel to hear testimony, receive evidence and make findings of facts and order disciplinary action as deemed appropriate. The specific charges filed against Zimmermann alleged that he had violated DR 7-107, (B) and (E), relating to trial publicity, by talking to the press about pending proceedings. The first instance involved a defendant charged with murder. Immediately after a preliminary hearing he purportedly engaged in an informal conversation with members of the news media which was reported in the local newspapers on the following day. In the second complaint he allegedly had a second discussion with the press after two defendants charged in a six (6) count indictment had been convicted of the charges, but prior to their sentencing hearing.

The first statement admittedly made by respondent to the media occurred outside of the courtroom immediately after a preliminary hearing at which the defendant was arraigned. Respondent commented to the assembled reporters that "the medical examiner said [the victim] was strangled, stabbed in the chest multiple times and had his throat slashed all the way across. The photographs of the body were pretty bad. We are considering asking for the death penalty. The defendant said he stabbed the victim multiple times in the chest before slashing his throat, almost from ear to ear." In the second case in a similar conversation with the press he was reported to have commented on the extreme torture suffered by the victim at the hands of the defendants. He said, "the verdicts reflected the mind of the jury for the community that such crimes against the elderly would not be tolerated and that he would ask the sentencing judge to impose maximum sentences on both defendants."

The Hearing Committee heard testimony of witnesses, statements of respondent and arguments of counsel. They reviewed the exhibits, the record of the proceedings and briefs of counsel, then reported their conclusions and findings. They were of the \*759 opinion that, in the first case,

respondent, John Zimmermann, had violated DR 7–107(B) and should receive a private reprimand for his extrajudicial comments made to representatives of the media concerning the examination and report of the medical examiner and photographs of the body, neither of which had been introduced at the preliminary hearing. They found that the defendant's confession had been introduced at the hearing, therefore it was a public record and respondent's comments in reference to it were permissible.

With respect to the other complaint they found that respondent's extrajudicial comments after the trial did not violate DR 7–107(E) because it was not reasonably likely his remarks would affect the imposition of sentence in that case.

They held that in applying the Rules of Professional Responsibility, there also must be a rule of reason applicable to their interpretation. There was no intent on the part of the respondent to interfere with a fair trial in the first case or influence the sentence to be imposed by the trial judge in the second. It was their conclusion he was following the policy of the office of the District Attorney General by being accessible to the news media. When respondent became aware that his extrajudicial comments in the first case had become the subject of a complaint to the Board of Professional Responsibility he made no further statements to the press until after the end of the trial. In the second case he intentionally did not comment to the media until after the trial was over although the sentencing phase had not been held. It was their conclusion that it was his intent to conduct himself properly.

They further held that as a public prosecutor, respondent had certain rights and responsibilities concerning the dissemination of public information. However, the Disciplinary Rules adopted by the Tennessee Supreme Court place specific restrictions on all attorneys relative to the dissemination of information concerning pending criminal trials, which must be governed by the delicate balance between the right to a fair trial on one hand and the right of free expression on the other.

Each of the parties appealed the decision of the Hearing Committee to the Chancery Court. Disciplinary counsel on behalf of the Board of Professional Responsibility complained that the private reprimand of respondent was insufficient and inappropriate based upon the facts and the alleged violations on the first complaint. As to the second they were of the opinion that the Hearing Committee erred

in finding that respondent did not violate the Code of Professional Responsibility.

The petition of respondent complained that the Hearing Committee erred in finding him in violation of DR 7–107(B) in reference to Complaint No. 1. As an affirmative defense he submitted that the Hearing Committee's interpretation of DR 7–107 violated his First Amendment rights in that the record failed to show that the comments made by him posed a clear and present danger; a serious and imminent threat; or a reasonable likelihood of interfering with a fair trial of the defendant in that case.

At the conclusion of the hearing in Chancery Court the trial judge entered written findings of fact with his conclusions that the respondent technically violated Disciplinary Rule 7–107(B) and (E) in the first complaint and also technically violated DR 7–107(E) involving the second complaint. He further found that respondent's insistence was untenable that he was protected by the First Amendment to the Constitution in making the statements attributed to him. That those statements, as printed, were violations of the Sixth and Fourteenth Amendment rights of the first defendant. In reference to the second case he concluded there was a technical violation of DR 7–107(E) but that the trial judge in that case was not aware of respondent's remarks and was not influenced by them in the sentencing proceedings.

The court was of the opinion that respondent did not act maliciously or with intent to interfere with a fair trial in reference to the first complaint, or to influence the trial judge in imposing sentence in reference to \*760 the second. He concluded that the evidence did not preponderate against the Hearing Committee's judgment in the matter and confirmed the findings of that forum in their entirety as to the discipline imposed.

Each of the parties have, in turn, appealed to this Court. Counsel for the Board of Professional Responsibility frames the issue around the appropriate sanctions to be imposed upon an Assistant District Attorney General who knowingly and intentionally violates the Code of Professional Responsibility, specifically Disciplinary Rule 7–107(B), by making improper statements to the news media after preliminary hearing and before trial of a sensational murder case.

Respondent, in his brief, inquires whether his extrajudicial statements to the press relating the medical examiner's

findings violate the Disciplinary Rules. Whether the statements found by the Hearing Committee as a violation of the Disciplinary Rules warrant *punitive* action. (Emphasis ours). Whether DR 7–107, as it is applied in the present case, violates his freedom of expression rights secured by the United States and Tennessee Constitutions.

We point out that under Rule 9, § 1.3 of this Court, the review of the judgment of the Hearing Committee in the trial court is on the transcript of the evidence before that committee, its findings and judgment and upon such other proof as either party may desire to introduce. The trial judge is to weigh the evidence and determine the facts by the preponderance of the proof. The review in this Court is *de novo* upon the transcript of the record from the Circuit or Chancery Court, which shall include the transcript of evidence before the hearing committee. We must presume, however, that the trial court was correct unless the preponderance of the evidence is contrary to his finding. *Gillock v. Bd. of Prof. Resp. of the Supreme Court*, 656 S.W.2d 365, 367 (Tenn.1983).

Disciplinary counsel acting for the Board of Professional Responsibility, ably assisted by counsel pro hac vice, insists that the severity or leniency of the sanction imposed, which is the basis for their appeal, is not an issue of fact. Therefore, this Court is not bound by the decision of the Chancery Court on that issue. It is urged that the judgment of that court should be modified to order a suspension from the practice of law against respondent. It is their position that the private reprimand directed by the hearing panel and the Chancery Court is too lenient and does not give sufficient warning to respondent and other attorneys of the serious nature of the misconduct and aggravating circumstances surrounding the charges made against Mr. Zimmermann.

[1] The record before us contains a concurring finding of fact with the exception that the hearing committee found respondent had violated DR 7–107(B) while the chancellor concluded there was a technical violation of both Sections B and E. Notwithstanding the judgments below, upon determining the existence of aggravating or mitigating circumstances, this Court may modify the judgment of the trial court. *Disciplinary Board v. Banks*, 641 S.W.2d 501, 504 (Tenn.1982). However, we are reluctant to substitute our judgment for that of two separate triers of fact who have reviewed the proof and heard the evidence in personam. See *Disciplinary Counsel v. Fitzgerald*, 607 S.W.2d 232, 234 (Tenn.1980). We adopt the statement made by the Hearing Committee in their judgment. “In applying the Rules of

Professional Responsibility, there also must be a rule of reason applicable to their interpretation.” The record clearly supports the findings of the trial judge that respondent was in technical violation of Disciplinary Rule 7–107(B) and (E) but that his conduct in discussing trial matters with the news media was neither malicious nor with the intent to interfere with the right to a fair trial of any of the defendants. The discipline imposed was adequate and appropriate. We are of the opinion his comments were not very well considered and, in order to avoid the possibility of violating an accused's constitutional rights, that it would be prudent for the District Attorney to review his “open policy with the media” in \*761 relation to the nature of the comments his staff is encouraged to communicate.

[2] Respondent has raised three issues for review, the first two of which we find it necessary to mention only in passing. We have previously discussed the Hearing Committee's conclusions that respondent's extrajudicial comments to representatives of the media concerning the examination and report of the medical examiner and photographs of the victim's body violated DR 7–107(B). The simple answer to his second complaint is that the purpose of sanctions under the Disciplinary Rules is to *discipline* and not to *punish*. The third inquiry, requires further amplification and consideration, that is whether DR 7–107, as applied in the present case, violates the freedom of expression rights secured by the United States and Tennessee Constitutions. We are of the opinion that it does not.

[3] There are two specific, though divergent, reasons why the strictures against trial publicity imposed by the Disciplinary Rules are not violative of an attorney's freedom of expression rights. In the case of *In Re Rachmiel*, 90 N.J. 646, 449 A.2d 505 (1982), under strikingly similar circumstances, the New Jersey Supreme Court held that the application of a disciplinary rule which proscribed attorneys involved in criminal cases from making statements that relate to “any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case” ... did not constitute a violation of the Right to Free Speech under the First Amendment. In that case a former prosecutor, after he had returned to private practice, made comments concerning a criminal case which he had previously handled. A complaint was filed by the county prosecutor with the District Ethics Committee. The committee issued a formal complaint against *Rachmiel* and held hearings. A presentment was filed charging him, inter alia, with violation of DR 7–

107(B) and (E).<sup>1</sup> The New Jersey Court, citing appropriate authorities, held:

<sup>1</sup> The New Jersey rule is identical to Tennessee Supreme Court Rule 9.

“In determining the validity of restrictions upon free speech, the constitutional analysis calls for the application of two demanding tests. The first is whether a substantial governmental interest is furthered by the restriction upon speech. (Citation omitted). The second requires that the restriction be no greater than is necessary or essential to protect the governmental interest involved. The application of these tests involves a balancing of the gravity and likelihood of the harm that would result from unfettered speech against the degree to which free speech would be inhibited if the restriction is applied. (Citations omitted)... [T]he restriction upon free speech imposed by the Disciplinary Rule addresses a substantial governmental interest. That interest relates to the fairness and integrity of the administration of justice and becomes particularly compelling in the administration of the criminal justice system. (Citations omitted)... The rule in question furthers a substantial governmental interest in that it attempts to restrict speech that would be prejudicial or deleterious to the administration of criminal justice.

The ethical rule at issue in this case imposes restraints upon a limited class of persons—attorneys for the prosecution or defense in a pending criminal matter. These persons have a unique role and responsibility in the administration of criminal justice and, therefore, have an extraordinary power to undermine or destroy the efficacy of the criminal justice system. (Citations omitted)... [S]uch attorneys are appropriately subject to carefully tailored restraints upon their free speech.”

The court ruled that the prohibition applied only to that speech which is “reasonably likely” to interfere with or affect a fair trial. We adopt the reasoning of the New Jersey court on this issue.

There is a further reason why in this State there is no unreasonable restraint placed on the freedom of speech rights of an attorney admitted to practice law in \*762 accordance with the rules governing such matters.

The preamble to the Code of Professional Responsibility states in pertinent part:

“Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standard of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the everchanging relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.”

Because it is occasionally necessary to remind ourselves of the rigorous standards each of us must maintain as a member of the legal profession, Sections 3.1 and 3.2 of Rule 9 of the Rules of this Court also bear repetition:

**3.1.** The license to practice law in this State is a continuing proclamation by the Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law.

**3.2.** Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office, the Code of Professional Responsibility of the State of Tennessee, or T.C.A. § 23–



3–201, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

In *Petition for Tennessee Bar Association*, 539 S.W.2d 805 (Tenn.1976), at p. 809 Justice Harbison has traced the disciplinary rules promulgated by this Court from their origin. Rule 40 of the Court, providing for the appointment of members of the bar to investigate grievances or complaints against lawyers charged with misconduct was published at 192 Tenn. 827 and subsequently readopted as Rule 42. By order dated July 19, 1965, this Court, *acting upon a Petition of the Tennessee Bar Association*, set up commissioners for the purpose of investigating complaints of unethical conduct and professional misconduct on the part of attorneys. To implement enforcement of the standards of professional ethics and responsibility, the order of July 19, 1965 directly involved the Board of Governors of the Tennessee Bar Association and local bar associations, in the manner set out in detail in that rule. The use of investigative committee reports under Rule 42 has received express sanction by the General Assembly, now encoded in T.C.A. § 23–3–202. In 1974 Rule 42 was revised at the behest of the Tennessee Bar Association. Instead of relying upon the voluntary efforts of the Bar Association, local bar associations and individual lawyers, the Court chose a method by which the financing of grievance investigations and enforcement of professional standards would be shifted to the entire membership of the State's legal profession and upon all persons holding a license to practice law in this State, with the exceptions set out in the Rule. New rules of the Court were adopted in 1981 and Rule 42 was replaced by current Rule 9.

Although this Court exercises the role of prescribing and seeking to enforce and uphold the standards of professional responsibility in this State, *Petition of Tennessee Bar Assoc.*, supra, p. 810, the Court has extended to any member of the profession the right to file a petition, at any reasonable time, to ask the Court to reconsider or modify its actions.

The Hearing Committee as well as the trial judge in this case have indicated a need for more precise guidelines for interpreting the applicability of DR 7–107 to extrajudicial statements in criminal cases. The Hearing Committee in its findings made note of the three tests adopted severally by courts in various jurisdictions to be used in such cases, that is, whether comments of counsel posed:

- (1) “[A] serious and imminent threat;”
- (2) “a clear and present

danger;” or (3) “a reasonable likelihood,” ... of interfering with the fair trial of a defendant.

We are of the opinion that the above differences are more semantical than real. We have no difficulty in finding adequate guidelines within the framework of the rule itself. Throughout the text constant reference is made to the statements a “reasonable person” might make, “reasonably likely” to interfere with a fair trial. The rule is explicit. There is no reason to complicate it by the addition of abstruse court inculcated definitions.

We have been greatly benefited in reaching the conclusions announced here by the briefs of amici curiae, National District Attorneys Association, the Tennessee District Attorneys General Conference and the Tennessee Association of Criminal Defense Lawyers. We express our appreciation for their assistance.

Respondent's challenge to the constitutionality of Disciplinary Rule 7–107 is found to be without merit. The judgment of the Chancery Court for Davidson County finding respondent to be in technical violation of Disciplinary Rule 7–107(B) and (E) and sustaining the hearing committee's verdict is affirmed by this Court. The costs of these proceedings will be paid equally by the Board of Professional Responsibility and respondent.

HARBISON, C.J., and FONES and COOPER, JJ., concur.

DROWOTA, J., concurring in part, dissenting in part.

DROWOTA, Justice, concurring and dissenting.

I concur in part and dissent in part. I agree with the majority opinion that DR 7–107 does not violate the freedom of expression rights secured by the United States and Tennessee Constitutions as applied in the present case. I disagree with the majority's finding that Respondent, John Zimmerman, was in technical violation of DR 7–107 and that “the discipline imposed [private reprimand] was adequate and appropriate.” I further disagree with the majority when it states: “We are of the opinion his [Zimmerman's] comments were not very well considered and, in order to avoid the possibility of violating an accused's constitutional rights, that it would be prudent for the District Attorney to review his

'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate."

DR 7-107 is entitled "Trial Publicity." Section (A) deals with extrajudicial statements made during the investigation of a criminal matter, Section (B) deals with extrajudicial statements made prior to trial, Section (D) deals with extrajudicial statements made during trial and Section (E) deals with extrajudicial statements made after trial and prior to the imposition of sentence. In this case we deal only with Sections (B) and (E).<sup>1</sup> Put in its simplest \*764 form, the technical violation of DR 7-107(B), as found by the majority in this case, is that a lawyer associated with the prosecution of a criminal matter, prior to commencement of trial, has made an extrajudicial statement that relates to: (4) the results of examinations or the refusal or failure of the accused to submit to examinations or tests, and (6) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

- <sup>1</sup>
- (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement, that a reasonable person would expect to be disseminated by means of public communication, and that relates to:
    - (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
    - (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
    - (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
    - (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
    - (5) The identity, testimony, or credibility of a prospective witness.
    - (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.
  - (E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

The Board of Professional Responsibility filed charges against John Zimmerman, an Assistant District Attorney General in Davidson County, alleging that he made improper extrajudicial statements to the news media about two pending criminal cases, which I shall refer to as the Sheffield case and the Emmitt and Haynes case. The Sheffield case involved the murder of a quadriplegic veteran in a Nashville cemetery by Sheffield. At his preliminary hearing Sheffield's confession was introduced, where he admitted stabbing the victim, Campbell. After the preliminary hearing, Zimmerman was questioned by reporters from the *Nashville Banner* and WSM radio. TV reporters and cameramen were also present. The following article appeared in the *Nashville Banner* about the Sheffield case:

"The medical examiner said (Campbell) was strangled, stabbed in the chest multiple times and had his throat slashed all the way across," Assistant District Attorney General John Zimmerman said.

"The photographs of the body were pretty bad. We're considering asking for the death penalty," Zimmerman said today.

Once at the cemetery, Sheffield allegedly stabbed the victim "multiple times in the chest and slashed his throat," Zimmerman said after Wednesday's preliminary hearing in General Sessions Court.

The following article also appeared in *The TENNESSEAN*:

Assistant Attorney General John Zimmerman said outside the courtroom that Sheffield, 19, told police he attempted to strangle Campbell, 52, but the older man "wouldn't die."

Then, according to Zimmerman, Sheffield said he stabbed Campbell "multiple times in the chest" before slashing his throat, almost from ear to ear.

With reference to the Sheffield case, the Hearing Committee found that Sheffield's confession (which was truly prejudicial) had been introduced at the preliminary hearing, therefore it was of public record and Zimmerman's comments concerning the confession were permissible. See DR 7-107(B)(3). The Committee, however, found Zimmerman's comments to the media concerning the examination and report of the medical examiner and photographs of the body were in violation of DR 7-107(B)(4).

I am of the opinion that Zimmerman's statements regarding the medical examiner's findings did not violate DR 7-107(B)

(4). It should be pointed out that in the Sheffield case the cause of death was not a contested issue, nor was the medical examiner's description of the injuries disputed, and the medical report had no bearing on the guilt or innocence of Sheffield. The \*765 autopsy report is a public record, T.C.A. § 38–7–110(c), and therefore, an attorney may state the medical examiner's findings. DR 7–107(B)(4) deals with “results of any examinations or tests or the refusal or failure of the *accused* to submit to examinations or tests” [emphasis added]. Section (B)(4) is meant to prevent comments about tests or refusal to submit to tests by the accused, not a victim. For example, the failure of a defendant to pass or to take a polygraph test cannot be commented upon, but here we have an examination of a victim, not the defendant. With reference to Zimmerman's statement that “the photographs of the body were pretty bad,” the photographs were never displayed or offered to the media by Zimmerman, and they were, therefore, not disseminated to the public. The majority opinion fails to cite what specific rule prohibits such a statement by Zimmerman and how it threatened the Defendant's fair trial.

Emmitt and Haynes were convicted in separate jury trials of assault with intent to commit first degree murder, aggravated kidnapping, aggravated rape, armed robbery, and first degree burglary. The victim was an 82–year–old senior citizen volunteer worker. Before the sentencing hearing, the following statements were attributed to Zimmerman in a local newspaper:

“I think these verdicts speak the mind of the jury for the community, in that crimes like this against the elderly are not going to be tolerated.”

“... will ask Judge Sterling Gray in a sentencing hearing ... to impose the maximum sentences on both Emmitt and Haynes and to order those terms consecutive.”

“This woman suffered torture at the hands of these two men for about three hours.... As far as I am concerned, there is nothing worse they could have done short of killing her.”

With reference to the Emmitt and Haynes case, the Hearing Committee determined there was no violation of DR 7–107(E) because it was not reasonably likely that Zimmerman's remarks had any effect on the imposition of the sentence in the case. Judge Gray testified at the disciplinary hearing that he was unaware of any extrajudicial statements made by

Zimmerman and was not influenced by anything said or done by Zimmerman outside the courtroom.

Zimmerman's statements to the press were not a staged press conference, he did not initiate the discussion, he responded only to questions propounded to him by the news media representatives outside the courtroom. The policy of the District Attorney's office was to speak openly and courteously with all members of the press consistent with the code of professional responsibility. This John Zimmerman did and he should not now be reprimanded for his actions.

The majority opinion points out that “[t]he hearing committee as well as the trial judge in this case has indicated a need for more precise guidelines for interpreting the applicability of DR 7–107 to extrajudicial statements in criminal cases.” The hearing committee noted three tests or standards adopted by courts in other jurisdictions which lend guidance in applying DR 7–107. The three tests are, whether extrajudicial statements of counsel posed: (1) a serious and imminent threat to the fair trial of a defendant, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir.1975), *cert. den.*, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976);<sup>2</sup> (2) a clear and present danger to the fair trial of the defendant, *Markfield v. New York*, 49 App.Div.2d 516, 370 N.Y.S.2d 82 (1975); or (3) a reasonable likelihood of interfering with the fair trial of a defendant, *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir.1979). The parties and Amici have asked this Court to give them and the Bar of this State some guidance for interpreting DR 7–107's applicability to extrajudicial statements. \*766 The majority opinion responds to the request by stating: “We have no difficulty in finding adequate guidelines within the context of the rule itself.” This response by the majority that “[t]he rule is explicit”, begs the question. To merely say that “[t]hroughout the text constant reference is made to the statements a ‘reasonable person’ might make, ‘reasonably likely’ to interfere with a fair trial,” is not an adequate response to the guidance sought by the bench and bar. The citation to a “reasonable person” found in DR 7–107, Sections (A), (B), (D), (E), (G) and (H), has nothing to do with the extrajudicial statement of counsel but refers to what “a reasonable person would expect to be disseminated by means of public communication.” In this case there was an obvious expectation that Zimmerman's statements would be disseminated by means of public communication, since the media approached Zimmerman after the preliminary hearing and sought statements from him. The “reasonable person” reference in Section (B) has nothing to do with giving guidance to the bar concerning extrajudicial statements made

prior to trial. The reference to “reasonably likely” in the majority opinion is not found in Section (B), therefore it is difficult to see how the rule can be said to be explicit.

2     *See, Ruggieri v. Johns–Manville Products Corp.*, 503 F.Supp. 1036 (R.I.1980); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 476–477 (5th Cir.1980) *en banc*; *Shadid v. Jackson*, 521 F.Supp. 85 (E.D.Tex.1981); *In re: Lasswell*, 296 Or. 121, 673 P.2d 855 (1983); *Kemner v. Monsanto Company*, 112 Ill.2d 223, 97 Ill.Dec. 454, 464, 492 N.E.2d 1327, 1337 (1986).

The bench and bar have asked for guidance in interpreting DR 7–107's applicability to extrajudicial statements. I am of the opinion that we should adopt a standard which balances the rights of the accused to a fair trial with the right of a free press and the public's right to information and knowledge.

The majority opinion states “that it would be prudent for the District Attorney to review his ‘open policy with the media’ in relation to the nature of the comments his staff is encouraged to communicate.” This reasoning by the majority is why I feel guidelines for DR 7–107(B) should be established by this

Court. The majority opinion does what respondent seeks to avoid—a stifling of the public's right to know by creating a chilling effect on prosecutors with the suggestion to “review his ‘open policy with the media’ ”. There is a delicate balance between a prosecutor's right to speak and the right of the public and the press to have access to information, and the rights of the individual accused of a crime and a defendant's right to a fair trial. I am of the opinion that Zimmerman's statements should be reviewed by the test of “whether his comments posed a clear and present danger to the fair trial of the defendant.” Under such a test, it is clear that Zimmerman's statements to the media did not pose a clear and present danger to the defendant's fair trial and he did not violate DR 7–107. I would reverse the decision of the Chancery Court recommending a private reprimand. I would dismiss the complaint filed by the Board of Professional Responsibility for I find no violation of DR 7–107.

#### All Citations

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## C. Special Additional Rules in Federal Court.

## LOCAL FEDERAL RULES

### LR83.03 RELEASE OF INFORMATION CONCERNING CIVIL PROCEEDINGS

(a) By Attorneys Concerning Civil Proceedings.

(1) An attorney or law firm associated with a civil action shall not during its investigation or litigation make or participate in making any extrajudicial statement, other than a quotation from or reference to public records that a reasonable person would expect to be disseminated by means of public communication if there is a serious and immediate threat that such dissemination will interfere with a fair trial.

(2) Comment relating to the following matters is presumed to constitute a serious and immediate threat to a fair trial, and the burden shall be upon one charged with commenting upon such matters to show that his comment did not pose such a threat:

- a. Evidence regarding the occurrence or transaction involved;
- b. The character, credibility, or criminal record of a party, witness, or prospective witness; or
- c. The performance or results of any examinations or tests or the refusal or failure of a party to submit to an examination or test.

(b) Provision for Special Orders in Widely Publicized and Sensational Cases. In widely publicized cases the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of a party to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters that the Court may deem appropriate for inclusion in such an order.

### LCrR2.01 - RELEASE OF INFORMATION CONCERNING CRIMINAL PROCEEDINGS

(a) By Attorneys Concerning Criminal Proceedings. No attorney or law firm shall release or authorize the release of information or a personal or professional opinion that a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which said attorney or law firm is associated, if there is a serious and immediate threat that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice. Any statement specifically prohibited by subsections (1), (2), or (3) of this section shall

be presumed to constitute a serious and immediate threat to the fair administration of justice. An attorney charged with making such a statement may exonerate himself by showing that his statement did not pose such a threat.

(1) With respect to a grand jury or other pending investigation of any criminal matter, an attorney for the government participating in or associated with the investigation shall refrain from making any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication, except such information as is contained in the public records or such statement as is necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(2) From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information or indictment in any criminal matter, until the commencement of trial or disposition without trial, an attorney or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

- a. The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the attorney or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, an attorney associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;
- b. The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;
- c. The performance of any examination or tests or the accused's refusal or failure to submit to an examination or test;
- d. The identity, testimony, or credibility of prospective witnesses, except that the attorney or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;
- e. The possibility of a plea of guilty to the offense charged or to a lesser offense; or
- f. Any opinion as to the accused's guilt or innocence, or as to the evidence in the case.

The foregoing shall not be construed to preclude the attorney or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission, or statement, that is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge including a brief description of the offense charged; from quoting or referring without comment to public records of the Court in the case; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(3) During the trial of any criminal matter, including the period of selection of the jury, no attorney or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or to the parties or issues in the trial, that a reasonable person would expect to be disseminated by means of public communication, except that the attorney or law firm may quote from or refer without comment to public records of the Court in the case.

(4) Nothing in this Rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings, or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any attorney from replying to charges of misconduct that are publicly made against him.

(b) By Courthouse Personnel. All courthouse personnel, including the Marshal, Deputy Marshals, Court Security Officers, the Court Clerk, Deputy Court Clerks, Probation Officers, Court Reporters, Law Clerks, and Secretaries, among others, are prohibited from disclosing to any person, without authorization by the Court, information relating to a pending criminal proceeding that is not part of the public record of the Court. This Rule specifically forbids the divulging of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.




## D. Obligation to be Truthful and Respect Rights of Third Persons.

West's Tennessee Code Annotated  
State and Local Rules Selected from West's Tennessee Rules of Court  
Rules of the Supreme Court of the State of Tennessee  
Rule 8. Rules of Professional Conduct (Refs & Annos)  
Chapter 4. Transactions with Persons Other than Clients

Sup.Ct.Rules, Rule 8, RPC 4.1

Rule 4.1. Truthfulness in Statements to Others

Currentness



(a) In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

(b) If, in the course of representing a client in a nonadjudicative matter, a lawyer knows that the client intends to perpetrate a crime or fraud, the lawyer shall promptly advise the client to refrain from doing so and shall discuss with the client the consequences of the client's conduct. If after such discussion, the lawyer knows that the client still intends to engage in the wrongful conduct, the lawyer shall:

(1) withdraw from the representation of the client in the matter; and

(2) give notice of the withdrawal to any person who the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct. The lawyer shall also give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and which the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

(c) If a lawyer who is representing or has represented a client in a nonadjudicative matter comes to know, prior to the conclusion of the matter, that the client has, during the course of the lawyer's representation of the client, perpetrated a crime or fraud, the lawyer shall promptly advise the client to rectify the crime or fraud and discuss with the client the consequences of the client's failure to do so. If the client refuses or is unable to rectify the crime or fraud, the lawyer shall:

(1) if currently representing the client in the matter, withdraw from the representation and give notice of the withdrawal to any person whom the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct; and

(2) give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

**Credits**

[Adopted September 29, 2010, effective January 1, 2011.]

## Editors' Notes

### COMMENT

#### **Misrepresentation**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts or law. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see RPC 8.4.

#### **Statements of Fact**

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, as is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

#### **Crime or Fraud by Client**

[3] Paragraphs (b) and (c) provide guidance for lawyers who discover that a client intends to or is engaging in criminal or fraudulent conduct, and in some cases may even have used the lawyer's services to assist them commit the crime or fraud. To avoid assisting the client with the crime or fraud, the lawyer must advise the client to refrain from or to rectify the consequences of the criminal or fraudulent act. If the client refuses or is unable to do so, the lawyer must withdraw from the representation of the client in the matter. Additionally, this Rule mandates limited disclosures--notice of withdrawal or disaffirmance of written work product--in circumstances in which such disclosure is necessary for the lawyer to prevent the client from using the lawyer's services in furtherance of the crime or fraud. To this limited extent, then, this Rule overrides the lawyer's duties in RPCs 1.6, 1.8(b), and 1.9(c) prohibiting disclosure or use to the disadvantage of the client of information relating to the representation. Other than the disclosure mandated by this Rule, however, the lawyer must not reveal information relating to the representation unless permitted to do so by RPC 1.6.

[4] If a lawyer learns that a client intends to commit a crime or fraud under circumstances in which the lawyer will not assist the offense by remaining silent, paragraph (b) requires remonstrance with the client against the crime or fraud and requires withdrawal if the client does not desist from the course of conduct in question. Although the lawyer is not required to reveal the client's intended or ongoing fraud, the lawyer is required to communicate the fact that he or she has withdrawn from the representation of the client to any person who the lawyer reasonably believes knows of the lawyer's involvement in the matter and whose financial or property interests are likely to be damaged by the client's intended or ongoing misconduct. This communication is necessary to fully distance the lawyer from the client's misconduct. If the client's intended conduct is a crime, full disclosure of the crime is permitted by RPC 1.6(b), but such disclosure is not required by paragraph (b) of this Rule.

[5] In some cases, a lawyer will learn about a client's crime or fraud after he or she has innocently prepared and submitted statements, opinions, or other materials to third parties who will be adversely affected if the client persists with his or her misconduct. If the lawyer was misled by the client, some of these statements, opinions or materials may be false or misleading. Even though accurate, they may be necessary for the accomplishment of the client's crime or fraud. This presents the lawyer with a dilemma. Without the consent of the client, the lawyer may not correct the statements, opinions, or materials. That would violate the prohibition against revealing information related to the representation of the client. Yet to do nothing would allow

*the client to use the lawyer's work in the client's ongoing effort to consummate the fraud. To resolve this dilemma, paragraphs (b) and (c) do not require disclosure of the crime or fraud but only require that the lawyer effectively disengage from the crime or fraud by giving notice to affected persons of the lawyer's disaffirmance of the lawyer's work product that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud. See RPC 1.6(b)(1) and (2) for the circumstances in which the lawyer is permitted to reveal information for the purposes of preventing the client's crime or fraud, and RPC 1.6(b)(3) for the circumstances in which a lawyer may reveal a client's crime or fraud for the purpose of preventing, rectifying or mitigating its consequences. See RPC 1.6(c)(1) for the circumstances in which the lawyer is required to reveal information for the purpose of preventing reasonably certain death or substantial bodily harm.*

*[6] This Rule does not apply if the lawyer learns of the client's crime or fraud after the lawyer's representation in the matter is concluded. In such circumstances, the lawyer must comply with RPCs 1.6, 1.8(b), and 1.9(c) and may not make any disclosures concerning the client's crime or fraud, unless permitted or required to do so by those Rules. See, e.g., RPC 1.6(b)(3) (permitting disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services); RPC 1.6(b)(4) (permitting disclosures to secure legal advice about compliance with these Rules); RPC 1.6(b)(5) (permitting disclosures to establish a defense to an allegation of misconduct); and RPC 1.6(c)(1) (requiring disclosure to prevent reasonably certain death or substantial bodily harm.*

**DEFINITIONAL CROSS-REFERENCES**

*“Fraud” and “fraudulent” See RPC 1.0(d)*

*“Knowingly” and “knows” See RPC 1.0(f)*

*“Material” See RPC 1.0(o)*

*“Reasonably believes” See RPC 1.0(i)*

Sup. Ct. Rules, Rule 8, RPC 4.1, TN R S CT Rule 8, RPC 4.1


The state court rules are current with amendments received through July 15, 2015.

West's Tennessee Code Annotated  
State and Local Rules Selected from West's Tennessee Rules of Court  
Rules of the Supreme Court of the State of Tennessee  
Rule 8. Rules of Professional Conduct (Refs & Annos)  
Chapter 4. Transactions with Persons Other than Clients


Sup.Ct.Rules, Rule 8, RPC 4.4

Rule 4.4. Respect for the Rights of Third Persons

Currentness



(a) In representing a client, a lawyer shall not:



(1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; or

(2) threaten to present a criminal or lawyer disciplinary charge for the purpose of obtaining an advantage in a civil matter.

(b) A lawyer who receives information relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 (including information protected by the attorney-client privilege or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such information to the lawyer, shall:

(1) immediately terminate review or use of the information;

(2) notify the person, or the person's lawyer if communication with the person is prohibited by RPC 4.2, of the inadvertent or unauthorized disclosure; and

(3) abide by that person's or lawyer's instructions with respect to disposition of written information or refrain from using the written information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

**Credits**

[Adopted September 29, 2010, effective January 1, 2011.]

**Editors' Notes**



**COMMENT**

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. For example, a lawyer may not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this

*Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded. It would be a violation of RPC 4.1 or RPC 8.4(c), however, if the lawyer stated falsely or affirmatively misled another to believe that a conversation or an activity was not being recorded. By itself, however, secret taping does not violate either RPC 8.4(c) (prohibition against dishonest or deceitful conduct) or RPC 8.4(d) (prohibition against conduct prejudicial to the administration of justice.)*

*[2] The duties imposed by paragraph (b) on lawyers who know or who reasonably should know that they have received information protected by RPC 1.6 that was disclosed to them inadvertently or by a person not authorized to disclose the information to them reflect the importance of client-lawyer confidentiality in the jurisprudence of this state and the judgment that lawyers in their dealings with other lawyers and their clients should take the steps that are required by this Rule in the interest of protecting client-lawyer confidentiality even if it would be to the advantage of their clients to do otherwise.*

*[3] This Rule, however, does not prohibit the receiving lawyer from seeking a definitive court ruling as to the proper disposition of such information, including a ruling regarding whether the disclosure effects a waiver of the attorney-client privilege or work-product rule. In making any disclosure to a court to obtain a ruling regarding disposition of the information, any disclosure of the information should be made in a manner that limits access to the information to the tribunal, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.*

**DEFINITIONAL CROSS-REFERENCES**

“Knows” and “knowingly” See RPC 1.0(f)

“Reasonably should know” See RPC 1.0(j)

“Substantial” See RPC 1.0(l)

“Written” See RPC 1.0(n)

Sup. Ct. Rules, Rule 8, RPC 4.4, TN R S CT Rule 8, RPC 4.4

The state court rules are current with amendments received through July 15, 2015.

## E. Media Public Records Access and Protecting Discovery.

2014 WL 4923162

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

The TENNESSEAN, et al.

v.

METROPOLITAN GOVERNMENT OF  
NASHVILLE and Davidson County, et al.

No. M2014-00524-COA-R3-CV. | June  
09, 2014 Session. | Sept. 30, 2014.  
| Application for Permission to Appeal  
Granted by Supreme Court Jan. 15, 2015.

Appeal from the Chancery Court for Davidson County, No. 14156IV; Russell T. Perkins, Chancellor.

#### Attorneys and Law Firms

Robb S. Harvey and Lauran M. Sturm, Nashville, Tennessee, for the appellants, The Tennessean, Associated Press, Chattanooga Times Free Press, Knoxville News Sentinel, Tennessean Coalition for Open Government, Inc., Tennessee Associated Press Broadcasters, WZTV Fox 17, WBIR-TV Channel Ten, WTVF-TV Channel Five, The Commercial Appeal, and WSMV-TV Channel Four.

Saul Solomon, Director of Law; James L. Charles, Associate Director, Lora Barkenbus Fox, Emily Herring Lamb, R. Alex Dickerson, Jennifer Cavanaugh, Assistant Metropolitan Attorneys, Nashville, Tennessee, for the appellee, The Department of Law of the Metropolitan Government of Nashville and Davidson County.

Edward Yarbrough and J. Alex Little, Nashville, Tennessee, for the intervenor, Jane Doe.

Robert E. Cooper, Jr., Attorney General and Reporter; Joseph F. Whalen, Acting Solicitor General; Janet M. Kleinfelter, Deputy Attorney General, for the intervenors-appellees, District Attorney General, Victor S. Johnson, III, and the State of Tennessee.

Douglas R. Pierce, Nashville, Tennessee, for the Amicus Curiae, Tennessee Association of Broadcasters.

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., joined. W. NEAL McBRAYER, J., filed a dissenting opinion.

#### OPINION

RICHARD H. DINKINS, J.

\*1 Various media outlets made request under the Tennessee Public Records Act for access to records accumulated and maintained by the Metropolitan Nashville Police Department in the course of its investigation and prosecution of an alleged rape in a campus dormitory. When the request was refused, the outlets a filed petition in Chancery Court in accordance with Tennessee Code Annotated § 10-7-505; the State of Tennessee, District Attorney General and alleged victim were permitted to intervene. The court held the required show cause hearing and, following an *in camera* inspection, granted petitioners access to four categories of records and documents. Petitioners, as well as the Metropolitan Government and Intervenor appeal, raising numerous and various statutory and constitutional issues. We have determined that the records sought are currently exempt from disclosure due to the continuing police investigation and pending prosecution; accordingly, we reverse the judgment of the Chancery Court and dismiss the petition.

#### I. FACTUAL & PROCEDURAL HISTORY

On August 9, 2013, four former members of the Vanderbilt University football team were indicted on five counts of aggravated rape and two counts of aggravated sexual battery of a student at an on-campus dormitory. On October 13, a reporter for the *Tennessean* newspaper made a request of the Metropolitan Police Department under the Tennessee Public Records Act (“TPRA”), Tenn.Code Ann. § 10-7-503 *et seq.*, for “any records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus and in which Vandenburg, Banks, Batey and McKenzie are charged” and “any records regarding the case recently concluded against Boyd by his plea bargain.”<sup>1</sup> The request was denied and, after unsuccessfully seeking recourse through the Metropolitan Director of Law and Mayor, on February 4, 2014, the *Tennessean* and various other media outlets (“Petitioners”) filed a Complaint and Petition for Access to Public Records in Davidson County Chancery Court naming the Metropolitan Government of Nashville and Davidson County as Respondent; the State and



District Attorneys General were permitted to intervene, as was the victim (Ms. Doe).<sup>2</sup>

1 Another student had previously entered a conditional guilty plea to a charge of trying to cover up the alleged rape.

2 The State Attorney General and District Attorney General, Victor Johnson, III, moved to intervene in order to protect the interest of the State in the ongoing criminal prosecution; in addition, as more fully discussed herein, the court in which the prosecution was pending had issued a protective order prohibiting disclosure of certain material produced by the State to the defendants.

The court held a show cause hearing in accordance with the TPRA and conducted an *in camera* inspection of the records in question<sup>3</sup>; in a Memorandum and Final Order entered March 12, the court ordered that Petitioners be granted access to (1) text messages and emails the police department received from third parties in the course of its investigation; (2) Vanderbilt access card information; (3) reports and emails provided to the Metropolitan police department by Vanderbilt; (4) pano scan data of the Vanderbilt premises.

3 The court categorized the records as follows:

1. All of the building surveillance tapes in the investigative file from three locations on the Vanderbilt University campus, including the Vanderbilt University dormitory where the alleged assault occurred—all with the image of Ms. Doe redacted;
2. All of the videos and photographs in the investigative file, except that Plaintiffs are not seeking photos or videotapes of the alleged assault or any photos or videotapes of Ms. Doe;
3. All of the text messages and e-mails that the Metropolitan Police Department received from third parties in the course of its investigation;
4. Written statements of the defendants and witnesses provided to the Metropolitan Police Department by Vanderbilt University;
5. Vanderbilt access card information;
6. Reports and e-mails provided to the Metropolitan Police Department by Vanderbilt University;
7. Metropolitan Police Department forensic tests performed on telephones and computers;
8. T.B.I. DNA reports;
9. Forensic reports prepared by private laboratories hired by the Metropolitan Police Department; and
10. The following items made or collected by the Metropolitan Police Department:

- a) police reports and supplements;
- b) search warrants;
- c) crime scene photographs;
- d) Pano-scan data relating to Vanderbilt University premises;
- e) background checks and other personal information regarding Ms. Doe, defendants, and witnesses;
- f) cell phone information obtained through several search warrants;
- g) photographic images and text messages recovered from the cell phones of five individuals who were charged with criminal offenses, except any photographs or video depicting Ms. Doe or the alleged sexual assault;
- h) statements of Ms. Doe, defendants and witnesses; and
- i) video recovered from a student witness's computer, except any photographs or videotapes depicting Ms. Doe or the alleged sexual assault.

The parties each raise issues on appeal.

## II. DISCUSSION

The TPRA provides that:

All state, county and municipal records<sup>4</sup> shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

4 The TPRA defines “public records” to include: “All documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” Tenn.Code Ann. § 10–7–503(a)(1)(A).

\*2 Tenn.Code Ann. § 10–7–503(a)(2)(A). The parties have raised a plethora of issues relative to the interpretation and application of this statute, specifically the “unless otherwise provided by state law” provision. We have determined that a common thread in these issues, which we must first

address, is the extent to which the records sought are exempt from disclosure given the present posture of the criminal proceeding. This is a question of law which we review *de novo*, with no presumption of correctness of the trial court's decision. See *Memphis Publishing Co. v. Cherokee Children and Family Svcs., Inc.*, 87 S.W.3d 67, 74 (Tenn.2002).

The Metropolitan Government as well as the State and District Attorneys General assert that the records are exempt pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure, which governs discovery and inspection of information in a criminal proceeding. Section (a)(1) of the rule sets forth specific information which must be disclosed by the State; of pertinence to the issues we address, section (a)(2) provides as follows:

Except as otherwise provided in paragraphs (A), (B), (E), and (G) of subsection (a)(1) [ 5 ], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

5 These exceptions are not at issue in this appeal.

Tenn. R.Crim. P. 16(a)(2). Our review of cases which have considered the interaction between Tenn. R.Crim. P. 16 and the TPRA leads us to conclude that, in light of the pending investigation and prosecution arising out of the events for which the records were compiled, access under the TPRA is not required at this time.

The question of whether records maintained by a state correctional facility in the course of its investigation into the murder of an inmate were available for inspection under the TPRA was before the court in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn.1987). In that case, attorneys representing the defendants who had been indicted for the inmate's murder subpoenaed records of the facility's investigation from the appropriate prison official; the request was refused and counsel filed a petition seeking judicial review pursuant to the TPRA. *Id.* at 166. The trial court held that the records

were exempt from inspection pursuant to Tenn. R.Crim. P. 16; the Court of Appeals reversed, holding that Rule 16 only applied to the rights and duties of the parties to the criminal prosecution and not the rights of access of citizens to public records as provided by the TPRA. *Id.* On further appeal, our Supreme Court reversed the Court of Appeals' decision, holding:

Rule 16 provides for the disclosure and inspection of categories of evidence in the possession of the state or in the possession of the defendant. However, the disclosure and inspection granted by the rule “does not authorize the discovery and inspection of reports, memoranda, or other internal state documents made by ... state agents or law enforcement officers in connection with the investigation or prosecution of the case, ...” Rule 16(a)(2) of the Rules of Criminal Procedure. This exception to disclosure and inspection does not apply to investigative files in possession of state agents or law enforcement officers, where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action.

\*3 *Appman*, 746 S.W.2d at 166. The Supreme Court then noted that the materials sought were the result of the investigation into a murder for which several individuals were indicted for the murder and another was indicted as an accessory after the fact. *Id.* at 166–67. The court also stated that the materials were relevant to the prosecution of the persons charged with the offenses arising out of the murder and that the prosecutions had not been terminated. *Id.* at 167. Applying the Rule 16(a)(2) exception to the disclosure and inspection of categories of evidence where the files are open and relevant to pending or contemplated criminal action, which was the case in *Appman*, the court held that the materials were not subject to inspection under the Public Records Act. *Id.*

In *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn.2007), members of the media filed a petition under the TPRA seeking access to, *inter alia*, cards memorializing field interviews conducted by City of Jackson police officers. The request had been denied on the basis of an asserted common law law enforcement privilege; the Supreme Court held that such privilege had not been adopted in Tennessee and, therefore, was not a “state law” exception to the TPRA. *Id.* at 338, 342. The court also considered whether the cards were exempt from disclosure under Tenn. R.Crim. P. 16. *Id.* at 344. The court noted that the cards “would clearly have been exempt

from disclosure under Rule 16(a)(2) and this Court's decision in *Appman* ” and remanded the case to allow the City to submit to the court for *in camera* review the cards or portions of cards which the City maintained were involved in a pending criminal investigation.<sup>6</sup> *Id.* at 345–46.<sup>7</sup>

<sup>6</sup> The court ordered that the petitioners be granted immediate access to those cards which were not submitted to the court for review.

<sup>7</sup> The holding of *Appman* and *Schneider* that Tenn. R. Crim P. 16(a)(2) is included in the “otherwise provided by state law” language of Tenn.Code Ann. § 10–7–503(a)(2)(A), thereby exempting records relating to ongoing criminal investigations or prosecutions from the access requirement, has been applied in other cases as well. See e.g., *Capital Case Resource Center of Tennessee, Inc. v. Woodall*, No. 01–A019104CH00150, 1992 WL 12217 (Tenn.Ct.App. Jan.29, 1992); *Freeman v. Jeffcoat*, No. 01–A019103CV00086, 1991 WL 165802 (Tenn.Ct.App. May 18, 1992); *Swift v. Campbell*, 159 S.W.3d 565 (Tenn.Ct.App.2004); *Waller v. Bryan*, 16 S.W.3d 770 (Tenn.Ct.App.1990).

In response to the show cause order, Metro submitted, *inter alia*, the affidavit of Steve Anderson, Chief of Police, which stated in pertinent part:

6. MNPDP officers have been investigating and gathering information relating to crimes that allegedly occurred on the Vanderbilt University campus around June 23, 2013, and the following days thereafter, for the purposes of prosecuting the perpetrators of the crimes.

7. The MNPDP investigation into the matter is still an active, ongoing and open matter. The investigation is not complete. Investigators are still working to gather and analyze evidence in the case.

8. Much of the information that the MNPDP has gathered in this investigation has been through subpoenas and search warrants—from defendants, potential witnesses, Vanderbilt University, Vanderbilt Police, Vanderbilt University Medical Center, and cell phone providers.

9. The grand jury has indicted four individuals in this case, on five counts of aggravated rape and aggravated sexual battery. One of the individuals is also charged with tampering with evidence and one count of unlawful photography (T.C.A. § 39–13–605). The trial for two of the individuals is scheduled for August 11, 2014.

\*4 12. The MNPDP's investigative file is the product of the education and investigative experience utilized by law enforcement officers to gather relevant documents and items related to this crime. MNPDP considers the creation of this kind of file to be an internal report created in preparation for the prosecution of a case by the District Attorney's office. MNPDP routinely consults with the District Attorney's office during the course of an investigation about its course and the evidence gathered to date.

In like fashion the State submitted the affidavit of District Attorney General Johnson, stating in pertinent part:

2. In late June 2013, the Metropolitan Nashville Police Department (MNPDP) began investigating and gathering information relating to crimes that allegedly occurred on the Vanderbilt University campus for the purpose of prosecuting the perpetrators of the alleged crimes. Shortly thereafter, MNPDP contacted my office for advice and assistance with their investigation.

3. In August, 2013, MNPDP presented this case to the Grand Jury and the Grand Jury returned an indictment against four individuals charging each with five counts of aggravated rape and two counts of aggravated sexual battery. Additionally, one of the four individuals was charged with one count of unlawful photography and one count of tampering with evidence.

4. An arraignment was subsequently held at which time all four individuals pled not guilty. Currently, trial is set for two of the defendants in August; a trial date has not been set for the other two defendants.

5. Before this case was presented to the Grand Jury, MNPDP's investigative file was reviewed by attorneys in my office. Once the indictment was issued by the Grand Jury against the four individuals, that investigative file became part of the prosecutorial file that was assigned to Deputy District Attorney Tom Thurman, who is handling this case for my office.

6. MNPDP's investigation into this case is still active and ongoing and any additional information that MNPDP collects or gathers during their investigation is provided to Deputy District Attorney Thurman and becomes part of his prosecutorial file.

It is apparent from the affidavits that the material that is the subject of the request is “relevant to a pending or contemplated criminal action” and therefore not subject to disclosure. *See Appman*, 746 S.W.2d at 166. Accordingly, the petition should be dismissed.

The fact that the police investigation and criminal prosecution are ongoing is a significant factor in our disposition of this case; this preempts our consideration of the other issues raised.

#### IV. CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed and the petition dismissed.

W. NEAL McBRAYER, J., dissenting.

\*4 The Court's decision in this case excepts materials that are “relevant to a pending or contemplated criminal action” from disclosure under the Public Records Act based upon Tennessee Rule of Criminal Procedure 16(a)(2). I find such a conclusion inconsistent with a fair reading of Rule 16(a)(2) and, therefore, respectfully dissent. However, because the trial court should have considered the victim's rights, the criminal defendants' Sixth Amendment rights under the United States Constitution, and the State's interests in a fair trial before determining what materials were subject to public inspection, I would vacate the trial court's ruling and remand for further proceedings.

\*5 The Public Records Act has been described as an “all encompassing legislative attempt to cover all printed material created or received by government in its official capacity.” *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn.1991) (quoting *Bd. of Educ. of Memphis City Sch. v. Memphis Publ'g Co.*, 585 S.W.2d 629, 630 (Tenn.Ct.App.1979)). The Act provides that “[a]ll state, county, and municipal records shall, at all times during business hours ... be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.” Tenn.Code Ann. § 10-7-503(a)(2)(A) (Supp.2014). The Legislature has further directed that the Act “be broadly construed so as to give the fullest possible public access to public records.” Tenn.Code Ann. § 10-7-505(d) (Supp.2014). Our Supreme Court has interpreted these provisions to create a legislatively-mandated presumption favoring openness and disclosure of government records. *Schneider v. City of*

*Jackson*, 226 S.W.3d 332, 340 (Tenn.2007) (citing *State v. Cawood*, 134 S.W.3d 159, 165 (Tenn.2004); *Tennessean v. Elec. Power Bd.*, 979 S.W.2d 297, 305 (Tenn.1998); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn.Ct.App.1999)). Absent an applicable exception, this mandate requires disclosure of public records “even in the face of serious countervailing considerations.” *Id.* (quoting *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn.1994)).

The Tennessee Supreme Court has utilized the Tennessee Rules of Criminal Procedure, and Rule 16(a)(2) in particular, as a basis for excepting materials from disclosure under the Public Records Act. *Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn.1987).<sup>1</sup> In *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn.2007), the Supreme Court extended the Rule 16(a)(2) exception to public records requests made by citizens other than criminal defendants or their counsel. 226 S.W.3d at 341. The majority reads *Schneider* as also extending the Rule 16(a)(2) exception to materials that are “relevant to a pending or contemplated criminal action.” In my view, such an extension of the Rule 16(a)(2) exception is not warranted by *Schneider*.

<sup>1</sup> In *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn.1986), the Supreme Court declined to apply Tennessee Rule of Criminal Procedure 16(a)(2) as an exception to the Public Records Act where the records in question were part of a closed investigative file. 710 S.W.2d at 517. The Supreme Court also noted that Rule 16(a)(2)'s “limitation on access to records applies only to discovery in criminal cases.” *Id.* At the time *Holt* was decided, public records were open to inspection “unless otherwise provided by state statute.” *Id.* at 515. In 1991, the Legislature replaced the phrase “state statute” with “state law.” 1991 Tenn. Pub. Acts 598.

Although in *Schneider* the Court granted the City of Jackson an opportunity to review the field interview cards or portions of the cards to determine whether any of the information was “involved in an ongoing criminal investigation,” the Court only directed such a review after finding that the “cards would clearly have been exempt from disclosure under Rule 16(a)(2)” and *Appman v. Worthington*, 746 S.W.2d 165 (Tenn.1987). *Id.* at 345–36. Field interview cards seemingly would fall within the ambit of Rule 16(a)(2) either as a “report, memorandum, or other internal state document made by ... law enforcement officers” or as including “statements made by state witnesses or prospective state witnesses.” *See* Tenn. R.Crim. P. 16(a)(2). Witnesses described the field

interview cards as the police officers' "work product." 226 S.W.3d at 337. As the court of appeals has previously explained, Tennessee Rule of Criminal Procedure 16(a)(2) "embodies the work product doctrine as it applies to criminal cases ." *Swift v. Campbell*, 159 S.W.3d 565, 572 (Tenn.Ct.App.2004).

\*6 In this case, the Metropolitan Government of Nashville and Davidson County ("Metro") conceded in both its brief<sup>2</sup> and at oral argument that the materials sought by the Petitioners had been provided to the criminal defendants, placing the materials outside the scope of materials described in Rule 16(a)(2). Certainly, the materials making up Metro's records regarding the alleged rape on the Vanderbilt campus, as described by the trial court, would not all fall within the description of documents found in Rule 16(a)(2). As a result, I conclude, as did the trial court, that the materials sought by Petitioners were not completely excepted from disclosure under the Public Records Act by virtue of Rule 16(a)(2).

2 In its brief, Metro states "[t]he Petitioners request access to the same information that is provided to a criminal defendant in a prosecution." Metro then states that "The criminal defendant is entitled to this information pursuant to Tennessee Rule of Criminal Procedure 16 and under the supervision of the Criminal Court."

Although Tennessee Rule of Criminal Procedure 16(a)(2) does not except from disclosure all of the public records requested by the Petitioners, this determination does not end the inquiry. As the court of appeals has previously noted, by excepting from disclosure public records made confidential "by state law," statutes, the Constitution of Tennessee, the common law, and administrative rules and regulations all became potential sources of exceptions to the Public Records Act. *Swift*, 159 S.W.3d at 571–72. Exceptions may be either explicit or implicit. *See id.* at 572 (the court's role in interpreting and applying the Public Records Act "is to determine whether state law either explicitly or implicitly excepts particular records or a class of records from disclosure..."). The trial court here identified three potential exceptions in addition to Rule 16(a)(2): the agreed protective order entered by the criminal court, the constitutional rights of

the accused in a criminal case, and the Victims' Bill of Rights. However, having identified three potential exceptions, the trial court addressed only one, the agreed protective order. The trial court properly concluded that materials covered by the agreed protective order were excepted from disclosure under the Public Records Act. *See Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn.1996). As for the other two potential exceptions, the trial court deferred to the criminal court.

Having been presented with the question of whether the public records were excepted from disclosure under state law, the trial court should have addressed all potential exceptions brought to its attention by Metro and the victim.<sup>3</sup> Deferring such determinations to the criminal court for consideration at a later date presents the unacceptable potential for public release of materials adversely impacting the victim's rights under Article 1, § 35 of the Tennessee Constitution and Tennessee Code Annotated sections 40–38–101 through 506, the criminal defendants' rights to a fair trial under the Sixth Amendment to the United States Constitution, and Metro's general fair trial interests. I would find that these rights and interests constitute "state law" exceptions to the Public Records Act.

3 I reject the notion, argued by the Petitioners, that only criminal defendants could raise Sixth Amendment rights to a "fair trial" as an exception to the Public Records Act in an action authorized by Tennessee Code Annotated section 10–7–505. Metro's general fair trial interests are sufficient to assert exceptions to public disclosure based on rights that typically belong only to criminal defendants.

\*7 While these exceptions might well lead to the same result reached by the majority in this case, the place for application of these exceptions in the first instance is the trial court. Therefore, I would vacate the trial court's ruling and remand for further proceedings.

All Citations

Slip Copy, 2014 WL 4923162

**IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE  
AT NASHVILLE  
DIVISION IV**

STATE OF TENNESSEE

§

§

vs.

§

Docket No: 2015-C-1800

§

SAM JONES

§

§

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**NOTICE OF REQUEST FOR DEFENSE DISCOVERY**

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This document is the Defendant’s request for discovery to the District Attorney for the listed, numbered items. Rule 16, Tennessee Rules of Criminal Procedure provides that discovery is by “defense request” rather than a motion. *It is the intention of this request that all supporting documents which are the subject of discovery should not be filed with the clerk of court. Instead, all discovery content should be provided directly to the undersigned defense counsel. The District Attorney may file a response with the clerk listing what is provided but supporting documents such as police reports, statements and other documentary evidence should be provided only to defense counsel.*

*The reason that the discovery content should not be filed with the clerk is so that it does not become a matter of public record. There may be information in the discovery which relates to information or documents or evidence which is not admissible but may find itself in the public domain by public disclosure to the clerk. Consequently, this request contemplates that discovery content will be disclosed only to the defense attorney and that no discovery be filed with the clerk except for a response listing what will be provided. All defense reciprocal discovery content will be provided to the State but not filed with the clerk.*

For the purposes of this request, the "State of Tennessee" includes the District Attorney General, the municipal police department, the county sheriff, the Tennessee Highway Patrol, the Tennessee Bureau of Investigation, any agents or employees of those offices, any other law enforcement officer, and any other person acting in conjunction with, or on behalf of, any law enforcement agency. The defendant defines the requests to include items currently within the actual or constructive possession, custody, control or knowledge of the State of Tennessee, and items which may become known, identified or available through the exercise of due diligence by the State of Tennessee. *See generally*, Tennessee Rules of Criminal Procedure (hereinafter cited as "Rule") 16; *State v. Brown*, 552 S.W.2d 383 (Tenn. 1977); ABA Standards, Discovery ¶¶2.4, 2.1(d) and 2.2(a).

1. To receive a list of names and current addresses of all witnesses who the State intends to call to testify, whether or not they are listed upon the indictment. Tenn. Code Ann. §40-13-107; Tenn. Code Ann. §40-17-106; *McBee v. State*, 213 Tenn. 15, 372 S.W.2d 173, (1963); ABA Standards, Discovery §2.1(a)(I).

2. To be provided with the criminal records of the all State's witnesses either before or at the latest after direct examination of said witnesses.

3. To be provided with any police reports and witness statements to the extent that they contain the defendant's prior record, statement, or statements of co-defendants, if any, or the results of any tests or examinations. *State v. Robinson*, 618 S.W.2d 754 (Tenn. Cr. App. 1981).

4. To be provided with the statements and reports of any witness after the witness testifies. Said production to be made outside the presence of the jury. Rule 26.2.

5. To be advised of the exact date, time and place of the offense alleged in each count of the indictment. Rule 7(c). Given the similarity of the charges it is most important to have some specifics as to what acts are alleged.

6. To inspect and copy any written or recorded statement, confession or admission against interest made by the defendant. Rule 16(a)(1)(A); ABA Standards, Discovery §2.1(a)(ii).

7. To be advised of the substance of any oral statement, confession or admission against interest made by the defendant, whether before or after arrest, in response to any person known to the defendant to be a law enforcement officer. Rule 16(1)(1)(A); ABA Standards, Discovery §2.1(a)(iii).

8. Upon a determination by the State to place co-defendants, if any, on trial jointly with this defendant, to inspect and copy any oral, written or recorded statements, including testimony before a Grand Jury relating to the offense charged, made by any alleged co-defendant, aider, abettor or accomplice, whether made before or after arrest. Rule 16(a)(1)(A); Rule 14(c)(1); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1968); ABA Standards, Discovery §2.1(a)(ii).

9. To receive a copy of the defendant's prior criminal record, if any. Rule 16(a)(1)(B).

10. That the defendant, through counsel, be allowed to inspect and/or copy all books, papers, photographs, documents tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State and which are material to the preparation of a defense in this matter, Rule 16(a)(1)(C), *or which the State intends to use in evidence*. Rule 12(d)(2).

11. That the defendant, through counsel, be allowed to inspect and/or copy all books, papers, photographs, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State and which were obtained from or belonged to the defendant. Rule 16(a)(1)(C).

12. That the defendant, through counsel, be allowed to inspect and/or copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the District Attorney, and which are material to the preparation of the defense. (Rule 16(a)(1)(D)).

13. That the defendant, through counsel, be allowed to inspect and/or copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, or by the exercise of due diligence may become known, to the District Attorney General and which are intended for use by the State as evidence in chief at the trial. Rule 16(a)(1)(D).

14. Copies of any writings executed or audio or video tapes recorded by any police official or other interested party dealing with the incident under which the defendant stands charged, including but not limited to:

- a. police reports,
- b. police logs and jail logs,
- c. booking sheets,
- d. "mug" shots or photographs,
- e. witness statements, and
- f. notes made by police officials to be used at trial.

15. Names and addresses of any witnesses who may have information regarding the guilt or innocence of the defendant.

16. Any other evidence obtained by observation of police witnesses intended to be used against the defendant at trial that is not part of a written police report furnished to defense counsel.

17. Any available evidence known to the prosecutor that tends to negate the guilt of the defendant, mitigate the degree of the offense, or reduce the punishment, regardless of whether it will damage the state's case.

18. That the defendant, through counsel, be notified as to whether there has been any electronic surveillance of any type, including wiretapping, conducted in connection



with investigation of this case; in the event of any such electronic surveillance, the defendant further requests an inventory of all telephonic, radio and/or recorded information which has been intercepted and/or recorded by law enforcement or any other person acting on behalf of or in conjunction with any law enforcement officers during the investigation of this case. Rules 16(a)(1)(A), 16(a)(a)(C), and 12(d)(2); 18 U.S.C.A. §§ 25.18(8) and (9); ABA Standards, Discovery § 2.1.

19. That in the event there has been any electronic surveillance, see 18 U.S.C.A. §§ 25.10 *et seq*, the defendant, through counsel, be provided with the contents of all such intercepted communications.

20. That the defendant, through counsel, be furnished the names and addresses of all persons known to the District Attorney General or other law enforcement officers to have been present at the time and place of the alleged offense. *See, Roberts v. State*, 489 S.W.2d 263 (Tenn. Cr. App. 1972).

21. Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the defendant requests any and all evidence in possession of the State or in the possession of any governmental agency that might fairly be termed "favorable", whether that evidence either be completely exculpatory in nature or simply tends to reduce the degree of the offense or punishment therefor, or whether that evidence might be termed "favorable" in the sense that it might be fairly used by the defendant to impeach the credibility of any witness the government intends to call in this matter. *See generally, Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968) and *U.S. v. Bagley*, 105 S.Ct. 3375 (1985), (Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule). Specifically, the defendant seeks, but does not limit, this request to the following:

(a) The nature and substance of any agreement, immunity promise or understanding between the government or any agent thereof, and any witness, relating to that witness's expected testimony, including but not limited to, understandings or agreements, relating to pending or potential prosecutions. *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), *Graves v. State*, 489 S.W.2d 74 (Tenn. Cr. App. 1972).

(b) The nature and substance of any preferential treatment given at any time by and State agent, whether or not in connection with this case, to any potential witness, including, but not limited to, letters from State attorneys or other law enforcement personnel to governmental agencies, state agencies, creditors, etc., setting out that witness's cooperation or status with the State, and which letter or communication might fairly be said to have been an attempt to provide some benefit or help to the witness.

(c) Any money or other remuneration paid to any witness by the State, including, but not limited to, rewards, subsistence payments, expenses or other payments made for specific information supplied to the State.

(d) Any and all information in the possession of the State regarding the mental condition of the State's witnesses which would reflect or bring into the question the witnesses' credibility. *State v. Brown*, 552 S.W.2d 383 (Tenn. 1977).

(e) The original statement and any amendment thereto, of any individuals who have provided the government with a statement inculcating the defendant, who later retracted all or any portions of that statement where such retraction would raise a conflict in the evidence which the State intends to introduce. *See United States v. Enright*, 579 F.2d 980 (6th Cir. 1978).

(f) Any and all interview memoranda or reports which contain any information, whatever the sources, which might fairly be said to contradict or be inconsistent with any evidence which the government intends to adduce in this matter. *See, United States v. Enright, supra*.

(g) The names and addresses of any witnesses whom the State believes would give testimony favorable to the defendant in regard to the matters alleged in the indictment, even though the State may not be in possession of a statement of this witness and regardless of whether the State intends to call this witness. *See, United States v. Eley*, 335 F. Supp. 353 (N.D. Ga. 1972).

(h) The results of any scientific tests or analysis done in person or object in connection with this case where the result of that test or analysis did not implicate, or was neutral to the defendant. *See, Barbee v. Warden of Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964); *Norris v. Slayton*, 540 F.2d 1241 (4th Cir. 1976).

(I) Any documentary evidence in the possession of the State which contradicts or is inconsistent with any testimony the State intends to introduce in this case.

(j) The statement of any individual involved in the perpetration of the charged offense, which person the State alleges to be the defendant, where such description might fairly be said not to match the defendant in characteristics such as height, weight, body build, color of hair, etc. *See, Jackson v. Wainwright*, 390 F.2d 288 (5th Cir. 1968).

(k) The name and address of any individual who has been requested to make an identification of the defendant in connection with this case, and failed to make such identification. *Grant v. Aldredge*, 498 F.2d 376 (2nd Cir. 1974).

22. That in the event the State intends to offer any "eye-witness identification testimony", the defendant, through counsel, be informed as to whether any such witness has at any time been asked to make any pretrial, extrajudicial identification of the defendant, whether by means of a live lineup, a photographic spread, or other type of confrontation; in the event such an extrajudicial identification has taken place, the defendant further requests that date of such identifications, and the names of all persons present at the identification. If such identification occurred as a result of a lineup, show up or photographic identification, the defendant requests the names and addresses of all persons attending and all persons who may have appeared in such lineup or photo spread with the defendant, as well as any written memoranda or documentation of such, including, but not limited to, the photographs taken or used in the identification process. Rules 12(d)(2) and 16(a)(1)(C).

23. That the District Attorney disclose its intention to use, in the State's case-in-chief at trial, all materials subject to discovery by this request. Rule 12(d)(2).

24. Advance written notice of any evidence which might be introduced pursuant to Rule 404(b), Tennessee Rules of Evidence, so that I might have an opportunity to object to same. See generally, *State v. Rounsavile*, 701 S.W.2d 817 (Tennessee 1985).

25. Pursuant to Rule 608(b)(3), Tennessee Rules of Evidence, advance written notice of any conduct which could in any way be construed as impeachment evidence.

26. That counsel have expert access to computers and other electronic media or devices such as cell phones so the defense expert can forensically copy same.

I would appreciate a written response within 15 days to the above requests or some idea when the information will be provided.

Respectfully submitted,

David L. Raybin, #3385  
*Hollins, Raybin & Weissman, P. C.*  
424 Church Street, Suite 2200  
Nashville, TN 37219  
(615)256-6666  
(615) 254-4254 fax

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent via hand-delivery to: Assistant District Attorney Robert Smith , Washington Square, Suite 500, 222 2<sup>nd</sup> Avenue North, Nashville, TN 37201 on this \_\_\_\_\_ day of October, 2015.

---

David L. Raybin  
Benjamin K. Raybin  
*Hollins, Raybin & Weissman, P. C.*  
424 Church Street, Suite 2200  
Nashville, TN 37219  
(615)256-6666  
(615) 254-4254 fax

**IN THE CRIMINAL COURT OF RUTHERFORD COUNTY, TENNESSEE**

STATE OF TENNESSEE )  
 )  
v. ) **CASE NO.: 111111**  
 )  
C===== R===== )

**MOTION FOR PROTECTIVE AND MODIFYING ORDER  
REGARDING DISCOVERY**

The defense is aware that in this jurisdiction the government files its discovery with the clerk and then the defense lawyer acquires his or her discovery by making a copy of what is in the clerk’s file. Pursuant to Rule 16(b), Tennessee Rules of Criminal Procedure, the defendant respectfully requests the Court enter an immediate protective order requiring the State to respond to the defendant’s request for discovery by providing a full copy to the defense attorney without filing the discovery response content with the Clerk of this Court. In short, the State must provide discovery to the defense attorney but may file whatever discovery it desires with the clerk, but the content should be filed under seal if it is filed at all. The defense attorney should not be required to acquire discovery from the clerk but should be provided a copy by the government and, as noted, any discovery filed with the clerk must be filed under seal. Because the State’s current discovery responses do not comport with the Rules of Criminal Procedure, a motion is thus necessary for this Court to direct that the State’s discovery response in this case be provided only to counsel for the defendant and not also with the clerk in a public fashion.

For all these reasons, counsel requests that the Court GRANT this motion.

A.

The defense understands that the State has a strong interest in documenting that discovery has been provided to the defense. However, the defense has a strong interest in the discovery not be a public record. These twin concerns can be accommodated by requiring the content be filed under seal. This request is prompted by the proliferation of sensitive documents filed with the clerk by the District Attorney's Office in response to defense discovery requests in child sex abuse cases. The filed discovery documents often contain inadmissible information which could prejudice the defense or, perhaps, the State, in the case of reciprocal discovery. The documents could also promote identity theft by the unintentional disclosure of confidential information such as social security numbers and the like.

Prior to 1963, Tennessee had no discovery procedures in criminal cases. In 1963, the defendant was afforded a statutory right to see his or her own confession. See Public Acts of 1963, Chapter 96. In 1968, discovery of certain physical evidence held by the prosecution was permitted. See Public Acts of 1968, Chapter 415.

The 1968 statute addressed the limited right of discovery in criminal cases and required that the defendant file a "motion" for discovery, and that the judge was required to issue an "order" granting the discovery motion. Thus began the practice of lawyers filing motions for discovery, getting an order to comply from the judge, and then the district attorney filing a full response with the court showing compliance with the order.

These discovery statutes were repealed by Public Acts of 1979, chapter 399 which was the provision removing those portions of our statutes which were in conflict or had

been altered by the then, recently promulgated Tennessee Rules of Criminal Procedure.<sup>1</sup> The new criminal rules became effective in 1978 and replaced the prior requirement that a lawyer had to file a “motion” for discovery with the new procedure that discovery was to be available simply by “request.”

The new rules abolished the archaic practice of discovery “motions.” For example, Rule 16(a)(1) provides the prosecutor is to disclose to the defendant the substance of any of the defendant’s statements “upon a defendant’s request.” Rule 16(a)(1)(E) requires the disclosure of the defendant’s prior record “upon a defendant’s request.” Identical language regarding disclosure “on request” can be found in Rule 16 as it relates to documents and objects, and reports of examinations and tests. There are no requirements that such “requests” be filed with the clerk as under prior law when discovery was by motion.

Compare these provisions with Rule 16(a)(1)(C) which requires disclosure of certain grand jury testimony, “upon a defendant’s motion.” That provision is intentionally distinct requiring a heightened procedural component because the district attorney might oppose the motion and the judge might want some control of what is disclosed.

Rule 16(c) imposes a continuing duty to disclose on both parties. Note that subsection (2) imposes a continuing duty if the party has previously requested the information or if the court has ordered its production. Court ordered production comes about under Rule 16(d) where the court regulates discovery or orders discovery in

<sup>1</sup> The unsigned counsel served as the designee of the Attorney General for the first criminal rules commission which drafted the initial set of criminal rules. The unsigned counsel later served as chair of the Tennessee Supreme Court criminal rules commission for six years.

appropriate cases such as motions to compel where there is a discovery dispute or where protective orders are needed.

Other discovery rules do not require that discovery must be filed with the court. Rule 12.1 addresses notice of alibi. There is nothing in this rule which contemplates the notice or the response be filed with the clerk of court. Indeed, Rule 12.1(a)(1) provides that when the district attorney desires disclosure of potential alibi witnesses then he or she shall, “serve the defendant with a written request to be notified of an intention to offer an alibi defense.” See also 12(d)(2) which provides that the defendant may request notice of the state’s intent to use evidence.

Compare these notice and discovery rules with Rule 12.2 regarding notice of an insanity defense or expert testimony. Rule 12.2(a) provides that notice of insanity requires notice to the opposing party and a requirement that a copy be filed with the clerk of court. Similarly, notice of expert testimony of the defendant’s mental condition must be filed with the district attorney and a copy of the notice with the clerk.

Rule 12.3 provides that notice of intent to seek an increased sentence or the death penalty must be in writing, served on the defense attorney, and “filed with the court clerk.”

As noted in the commission comments to Rule 16, the “rule substantially conforms to the new federal discovery Rule 16... .” The commission comments to the similar federal rule provide that “the rule provides that the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or



to issue a protective order.” There is nothing in the federal rules about filing discovery documents with the clerk.

It can be observed, then, that the Tennessee rules like their federal counterpart are very specific when discovery and discovery-like matters are to be filed with the clerk of court. In other instances, the rules do not require or even contemplate that any discovery need be lodged with the court unless or until there is some discovery dispute.

The State’s notion that discovery is filed with the clerk and the defense attorney acquires the discovery from the clerk is unique. There is no such procedure authorized or contemplated by the criminal rules. Normal and customary practice dictates that the lawyers provide each other with discovery. The defense insists on this.

The proliferation of paper is not the main problem. The primary concern is that the advanced disclosure of evidence can easily become part of the public domain, and work to the prejudice of the defense and occasionally the state. Every discovery response contains various police reports, names, addresses, telephone numbers, and assorted personal information. More modern discovery contains a vast amount of private data, such as bank account records, social security numbers, credit card information, and a host of other information about the defendant and potentially other witnesses. It is, quite literally, a treasure trove of information all of which is publicly accessible. All it takes is some person with a scanner and things will start showing up on Facebook. There is certainly no reason for the current practice other than, “That is the way we have always done it.”

## B.

The Rules of Criminal Procedure do not contemplate that discovery responses be filed with the court clerk. The rules are very specific as to what should be filed and the ostensible silence of the rules as to any direct prohibition on filing discovery responses with the clerk does not mean that hundreds of pages of what should be confidential discovery disclosure to only the lawyers who have requested it, should somehow now be made part of the public record long before the trial commences.

In Tennessee discovery is defense triggered. In other words, except for *Brady* material, the State has no obligation to provide discovery to the defense absent a defense request for discovery. Having made its request for discovery the defense should not be penalized by having the State cast its response into the public domain.

It is in the public interest for the parties to engage in discovery. The rules of discovery exist, in part, to prevent “trial by ambush,” *Austin v. City of Memphis*, 684 S.W.2d 624, 632 (Tenn.Ct.App.1984), and to rid trials of the element of surprise that often leads to results based not upon the merits but upon unexpected legal maneuvering. *Hood v. Roadtec, Inc.*, 785 S.W.2d 359, 362 (Tenn.Ct.App.1989); *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn.Ct.App.1981).

In *State v. Gaddis*, 530 S.W.2d 64 (Tenn.1975), Justice Henry wrote for a unanimous Supreme Court that:

We note an emerging trend toward broad and reciprocal discovery in criminal cases. The days of trial by ambush are numbered. Rapidly fading is what Dean Pound described as the “sporting theory of justice”. 530 S.W.2d at 69.

Lawyers have a duty to their clients to seek discovery. It would be manifestly inconsistent with the discovery rules to impose a penalty on a party by suggesting that the party may have his or her discovery but that the other party may cast the discovery into the public domain to the potential prejudice of the requesting party. Such Hobson's choices are not contemplated by modern discovery rules.

This Court has abundant authority to enter such protective orders so as to safeguard the rights of the various parties to a fair trial. The State can identify no interest whatsoever in its right to a fair trial by the advance public disclosure of these documents. Filing things with the clerk's office is not appropriate to demonstrate that the State is acting in a fair manner. This Court can have full access to any and all discovery and supervise the proceedings which are the proper roles of this Court.

Because matters filed with the criminal court clerk become matters of public record, the unnecessary filing of prosecution discovery could be construed as an ethical problem where the disclosure mentions a defendant's confession, prior record, or some other matter which might not be admissible in evidence. See comment to Tennessee Supreme Court Rule 3.6:

[5] There are, on the other hand, certain subjects that are 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 in a criminal investigation, or witness; or the identity of a witness; or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

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

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

(5) information 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] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

The defense is well aware that Supreme Court Rule 3.6(b) provides that “Notwithstanding paragraph (a), a lawyer may state:....(2) information contained in a public record; ...” However, it is questionable if this exception applies to that which has been improperly injected into the public record in the first place.

The defense is preserving its objections as early as possible. The failure of the defense to object or take appropriate action for discovery violations could result in waiver of the issues. See *State v. Schiefelbein*, 230 S.W.3d 88, 111-113 (Tenn.Crim.App. 2007).

Why should the defense have to risk challenging jurors who may have read information which the State has prematurely injected into the public record? Taken it to

its logical conclusion the defense would be left with a bunch of illiterate people who never read anything or watch any news at all. While we might ultimately be able to “seat a jury” the defense does not wish to be left with those who pay no attention to the media at all. “[ With respect to pretrial publicity] [e]ven if a fair trial can ultimately be ensured through [extensive] voir dire, change of venue, or some other device, these measures entail serious costs to the system.” *State v. Carruthers*, 35 S.W.3d 516, 564 (Tenn. 2000).

It is implicit in the Rules of the Supreme Court that pre-trial publicity or pre-trial disclosure of information about specific testimony, witnesses, and evidence is profoundly prejudicial to the defendant’s right to fair trial. This is not a situation where the Court has to “balance” some public interest with the defendant’s right to a fair trial. There is no “public interest” in the advance disclosure of the State’s discovery with the clerk of this Court so that same might be a matter of public record. Simply because the rules do not directly prohibit the practice does not authorize the State to pick and choose what it desires to disclose in the public record.

### C.

In general, courts have found no right of public access to pretrial discovery. The United States Supreme Court has stated that “pretrial depositions and interrogatories are not public components of a civil trial” and “restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).

Numerous courts have reached the same conclusion under the First Amendment, in both civil and criminal cases. E.g., *In re Associated Press*, 162 F.3d 503, 512–13 (7th Cir.1998) (criminal case; district court properly excluded the public and press from governor's deposition taken in camera (and thus with the judge present) under rule permitting the taking of a potential witness's testimony by deposition); *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir.1986) (criminal case; the press does not enjoy any greater right of access than the public and therefore whether the press has a right of access to discovered materials turns on the public's right of access; “[d]iscovery is neither a public process nor typically a matter of public record” and “[h]istorically, discovery materials were not available to the public or press”; documents collected during discovery are not “ ‘judicial records’ ”); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir.1987) (no First Amendment right to discovery; discovery process is not traditionally open to the public); *Times Newspapers, Ltd. v. McDonnell Douglas Corp.*, 387 F.Supp. 189, 197 (C.D.Cal.1974) (depositions “are not a judicial trial, nor a part of a trial, but a proceeding preliminary to a trial, and neither the public nor representatives of the press have a right to be present” when depositions are taken); *Kimberlin v. Quinlan*, 145 F.R.D. 1 (D.D.C.1992) (no right to attend depositions); *Mokhiber v. Davis*, 537 A.2d 1100, 1109 (D.C.1988) (“no ... right of access to pretrial depositions, interrogatories, and documents gained through discovery”); *Amato v. City of Richmond*, 157 F.R.D. 26 (E.D.Va.1994) (no First Amendment right to be present at deposition); *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla.1987) (press has no First Amendment right to attend a deposition in a criminal trial or to obtain unfiled

depositions); *People v. Pelo*, 384 Ill.App.3d 776, 780–84, 894 N.E.2d 415, 323 Ill.Dec. 648 (2008) (no public right of access to deposition in criminal case that had not been submitted into evidence or used in open court; deposition taken pursuant to a rule allowing the deposition for preservation of evidence because of a substantial possibility it would be unavailable at the time of trial); *State ex rel. Mitsubishi Heavy Indus. Am., Inc. v. Circuit Court*, 2000 WI 16, 233 Wis.2d 1, 12–21, 605 N.W.2d 868 (no First Amendment right or right under court rule to unfiled pretrial discovery materials).

*In re NHC--Nashville Fire Litig.*, 293 S.W.3d 547, 564 (Tenn. Ct. App. 2008) is instructive as to the issues here:

The definition of public or judicial records described in *Ballard* must be contrasted with unfiled discovery. Unlike filed discovery, pretrial depositions, interrogatories, and other discovery materials not filed with the court “are not public components of a civil trial.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984); see also *Ballard*, 924 S.W.2d at 661–62. The *Rhinehart* Court explained:[P]retrial depositions and interrogatories ... were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information. *Rhinehart*, 467 U.S. at 33, 104 S.Ct. 2199 (emphasis added; citations omitted). The Court emphasized the private nature of discovery proceedings: Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private. Rules of Civil Procedure may require parties to file with the clerk of the court interrogatory answers, responses to requests for admissions, and deposition transcripts. *Jurisdictions that require filing of discovery materials customarily provide that trial courts may order that the materials not be filed or that they be filed under seal. Federal district courts may adopt local rules providing that the fruits of discovery are not to be filed except on order of the court. Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is*

subject to the control of the trial court. Id. at n. 19 (citations omitted). Thus, in applying *Ballard* in this case, we must be cognizant of the distinction between unfiled discovery and the filed discovery that was the subject of the dispute in *Ballard*. The *Ballard* court found only that discovery responses that are filed with the court are “public records.” *Ballard*, 924 S.W.2d at 662. Moreover, the *Ballard* court repeatedly cited favorably an influential law review article by Professor Arthur Miller on protective orders and public access to the courts, in which Professor Miller draws a clear distinction between documents filed with the court and unfiled discovery. See *Ballard*, 924 S.W.2d at 658–59 (citing Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Court, 105 Harv. L.Rev.. 427 (Dec. 1991)). We conclude from this that unfiled discovery documents are not considered public or judicial records.

The State cannot circumvent these rules by filing that which should not be filed so as to artificially inject matters into the public domain. The Rules of Criminal Procedure do not contemplate that discovery be filed with the clerk. This Court has vast authority to issue appropriate protective orders. “Protective orders can take innumerable forms, such as limiting the subjects or terms under which discovery may be conducted, limiting the persons in whose presence discovery is conducted, or redacting sensitive information from documents disclosed in the course of litigation.” *In re NHC--Nashville Fire Litig.*, 293 S.W.3d 547, 561 (Tenn. Ct. App. 2008).

#### D.

The granting or denying of a protective order relative to discovery procedures rests within the sound discretion of the trial court. *Tenn. Dep't of Commerce and Ins. v. FirstTrust Money Servs., Inc.*, 931 S.W.2d 226, 230 (Tenn.Ct.App.1996). Such a discretionary decision is reviewed for abuse of discretion. Id. The burden of establishing abuse of discretion is on the party seeking to overturn the trial court's ruling on appeal. *Ballard v. Herzke*, 924 S.W.2d 652, 659 (Tenn.1996). “Trial courts, to be sure, have the



discretion to enter orders necessary to insure compliance with Rule 16 [in criminal cases.]”.*State v. Brown*, 836 S.W.2d 530, 548 (Tenn. 1992).

Indeed, Our Supreme Court has held that until a criminal case is at an end there is NO right of public access to investigative files under the public records law. In *Appman v. Worthington*, 746 S.W.2d 165 (Tenn.1987) a lawyer representing prisoners who had been charged with killing a fellow prisoner invoked the public records statutes to obtain the Department of Correction's internal investigative records regarding the killing. The Court, invoking Tenn. R.Crim. P. 16(a)(2), affirmed the trial court's denial of the lawyer's request for access to the records because the trial of the charges against his clients had not yet occurred. *Appman v. Worthington*, 746 S.W.2d at 166–67.

It is only when the case is closed are case files open to public inspection. *Memphis Pub. Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986) (Rule prohibiting discovery or inspection of reports, memoranda, or other internal state documents made by state agents or law enforcement officers in connection with investigation or prosecution of the case could not operate to preclude inspection by media and public of a police investigative file which was closed and not relevant to any pending or contemplated criminal action. Rules Crim.Proc., Rule 16(a)(2) ). Our case has just begun.

The issue in this case is not if these matters will be disclosed but when they will be disclosed. Undoubtedly, the vast majority of the information which the State seeks to put into the public record at this point will be matters that are subject to proof in open court. At that time, however, all such evidence will be subject to cross-examination and the admissibility of same governed by the rules of evidence. It is then that the public's right

of free access to the courts will be honored in full but it will be under appropriate evidentiary rules and not shovels full of documents which the state proposes to file which may or may never find their way into the public domain.

The State could suffer no harm in delaying until trial the disclosure of the evidence which it seeks to inject into the public record just weeks after the defendant's indictment and arraignment. Conversely, the defense will be profoundly prejudiced. Accordingly, this Court should find that all of the discovery which the State seeks to introduce into the public record at this time should be placed under seal so that the fair trial rights of this defendant might be preserved or the Court should direct that the State simply not file it with the clerk at this time.

E.

Because of the practice in this jurisdiction of providing discovery to the defense bar in child sex abuse cases, a motion is necessary for this Court to direct that the State's discovery response in this case be provided only to counsel for the defendant and not also with the clerk.

For all these reasons, counsel requests that the Court GRANT this motion.

Respectfully submitted,

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David L. Raybin, #3385  
*Hollins, Raybin & Weissman, P. C.*  
Fifth Third Financial Center, Suite 2200  
424 Church Street  
Nashville, TN 37219  
(615)256-6666

## F. Slander

West's Tennessee Code Annotated  
Title 29. Remedies and Special Proceedings  
Chapter 24. Libel and Slander (Refs & Annos)

T. C. A. § 29-24-103

§ 29-24-103. Newspaper or periodical; notice; retraction

Effective: July 9, 2012

Currentness

(a) Before any civil action is brought for publication, in a newspaper or periodical, of a libel, the plaintiff shall, at least five (5) days before instituting such action, serve notice in writing on the defendant, specifying the article and the statements therein which the plaintiff alleges to be false and defamatory.

(b)(1) If it appears upon the trial that the article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in the article were true, and that within ten (10) days after the service of such notice, or in the next regular edition of such newspaper or periodical, if more than ten (10) days from date of notice, a full and fair correction, apology, or retraction was published in the same editions, and in the case of a daily newspaper, in all editions of the day of such publication, or corresponding issues of the newspaper or periodical in which the article appeared; and in the case of newspapers on the front page thereof, and in the case of other periodicals in as conspicuous a place as that of the original defamatory article, and in either case, in as conspicuous a plat or type as was the original article, then the plaintiff shall recover only actual, and not punitive, damages.

(2) The exemption from punitive damages shall not apply to any article about or affecting a candidate for political office, published within ten (10) days before any election for the office for which the person is a candidate.

**Credits**

1955 Pub.Acts, c. 47, § 1.

**Formerly** § 23-2605.

Notes of Decisions (22)

T. C. A. § 29-24-103, TN ST § 29-24-103

Current through end of the 2015 First Reg. Sess.

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West's Tennessee Code Annotated  
Title 29. Remedies and Special Proceedings  
Chapter 24. Libel and Slander (Refs & Annos)

T. C. A. § 29-24-104

§ 29-24-104. Radio and television

Currentness

(a) The owner, licensee, or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee, or operator, or agent or employee thereof, unless it shall be alleged by the complaining party that such owner, licensee, operator, or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

(b) It shall be the responsibility of the owner, licensee or operator to show that due care was used.

(c) In no event, however, shall any owner, licensee, or operator, or the agents or employees of any such owner, licensee or operator of any such a station or network of stations, be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by any candidate for public office, unless such statement is made by an agent or employee of the owner, licensee, or operator in the course of employment.

**Credits**

1955 Pub.Acts, c. 12, §§ 1, 2.

**Formerly** §§ 23-2606, 23-2607.

Notes of Decisions (14)

T. C. A. § 29-24-104, TN ST § 29-24-104

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## G. Insulting the Judge

145 S.W.3d 538  
Supreme Court of Tennessee,  
at Nashville.

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE SUPREME COURT OF TENNESSEE

v.

Edward A. SLAVIN, Jr.

No. M2003-00845-SC-R3-BP. |  
Feb. 11, 2004 Session. | Aug. 27, 2004.

**Synopsis**

**Background:** In an attorney disciplinary hearing, the hearing committee recommended public censure. Board of Professional Responsibility (BPR) petitioned for writ of certiorari. The Chancery Court, Knox County, Richard E. Ladd, Chancellor, suspended attorney for three years. Attorney appealed.

**Holdings:** The Supreme Court, Adolpho A. Birch, Jr., J., held that:

[1] recusal of chancellor was not warranted;

[2] First Amendment protection of free speech did not preclude attorney from receiving disciplinary sanction for comments about judges and attorney; and

[3] suspension for two years, with right to petition for reinstatement after the first year, was appropriate disciplinary sanction.

Affirmed as modified.

**Attorneys and Law Firms**

\*541 Edward A. Slavin, Jr., St. Augustine, Florida, and David A. Stuart, Clinton, Tennessee, for the appellant, Edward A. Slavin, Jr.

Laura L. Chastain, Nashville, Tennessee, for the appellee, Board of Professional Responsibility.

ADOLPHO A. BIRCH, JR., J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and E.

RILEY ANDERSON and JANICE M. HOLDER, JJ., joined. WILLIAM M. BARKER, J., not participating.

**Opinion**

ADOLPHO A. BIRCH, JR., Justice.

We have this case on direct appeal pursuant to Tennessee Supreme Court Rule 9, section 1.3, from an order of the Chancery Court suspending Edward A. Slavin, Jr., Esq., from the practice of law for three years. Slavin appeals, raising the following issues: (1) whether Chancellor Richard E. Ladd erred in refusing to recuse himself; (2) whether Slavin's in-court speech is protected by the First Amendment; and (3) whether the sanctions imposed by the Chancellor are excessive.

Upon careful review of the record and applicable authority, we conclude that Chancellor Ladd did not abuse his discretion in refusing to recuse himself and that the speech at issue does not fall within the protective ambit of the First Amendment. After a thorough examination of the sanctions, we impose a two-year suspension. Slavin may, however, apply for reinstatement pursuant to Tennessee Supreme Court Rule 9, section 19.3, at the expiration of one year from date of this opinion.

**I. Facts and Procedural History**

Edward A. Slavin, Jr., Esq., ("Slavin") was licensed to practice law in Tennessee in 1987, and he has represented many "whistle-blower" clients before federal agencies. Three judicial officers lodged complaints against Slavin with the Board of Professional Responsibility ("BPR"). The complaints, as summarized, are as follows: Dale Workman ("Workman"), Chancellor for the Sixth Judicial District, alleged that Slavin filed a motion for a new trial and for recusal. In these pleadings, Workman stated that Slavin accused him of rushing his consideration of the case on a day when he appeared to be preoccupied, taking a two-hour lunch for personal business, unfairly restricting the amount of time for cross-examination of the defendant's witness, refusing to allow a rebuttal witness to be called, taking an inadequate amount of time for a rushed reading of portions of the record, mocking and trivializing the medical treatment provided to the plaintiff, showing bias and prejudice by making pejorative remarks about "press releases," and being rude. According to

Workman, Slavin stated that Workman “is apparently a chain smoker, who’s [sic] smoke filled chambers Mrs. Campbell and the parties’ counsel were obliged to enter” causing Mrs. Campbell restricted breathing in court. According to Workman, Slavin also stated that “[t]he trial court’s lifestyle choice and personal opinions should not be permitted to deny Ms. Campbell a fair trial.”

Additionally, Curtis L. Collier (“Collier”), Judge of the United States District Court (Eastern District, Tennessee), complained to the BPR about Slavin’s conduct and speech during the trial of *Lockheed \*542 Martin Energy Systems, Inc. v. Slavin*, 190 F.R.D. 449 (E.D.Tenn.1999). According to Collier, *Lockheed Martin Energy Systems* (“Lockheed”) brought suit against Slavin to compel him to comply with a Department of Labor order to repay attorney’s fees and expenses. In that case, Slavin filed a seventeen-page response “replete with unnecessary, baseless, irrelevant, and frivolous claims, defenses, and legal contentions.” Lockheed’s counsel, Wilson Horde, Esq., (“Horde”) filed a petition for sanctions pursuant to Federal Rule of Civil Procedure 11. In response to the Rule 11 petition, Slavin repeated the substance of what he had included in his previous answer and “added more irrelevant allegations.” As an attachment to the response, Slavin included a nine-page “declaration” from District Attorney General James Ramsey executed on April 27, 1994, in which Ramsey stated that he believed that his (Ramsey’s) law license had been suspended by the Tennessee Supreme Court because of actions taken by Horde. Collier viewed this assertion as a further attack on Horde and Lockheed.

Collier included in his complaint that on the date of the scheduled Rule 11 hearing in the *Lockheed* case, Slavin requested a continuance. Then, on the date of the rescheduled hearing, Slavin failed to appear. Slavin’s attorney offered no tenable explanation for Slavin’s absence. The court found that “[i]t was faced with not just an attorney who has filed baseless, frivolous and unprofessional pleadings and responses to motions, but an attorney who has done so repeatedly, flagrantly, and in a manner which reflects a callous disregard for the proper and efficient functioning of the Court and also reflects a sense of disrespect for the authority of a judicial system and the obligations of the legal community.” Also, the court ordered Slavin to provide additional information—an order with which Slavin did not comply. The court stated, “Thus, it appears even in the face of very serious sanctions and a direct order from the Court, Mr. Slavin continues to demonstrate a lack of respect for the Court and its authority.”

The complaint of John M. Vittone (“Vittone”), Administrative Law Judge for the United States Department of Labor, alleged that Slavin had been unprofessional in appearances before the court and had used the peer review process to harass the judges. He stated that several judges had invoked their authority to permanently prevent Slavin from representing clients in cases in which they preside. Vittone cited instances in which Slavin asserted that the Administrative Review Board (“ARB”) <sup>1</sup> decision in a matter “ranks with the Dred Scott decision among the injustices in American History” and is a “disgrace to the human race.” He also stated that Slavin left voicemail messages calling opposing counsel a “red neck peckerwood” and describing counsel collectively as “Nazis.” Vittone claimed that Slavin’s activities went beyond criticism of the judiciary and were “transparent attempts to use the legal process to harass and/or punish judges who issued adverse rulings.”

1 The Administrative Review Board of the United States Department of Labor has the authority of the Secretary of Labor and other deciding officials to issue final agency decisions under a broad range of federal labor laws.

The above complaints provided the basis for a petition filed by the BPR against Slavin on August 4, 2000. On May 22, 2001, the BPR filed a “Supplemental Petition for Discipline” based on the complaint of Rudolf L. Jansen (“Jansen”), an Administrative Law Judge for the United States Department of Labor. According to the complaint, Jansen issued a recommended decision and order granting summary \*543

judgment in a matter in which Slavin had represented two persons. On March 16, 1999, Slavin appealed to the ARB, and his pleading contained comments which Jansen found to be offensive. Those comments included: referring to Jansen as “[p]etty, barbarous and cruel”; “Recommended Decision is a stench in the nostrils of the Nation”; “Shows complete contempt for First Amendment Values”; “Jansen ... is no better than Respondents—he is a retaliator”; and “Disgraces his judicial office.” In its decision, the ARB noted that Slavin “has again engaged in personal and vitriolic attacks on a Department of Labor Administrative Law Judge.” Slavin then requested that the Inspector General investigate Jansen’s conduct in the case.

On August 30, 2001, the BPR filed a “Second Supplemental Petition for Discipline.” This petition was based on complaints made by four clients Slavin had represented in a suit against their employer, the U.S. Department of Energy. The clients alleged that Slavin had been unprepared and had



hindered their cases by failing to provide effective assistance of counsel. In addition, they alleged that Slavin had been antagonistic toward the judge in their case to the extent that the judge had barred him from appearing in cases before her. Moreover, they charged that Slavin filed an appeal for one client even though he had been instructed not to, had given false information to a judge about a client's health, had failed to return documents as requested, and had refused to follow the clients' directions regarding settlement.

The second supplemental petition included also the complaint of Debra Thompson, Esq., ("Thompson"), who stated that Slavin had made disparaging comments about her. She alleged that Slavin had called her a "harridan"<sup>2</sup> in the presence of her client and the court reporter. Thompson also alleged that Slavin had called her "condescending, hierarchical, uncivil, unkind, and uncooperative."

<sup>2</sup> A shrewish woman. *Webster's II New College Dictionary* 506 (2001).

A hearing pursuant to Tennessee Supreme Court Rule 9, section 8, was conducted on February 12, 2002. The Hearing Committee sustained the complaint of Collier alleging that Slavin had failed to follow orders of the court as violations of Tennessee Supreme Court Rule 8, Disciplinary Rule<sup>3</sup> ("DR") 1-102(A)(1), DR 1-102(A)(5), DR 7-102(A)(8), DR 7-106(A), and DR 7-106(C)(6) (2002). Regarding DR 7-106(C)(6), the Hearing Committee found that Slavin, "by ignoring the Orders of Judge Collier engaged in undignified and discourteous conduct which is degrading to a tribunal."

<sup>3</sup> The proceedings in this case are governed by the Code of Professional Responsibility previously set forth in Rule 8 of the Tennessee Supreme Court Rules (2002). The Code was replaced on March 1, 2003, by the Rules of Professional Conduct.

The Hearing Committee also sustained allegations that Slavin had made false statements regarding a client's illness, had made false statements during a deposition with regard to a client's identity as an investigator, and had failed to communicate with clients and return their records. Consequently, Slavin was found to have violated DR 1-102(A)(1), DR 1-102(A)(4), DR 1-102(A)(5), DR 7-101(A)(2), and DR 7-102(A)(8). The Hearing Committee, however, dismissed the charge under DR 7-106(C)(6) because Slavin's expressions were protected by the right to free speech.

The Hearing Committee dismissed the complaints of Vittone, Workman, and Jansen in their entireties. Regarding the dismissal of the charges under DR 7- \*544 106(C)(6), the Hearing Committee found that while Slavin's actions were "undignified and discourteous," the Board did not carry its burden of proving false statements, and thus, Slavin's expressions were protected by the First Amendment. *Ramsey v. Bd. of Prof'l Responsibility*, 771 S.W.2d 116 (Tenn.1989).

The Hearing Committee also dismissed Thompson's complaint in its entirety. Regarding the alleged violation of DR 7-106(C)(6), the Hearing Committee found that Slavin's expressions were protected by the First Amendment.

The Hearing Committee found as a mitigating factor that Slavin did not have a record of prior disciplinary action. It found as an aggravating factor that his violations of the Disciplinary Rules were multiple. The Hearing Committee concluded: "For violations of the provisions addressed above, the Hearing [Committee] finds that Respondent should be given a public censure."

On May 31, 2002, the BPR filed a "Petition for Writ of Certiorari" in the Chancery Court for Knox County pursuant to Tennessee Supreme Court Rule 9, section 1.3. The Chief Justice of this Court assigned Richard E. Ladd, Chancellor, Second Judicial District, to hear the case as required by Tennessee Supreme Court Rule 9, section 1.5. A hearing was conducted on December 10, 2002; Slavin did not attend the hearing but was represented by counsel. After a brief colloquy between Ladd and Slavin's attorney, David Stuart, Esq., ("Stuart"), the remainder of the hearing was consumed by discussion and the introduction of exhibits. No testimony was adduced during this hearing.

Following the hearing, Ladd issued a memorandum opinion. It appears that although Ladd agreed with the Hearing Committee's findings of facts, he disagreed with the Hearing Committee's legal conclusions drawn from those facts. He stated, "I find that the acts of Mr. Slavin are not protected by the First Amendment in this case."

Ladd disagreed with the Hearing Committee also with regard to the complaint of Jansen, finding "by a clear preponderance of the evidence, in fact uncontested evidence, a violation of Disciplinary Rules." Ladd stated that in the case underlying Jansen's complaint, the opposing side filed a motion for summary decision. Slavin filed nothing in response in that case, and Jansen granted a summary decision. According

to Ladd, Slavin then filed “a 27 page document entitled: Complainant's Petition for Review, Motion for Summary Reversal, Motion for Oral Argument, with Motion to File 45 Page Opening Brief; Investigative Request, Disqualification Appeal by Today to the Administrative Review Board, with copies to many others, including the Inspector General, the Secretary of Labor, the Honorable John M. Vittone, Chief Administrative Law Judge.” The ARB concluded that the case was frivolous.

Ladd referred to the ARB's Final Decision and Order in which the ARB “lists 18 examples of personal insults which Mr. Slavin used against Judge Jansen in his motion.” Ladd stated, “Without even considering whether these representations are truthful or not, the so-called motion and brief ... to this Court, is a clear violation of DR 1–102(A)(5), engaging in conduct that is prejudicial to the administration of justice, and DR 7–106(C)(6), engaging in undignified or discourteous conduct which is degrading to a tribunal.” Thus, Ladd concluded that “the acts of Mr. Slavin are not protected by the First Amendment in this case.”

Regarding Vittone's complaint, Chancellor Ladd stated the following:

**\*545** Judge Vittone testified that four or five Administrative Law Judges had barred Mr. Slavin from appearing before them due to his conduct in various cases. Judge Vittone stated that Mr. Slavin in four to five instances has requested a Peer Review for Judge misconduct, similar to the Tennessee Court of Judiciary.

Judge Vittone advised Mr. Slavin twice that the conduct—that his conduct was impermissible in using the Peer Review procedure to try to get a reversal on a question of law, an appealable issue. This is corroborated by Mr. Slavin's expert witness and good friend, Retired Judge Nahum Litt, who testified that he had told Mr. Slavin that he was improperly using the Peer Review process on appealable matters.

And yet being advised by the Chief Judge and his good friend who was a retired Chief Judge, he continued to do so. I find that Mr. Slavin, by using the Peer Review process in the manner in which he did, was systematically harassing and attempting to intimidate judges by his action. And in fact he was successful in that four or five judges barred him from appearing before them, which, apparently, Administrative Law Judges have the power to do, which

resulted in getting rid of those judges on hearing any of his, Mr. Slavin's, cases.

The Court finds that the acts of Mr. Slavin violate Disciplinary Rule 1–102(A)5, engaging in conduct that is prejudicial to the administration of justice.

Ladd found by a preponderance of the evidence that the Hearing Committee erred in dismissing Workman's complaint. He stated that Slavin's conduct with regard to Workman violated DR 7–106(C)(6), engaging in undignified and discourteous conduct which is degrading to a tribunal, and is not protected free speech. He noted that Slavin's Corrected Motion for a New Trial in that case “pretty well speaks for itself on the Court's finding.”

Regarding Thompson's complaint, Ladd found that Slavin violated DR 7–102(A)(1) because “his actions would serve merely to harass another person or a fellow lawyer.” He agreed with the hearing panel's findings regarding Slavin's clients. He found that Slavin's most serious violation was that of DR 7–101(A)(4)(c) which provides that lawyers shall not prejudice or damage the client during the course of the professional relationship. He also referred to DR 1–102(A)(5) which provides that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. He stated that “by [Slavin's] actions, he is stealing from the client.” Ladd noted the testimony of Judge Nahum Litt (“Litt”) who “described how Mr. Slavin takes cases with major elements missing.” He referred to additional testimony by Litt in which he stated, “The Peer Review was to cover matters not appealable; however, in his opinion, most of what Mr. Slavin filed in Peer Review were appealable issues.”

Ladd ordered that Slavin be suspended from the practice of law for three years and that before he applies to the Supreme Court for readmittance, he must “submit some kind of proof to the Supreme Court of a knowledge of how to properly represent a client and subordinate his own feelings in the practice of his law.” He stated that Slavin's actions “could be grounds for disbarment,” but he found “a glimmer of hope” in Slavin because he is industrious and has a good mind. However, he questioned Slavin's judgment.

## II. Standard of Review

[1] Slavin is before this Court as a matter of right pursuant to Tennessee Supreme Court Rule 9, section 1.3, which provides the following:

\*546 Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal direct to the Supreme Court where the cause shall be heard upon the transcript of the record from the circuit or chancery court, which shall include the evidence before the hearing committee.

In addition, “our review of this cause is de novo on the record of the trial court, and to the findings of the trial court there is attached a presumption of correctness unless the evidence preponderates against those findings.” *Sneed v. Bd. of Prof'l Responsibility*, 37 S.W.3d 886, 890 (Tenn.2000).<sup>4</sup>

<sup>4</sup> As noted in *Sneed v. Board of Professional Responsibility*, 37 S.W.3d 886, 890 n. 14 (Tenn.2000), “Tennessee Supreme Court Rule 9, Section 1.3, does not explicitly provide for de novo review upon the record of the trial court, with a presumption of correctness unless the preponderance of the evidence is contrary to the findings.” According to *Sneed*, this standard is inferred from the following sources: Tenn. R.App. P. 13(d); *Murphy v. Bd. of Prof'l Responsibility*, 924 S.W.2d 643, 647 (Tenn.1996); *Gillock v. Bd. of Prof'l Responsibility of Supreme Court*, 656 S.W.2d 365, 367 (Tenn.1983); and *Scruggs v. Bracy*, 619 S.W.2d 101, 103 (Tenn.1981). Essentially, we are reviewing the record of the Hearing Committee in that no testimony was adduced in the trial court.

### III. Analysis

In this appeal, Slavin contends the following: (1) that Ladd erred by refusing to recuse himself; (2) that Slavin's in-court statements were protected by free speech; and (3) that Ladd erred by increasing the sanction imposed by the Hearing Committee.

#### A. Recusal

[2] [3] Concerning the recusal issue, whether recusal is warranted is left to the discretion of the trial judge, and such decision will not be reversed absent a clear abuse of discretion on the face of the record. *Davis v. Liberty Mut. Ins. Co.*,

38 S.W.3d 560, 564 (Tenn.2001). The record in this case contains an exchange which occurred at the beginning of the hearing held on December 10, 2002, a hearing at which Slavin was not present.<sup>5</sup> The exchange, between Ladd and Slavin's attorney, was as follows:

<sup>5</sup> This hearing was, apparently, the appeal of right from the judgment of the hearing committee.

THE COURT: And you are Mr. Stuart?

MR. STUART: Yes, Your Honor, David Stuart from the Anderson County Bar.

THE COURT: All right. Born and raised in Anderson County, Mr. Stuart ... I was.

MR. STUART: Oh, you were. Really? Oh, okay.

THE COURT: Born in Oliver Springs, grew up in Norris.

MR. STUART: Is that right? Well, it is very nice to meet you.

THE COURT: My father was Purchasing Agent for a period of time.

MR. STUART: Oh, really?

THE COURT: In Anderson County.

MR. STUART: I met him. I was County Attorney for a long time, and he testified—He had just left Purchasing Agent when I became County Attorney, and he testified. I thought you looked familiar. That must be the reason why.

On December 16, 2002, six days after the hearing, Stuart sent Ladd a letter stating that Slavin intended to file a motion for Ladd's recusal. The letter suggested that Ladd may have residual bias because of Stuart's efforts to impeach \*547 Ladd's father in a case tried in 1983.<sup>6</sup> The suggestion is based on Stuart's statement that Slavin had supplied documents to Stuart to be used in an effort to impeach Ladd's father, a witness in the case. Additionally, Stuart suggests in his letter that Ladd's impartiality may reasonably be questioned.

<sup>6</sup> *Clinton Bus Co., et al. v. Anderson County Bd. of Educ.*, Anderson County Docket No. E-8362.

On December 30, 2002, Ladd filed an affidavit<sup>7</sup> in which he denied any personal knowledge of Slavin or of Stuart. Additionally, he stated that he had never heard of the *Clinton Bus Co.* case. He said, “In summary, prior to receiving the letter of December 16th, I had no knowledge whatsoever of anything mentioned about the case in Mr. Stuart's letter.” Moreover, Ladd explained that his father was eighty-nine years old and due to a series of strokes and dementia could not recall any case in which he may have testified. Finally, he stated that prior to reading the letter of December 16, 2002, he had no knowledge of ever having seen or heard of a local weekly tabloid entitled the “Appalachian Observer” edited by Slavin.

<sup>7</sup> The affidavit stated the following:

I. I had no personal knowledge of the respondent, Edward A. Slavin, Jr., Esquire or his counsel, David A. Stuart, Esquire, until I received the order appointing me to hear this case signed by Chief Justice Frank F. Drowota, III, that was entered on the 19th day of July, 2002.

II. My father, A.B. Ladd, was at one time purchasing agent for Anderson County, Tennessee and retired over 25 years ago. I have lived and practiced law or presided as Chancellor in Sullivan County since December 1963. I had never heard of the case *Clinton Bus Company, et al, v. Anderson County Board of Education*, Anderson County Chancery Court Docket No. E8352 prior to Mr. Stuart's letter to me dated December 16, 2002. I have no memory of my father A.B. Ladd ever mentioning the case nor the fact that he testified in the case, nor the nature of his testimony, nor the fact that he was cross-examined by Mr. Stuart. In summary, prior to receiving the letter of December 16th, I had no knowledge whatsoever of anything mentioned about the case in Mr. Stuart's letter.

III. My father, A.B. Ladd is now 89 years of age and due to a series of strokes and dementia, [he] cannot even tell me what year he retired, let alone recall any case in which he may have testified.

Thus, I have not been able to determine from him whether he ever told me about the case.

IV. I have no knowledge of ever seeing or hearing of a local weekly tabloid entitled the “Appalachian Observer” edited by Mr. Slavin until the letter of December 16, 2002.

On January 3, 2003, Slavin filed a motion requesting that Ladd recuse himself in this case.<sup>8</sup> He also filed a motion for a new trial. On February 28, 2003, Ladd entered an order denying the motion for a new trial and the motion for recusal.

<sup>8</sup> As stated, this motion was filed after Ladd had heard the appeal.

On appeal, Slavin contends that Ladd erred in refusing to recuse himself. In response, the BPR contends that Slavin's failure to seek recusal in a timely manner has foreclosed this issue. Indeed, the BPR suggests that Slavin has attempted to manipulate the recusal issue to gain procedural advantage.

[4] “Parties may lose the right to question a judge's impartiality if they attempt to manipulate the impartiality issue to gain procedural advantage.” *Davis v. Tenn. Dep't of Employment Sec.*, 23 S.W.3d 304, 313 (Tenn.Ct.App.1999). “[T]he failure to seek recusal in a timely manner results in a waiver of a party's right to question a judge's impartiality.” *Id.* Even though there is evidence to support a finding that the recusal issue was waived for failure to \*548 raise it in a timely manner, we nevertheless prefer to address the issue.

[5] [6] “The right to a fair trial before an impartial tribunal is a fundamental constitutional right.” *State v. Austin*, 87 S.W.3d 447, 470 (Tenn.2002). Moreover,

Article VI, § 11 of the Tennessee Constitution provides that “no Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested.” The purpose of this constitutional provision is to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality or favor. *Chumbley v. People's Bank & Trust Co.*, 165 Tenn. 655, 659, 57 S.W.2d 787, 788. (1933).

*State v. Benson*, 973 S.W.2d 202, 205 (Tenn.1998).

[7] [8] [9] Tennessee has also recognized that “the preservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial.” *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn.Ct.App.1998). Thus, recusal is also appropriate “when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.” *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d at 564–65 (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn.Crim.App.1994)). “Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias.” *Id.* We note,

however, that the mere fact that a judge has ruled adversely to a party or witness in a prior proceeding is not grounds for recusal. *Id.*

Ladd has included in the record an affidavit outlining the basis for his refusal to recuse himself. It is entirely adequate and, we think, dispositive of the issue. Accordingly, this issue is without merit.



## B. First Amendment

[10] [11] [12] [13] Slavin next contends that the BPR, Department of Labor, and Department of Energy have sought sanctions against him for speech protected by the First Amendment. The Hearing Committee found that the in-court statements complained of, while “undignified and discourteous,” were protected speech under First Amendment principles. The trial court, however, reached the opposite conclusion, ruling that Slavin's statements were not protected by the First Amendment.

Specifically, Ladd concluded that Slavin's speech with regard to Workman violated DR 7–106(C)(6) by Slavin's having engaged in undignified and discourteous conduct degrading to a tribunal. He concluded, as to Slavin's speech toward Jansen, that Slavin had violated DR 1–102(A)(5) and DR 7–106(C)(6). With regard to Vittone, Ladd concluded that Slavin had manipulated the Peer Review process to “systematically harass [ ] and attempt[ ] to intimidate judges” and by so doing, had violated DR 1–102(A)(5). Finally, Ladd found that Slavin's conduct toward Thompson constituted a violation of DR 7–102(A)(1) by his having engaged in conduct “when it is obvious that such action would serve merely to harass or maliciously injure another.”

The free speech clause of the First Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment and provides that “Congress shall make no law ... abridging the freedom of speech.” \*549 Article I, section 19, of the Tennessee Constitution similarly provides that “[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.”

[14] [15] In the context of judicial proceedings,<sup>9</sup> an attorney's First Amendment rights are not without limits. Although litigants and lawyers do not check their First

Amendment rights at the courthouse door, those rights are often subordinated to other interests inherent in the judicial setting. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991); *United States Dist. Court v. Sandlin*, 12 F.3d 861, 866 (9th Cir.1993); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 476 (S.D.N.Y.1982); *State v. Carruthers*, 35 S.W.3d 516, 560–61 (Tenn.2000). Thus, while we find that legitimate criticism of judicial officers is tolerable, “an attorney must follow the Rules of Professional Conduct when so doing.” *Shortes v. Hill*, 860 So.2d 1, 3 (Fla.Dist.Ct.App.2003). A lawyer is not free to “seek refuge within his own First Amendment right of free speech to fill a courtroom with a litany of speculative accusations and insults.” *United States v. Cooper*, 872 F.2d 1, 3 (1st Cir.1989).

9 We note that our Court held in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 122 (Tenn.1989) that an attorney who made out-of-court statements to the media regarding judicial proceedings was not subject to discipline, and the statements were protected by the First Amendment. That case, however, is distinguishable. In the case under submission, the statements at issue were made during in-court judicial proceedings.

The United States Supreme Court stated:

It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to “free speech” an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.

*Gentile*, 501 U.S. at 1071, 111 S.Ct. 2720.

[16] “The First Amendment does not preclude sanctioning a lawyer for *intemperate* speech during a courtroom proceeding.” *Jacobson v. Garaas (In re Garaas)*, 652 N.W.2d 918, 925 (N.D.2002) (emphasis added). Commenting on *Gentile* in a disciplinary proceeding, the Supreme Court of Missouri concluded:

An attorney's free speech rights do not authorize unnecessary resistance to an adverse ruling.... Once a judge rules, a zealous advocate complies,

then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge.

*In re Coe*, 903 S.W.2d 916, 917 (Mo.1995).

In *Kentucky Bar Association v. Waller*, 929 S.W.2d 181, 183 (Ky.1996), the Supreme Court of Kentucky observed that the statements need not be false to pursue disciplinary action:

Respondent appears to believe that truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him. In this respect he has totally missed the point. There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system. Officers of the court are obligated to uphold the \*550 dignity of the Court of Justice and, at a minimum, this requires them to refrain from conduct of the type at issue here.

Thus, an attorney's speech may be sanctioned if it is highly likely to obstruct or prejudice the administration of justice. "These narrow restrictions are justified by the integral role that attorneys play in the judicial system, which requires them to refrain from speech or conduct that may obstruct the fair administration of justice." *Office of Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 793 N.E.2d 425, 428–29 (2003).

Accordingly, we conclude that Slavin's in-court remarks were not protected by the First Amendment. By this holding we intend to limit an attorney's criticisms of the judicial system and its officers to those criticisms which are consistent in every way with the sweep and the spirit of the Rules of Professional Conduct. See *Fla. Bar v. Ray*, 797 So.2d 556, 560 (Fla.2001).

### C. Sanctions

[17] For his final issue, Slavin contends that Ladd erred by imposing a three-year suspension from the privilege to practice law. Having concluded that the violations found by Ladd were proper, we consider sanctions imposed in similar cases. In *Farmer v. Board of Professional Responsibility*, 660 S.W.2d 490, 491–93 (Tenn.1983), this Court found that the attorney should be disciplined for using "scurrilous and improper language in briefs which he himself filed." In that case, we concluded that the attorney "deliberately chose to use language and tactics which cannot be tolerated in the legal profession" and affirmed the Hearing Committee's decision to suspend the attorney for sixty days. *Id.* at 493.

Although this Court concluded that the attorney was not subject to sanctions for his out-of-court statements to the media in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 122–23 (Tenn.1989), we did conclude that the attorney acted in a manner prejudicial to the administration of justice. In that case, the attorney failed to abide by court orders, failed to respond to questions from the court while appearing before the court, and slammed courtroom doors during hearings. *Id.* at 123. Thus, we imposed a sanction of 180 days, with all but 45 days suspended. *Id.*

In *Galbreath v. Board of Professional Responsibility*, 121 S.W.3d 660 (Tenn.2003), we held that a thirty-day suspension was warranted for an attorney's misconduct that included attempts to subvert the legal process. In that case, the attorney, dissatisfied with a judge's rulings, began a calculated campaign through threats and intimidation to force the judge's recusal. *Id.* at 666.

Additionally, we note similar cases in other jurisdictions. In *Kentucky Bar Association v. Waller*, 929 S.W.2d 181, 183 (Ky.1996), the Supreme Court of Kentucky ordered a six-month suspension for an attorney's comments made in a written memorandum submitted to a trial court. The Supreme Court of Kentucky described the memorandum as follows:

After the appointment of Judge Harris, Waller filed a motion to set aside the earlier temporary injunction. On June 21, 1994, Waller filed a memorandum styled as "Legal Authorities Supporting the Motion to Dismiss" which contained the following introductory language: Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent

ass-hole it replaced if you graduated from the eighth grade....

*Id.* at 181.

The Supreme Court of Ohio, in \*551 *Office of Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 793 N.E.2d 425, 433 (2003), imposed a six-month suspension on an attorney for comments made in a written motion. The Court described the motion as follows:

In a motion seeking reconsideration or, in the alternative, certification of the case as a conflict to this court, respondent accused the panel that decided his client's appeal of being dishonest and ignoring well-established law. He declared that the panel had issued an opinion so "result driven" that "any fair-minded judge" would have been "ashamed to attach his/her name" to it. He then added that the panel did not give "a damn about how wrong, disingenuous, and biased its opinion is."

*Id.* at 427. In upholding the six-month suspension, the Supreme Court of Ohio stated:

An attorney's speech may be sanctioned if it is highly likely to obstruct or prejudice the administration of justice.... These narrow restrictions are justified by the integral role that attorneys play in the judicial system, which requires them to refrain from speech or conduct that may obstruct the fair administration of justice.

*Id.* at 429.

As we continue our de novo consideration of the sanctions imposed, we note a dramatic increase in the punishment imposed by the trial court beyond that imposed by the Hearing Committee. We think this difference is easily explained by the fact that the trial court reinstated several violations that had been dismissed by the Hearing Committee.

Although we are much impressed with Slavin's intellect and legal skill, what does not impress us is his apparent defiance in refusing to respect the line separating, in the judicial context, tolerable criticism from unacceptable speech. He has trampled upon that line, and indeed by so doing has propelled himself into the quagmire of unacceptable speech.

Accordingly, we hereby suspend Slavin from the practice of law for a period of two years from date of this opinion. Slavin may petition for reinstatement under Supreme Court Rule 9, section 19.3, at the expiration of one year from date of this opinion. It is further ordered that Slavin shall comply in all respects with Tennessee Supreme Court Rule 9, and specifically with section 18 regarding the obligations and responsibilities of suspended attorneys. Costs of this review are taxed to the appellant, Edward A. Slavin, Jr., for which execution may issue, if necessary.

WILLIAM M. BARKER, J., not participating.

**All Citations**

145 S.W.3d 538

## INSULTING THE JUDGE

The Preamble to Rule 8 [six] provides in part:

**A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.**

Rule 8.2(a)(1) provides: “**(a) A lawyer shall not make a statement that the lawyer knows to be false or that is made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of the following persons: (1) a judge; .....**”

Courts in other jurisdictions have found that statements by an attorney that are demeaning to the judiciary and that violate Rule 8.2(a) of the Rules of Professional Conduct may also violate Rule 8.4 which provides: “**It is professional misconduct for a lawyer to:... (d) engage in conduct that is prejudicial to the administration of justice.....**” See *matter of Westfall*, 808 S.W.2d 829, 839 (Mo. 1991) and *In re McClellan*, 754 N.E.2d 500 (Ind. 2001). (“The respondent violated [Rule 8.4] by engaging conduct that demeaned the judiciary and the legal profession.”).

Generally, “[s]tatements in violation of Rule 8.2(a) must (1) be false, (2) impugn the integrity or qualifications of judges, judicial officers or public legal officers, and (3) be made by the attorney knowing them to be false or with reckless disregard for their truth or falsity.” *Attorney Grievance Comm'n of Maryland v. Frost*, 69 SEPT.TERM 2012, 2014 WL 726525 (Md. Feb. 26, 2014).

Many courts conclude that in attorney disciplinary proceedings “the standard to be applied is whether the attorney had an objectively reasonable factual basis for making the statements.” *The Florida Bar v. Ray*, 797 S.O.2d 556, 557-60 (Fla. 2001). The attorney “must have a reasonable, objective belief in the truth of the statements.” *Statewide Grievance Committee v. Burton*, 10 A.3d 507, 512 (Conn. 2011).

Courts almost unanimously reject a subjective analysis or subjective standard. An “objective standard applies, under which the finding of a violation depends on what the reasonable attorney, considered in light of all of his professional functions, would do in the same or similar circumstances.” *In re Madison*, 282 S.W.3d 350, 352-53 (Mo. 2009). See also *The Florida Bar v. Ray*, 797 So.2d 556, 557-60 (Fla. 2001).



It is important to note that courts also consider the context of the proceeding in determining whether what is objectively reasonable. Further lawyers “should be free to challenge, in appropriate legal proceedings, a court’s perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court.” *Wendt v. Wendt*, 757 A.2d 1225, 1249-50 (Conn. App. 2000).

An attorney “may make statements critical of a judge in a pending case which the attorney is a participant. He may even be mistaken. What is required by the rules of professional conduct is that he have a reasonable factual basis for making such statements before he makes them.”

*In re Cobb*, 838 N.E.2d 1197, 1211-16 (Mass. 2005).

## B.

*In re Dixon*, 994 N.E.2d 1129, 132-40 (Ind. 2013) arose in criminal context the attorney was seeking the disqualification of the judge for actual bias:

Rule 8.2 violations often arise in the context of public comments by attorneys outside a legal proceeding. *See, e.g., Matter of Reed*, 716 N.E.2d 426 (Ind.1999) (prosecutor's statements to press that newly appointed judge was ignorant, was being improperly influenced by politicians, had fabricated a report about liquor being present in court offices, and had no understanding of the cases); *Matter of Atanga*, (discussed above); *Matter of Garringer*, 626 N.E.2d 809 (Ind.1994) (lengthy “open statement” charging bankruptcy court officials with misconduct and criminal acts), *cert. denied*. However, Rule 8.2 violations have sometimes arisen from statements made within a legal proceeding. *See, e.g., Matter of Wilkins*, (discussed above); *Matter of Becker*, 620 N.E.2d 691 (Ind.1993) (statement in appellate brief falsely accusing trial court of causing recording of hearing to be turned off during important testimony). In either context, the objective standard we adopt today, standing alone, is sufficient to balance the public interest in candid discussions about judges' qualifications against the competing interest in maintaining public confidence in the administration of justice. Prof. Cond. R. 8.2(a), Comment [1].

But in this case, Respondent's statements were made not just within, but as material allegations of, a judicial proceeding seeking a change of judge on three grounds, each of which *affirmatively requires* alleging personal bias or prejudice on the part of the judge. ....

But even though Rule 8.2 holds attorneys to a higher disciplinary standard than *New York Times* does in defamation cases, we also recognize that attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients—particularly on issues, as here, that *require* criticism

of a judge or a judge's ruling. And as discussed above, in seeking a change of judge under Criminal Procedure Rule 12(B), a party must allege personal bias or prejudice on the part of the judge—and an attorney must therefore be allowed to assist the client in doing what the rule requires. A motion for a change of judge due to personal bias is inherently sensitive, but it implicates the client's fundamental due process right to a neutral decision maker. Counsel's advocacy on such matters must not be chilled by an overly restrictive interpretation of Rule 8.2(a).

We will therefore interpret Rule 8.2(a)'s limits to be the least restrictive when an attorney is engaged in good faith professional advocacy in a legal proceeding requiring critical assessment of a judge or a judge's decision. In any other context, counsel's advocacy would be limited only by Professional Conduct Rule 3.1, which requires only “a basis in law and fact ... that is not frivolous,” and Indiana Trial Rule 11(a), under which an attorney's signature “constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay.” And while criticism of a judge necessarily implicates Rule 8.2(a), even in genuine professional advocacy, any further restrictions of counsel's advocacy on that sensitive subject should be as minimal as possible.

*In re Dixon*, 994 N.E.2d 1129, 1137-38 (Ind. 2013).

*In re Graham*, 453 N.W.2d 313, 322 (Minn. 1190), held that “the standard must be an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstance.”

What is “reasonable” here must be measured by the legal requirements which (1) compel allegations of bias in the motion to recuse the judge or to assert that issue on appeal, and (2) the standard which governs such a pleading in the context of settled Tennessee law governing motions for new trial and appellate procedure.

Relevant is Rule 10b regarding disqualification or recusal of a judge which provides in Section 1.01 that a motion to disqualify a judge “shall state, with specificity, all factual and legal grounds supporting disqualification of the judge... .” See also the relevant comment 1 in Rule 1.3 which says that a lawyer “must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”

771 S.W.2d 116

Supreme Court of Tennessee,  
at Knoxville.

James Nelson RAMSEY, Petitioner–Appellant,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF the SUPREME COURT OF  
TENNESSEE, Respondent–Appellee.

April 17, 1989. | Rehearing  
Denied May 22, 1989.

Disciplinary proceedings were brought against district attorney general. The Equity Court, Anderson County, William Inman, Chancellor, imposed sanction, and appeal was taken. The Supreme Court, Drowota, C.J., held that district attorney who fails to abide by court orders and fails to respond to questions from court while appearing before court, and who slams courtroom doors during hearings has degraded court and acted in manner prejudicial to administration of justice, thereby, warranting suspension from practice of law for 180 days, with 135 days of that sanction suspended.

Affirmed as modified.

**Attorneys and Law Firms**

\*116 James E. Foglesong, Foglesong, Cruz, Shope and Kerr, Knoxville, Roger M. Adelman, \*117 Ned I. Miltenberg, Kirkpatrick & Lockhart, Washington, D.C., for petitioner-appellant.

Tennessee Dist. Attys. Conference, Joe Baugh, President, amicus curiae.

William W. Hunt, III, Disciplinary Counsel, Nashville, for respondent-appellee.

**OPINION**

DROWOTA, Chief Justice.

Appellant, James Nelson Ramsey, the District Attorney General for Anderson County, has appealed the suspension of his law license for one-hundred and eighty (180) days. He raises four basic grounds as to why the Order of Suspension should not stand: (1) jurisdiction, (2) denial of due process,

(3) constitutional right to free speech, and (4) the sufficiency of the evidence as a matter of law.

Appellant, a native of Oak Ridge, was in 1972 admitted and licensed by this Court to practice law in Tennessee. In 1978, Appellant ran for and was elected District Attorney General. Appellant contends that “after his election, he was faced with appearing before two judges who allied in political hostility against him.”

A complaint was filed against Appellant with the Board of Professional Responsibility on April 18, 1985. A Petition for Discipline was filed by the Board on August 29, 1985. A three-member Hearing Panel of the Board heard this cause on March 16 and 17, 1987. The Hearing Panel filed its Findings and Judgment on April 8, 1987. The Panel stated:

“[I]t seems appropriate to observe that the issues in this case affect or involve many persons; nevertheless, the operative facts are focused primarily on two persons. The case presents the lengthy and rather sad saga of the relationship between these two persons. One of these persons is the [Appellant], James Nelson Ramsey, a licensed attorney and the duly elected District Attorney General of Anderson County, Tennessee. The other is Judge James B. Scott who likewise is a licensed attorney and the duly elected Judge of the Circuit and Criminal Court of Anderson County....

The relationship between the [Appellant] and Judge Scott is complex and it cannot be accurately described with one or even with a few words. Suffice it to say that the level of disaffection between them is exceeded only by the level of suspicion which each harbors for the other. The panel feels constrained to point out in this submission that the failure of these two elected officials to work cooperatively is harmful to the administration of the justice in Anderson County and borders on being a public disgrace.

The Petition for Discipline alleges multiple acts of contemptuous behavior by the [Appellant], multiple public expressions regarding either the court's adjudications of contempt or the Board of Professional Responsibility's prior adjudication of discipline, and in addition, the Petition charges a pattern of behavior which violates the Disciplinary Rules.”

The Panel first addressed the charges of unethical conduct based on the Appellant's public expression to the media. The Panel found “the right of free speech may not be absolute,

but it does appear to be broad enough to protect these expressions.”

The Panel next addressed the contempt adjudications in 1983, and 1985, and found Appellant's actions were not only contemptuous but were also violative of DR 1–102(A)(5) and DR 7–106(C)(6).<sup>1</sup> The Panel further found Appellant's “conduct since 1979, as alleged in the Petition and established by the evidence, shows a pattern of disrespect for the Court. Every instance is different but they all contain a common thread of indifference toward and disrespect for the Court.” The Panel adjudged that Appellant “should be suspended from the practice of law for a period of one-hundred and eighty (180) days.” The Panel \*118 concluded its findings and judgment by stating: “All concerned parties should examine their own conscience and strive to put an end to the hostilities and suspicion which appears to permeate the criminal justice system in Anderson County.”

<sup>1</sup> “DR 1–102(A)(5) (A lawyer shall not engage in conduct that is prejudicial to the administration of justice),” and “DR 7–106(C)(6) (In appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal).”

On July 1, 1987, the Appellant filed a Petition for Writ of Certiorari in the Chancery Court of Anderson County. A special judge was designated by this Court on July 29, to hear this cause. On December 15, 1987, a de novo review of the Panel's determination was held by Chancellor William H. Inman. The Chancellor abstained from the jurisdiction issue, finding that the Supreme Court “has the exclusive prerogative to determine the constitutionality of its Rules.” The Chancellor found no merit in Appellant's due process argument as it related to the Hearing Panel members allegedly having interests adverse to Appellant. With reference to Appellant's argument that his right to free speech guaranteed by the Tennessee and United States Constitutions was violated—the Chancellor found Appellant's “pronouncements are simply not privileged.” The Chancellor adopted the Hearing Panel's findings of fact and affirmed the Panel's suspension of Appellant's law license for 180 days.

Pursuant to Rule 9, Section 1.3 Appellant appealed the Chancellor's decision to this Court.

I

JURISDICTION

[1] Appellant contends that, as an elected public official, neither Rule 8 nor Rule 9 of this Court's rules can be applied to him.<sup>2</sup> To do so, he submits, would violate both the Tennessee Constitution and the United States Constitution. Appellant avers that in suspending him the Disciplinary Board, and presumably the Chancery Court, exceeded its statutory jurisdiction and violated the constitutional principle of separation of powers.

<sup>2</sup> Rule 8, Rules of the Supreme Court, is entitled “Code of Professional Responsibility.”

Rule 9, Rules of the Supreme Court, is entitled “Disciplinary Enforcement.”

Appellant argues that under the Tennessee Constitution, judges and district attorneys are treated identically and Article VI, Section 6 ordains a single and exclusive method of removal—impeachment by the Legislature. We agree that the exclusive method of removal from office for judges and district attorneys is by impeachment. However, this does not mean that district attorneys and judges are not subject to discipline. The right of this Court to establish Rules of practice and procedure for disciplining attorneys is clear. *Petition of Tennessee Bar Ass'n*, 539 S.W.2d 805, 810 (Tenn.1976). Rule 9, Section 1.1, Rules of the Supreme Court, states that “any attorney admitted to practice law in this State ... is subject to the disciplinary jurisdiction of the Supreme Court, the Board, the hearing committees, hereinafter established, and the Circuit and Chancery Court.”

This Court has inherent, original and exclusive jurisdiction pertaining to the licensing of attorneys. *Belmont v. Board of Law Examiners*, 511 S.W.2d 461 (Tenn.1974). Our authority “to make rules governing the practice of law is traditional, inherent and statutory. Such power is indispensable to the orderly administration of justice.” *Barger v. Brock*, 535 S.W.2d 337, 342 (Tenn.1976). No person shall engage in the practice of law in Tennessee, except pursuant to the authority of this Court. Rule 7, Section 1.01, Rules of the Supreme Court.

The office of District Attorney constitutes no shield or protection to an attorney who violates his oath as an attorney or the disciplinary rules of this Court. Judges and district

attorneys alike are not only subject to the disciplinary rules of this Court, but are subject to annual registration and payment of a license fee to support the attorney disciplinary system. *Petition of Tennessee Bar Ass'n*, 539 S.W.2d 805, 809 (Tenn.1976), Rule 9, Section 20.1.<sup>3</sup>

<sup>3</sup> Judges and district attorneys alike are also subject to mandatory continuing legal education. Rule 21, Section 2.01 et seq., Rules of the Supreme Court.

Disciplinary proceedings which result in disbarment or suspension from the practice \*119 of law are not equivalent to impeachment. A disbarment is a removal of a law license; an impeachment is the removal from office. They are not the same. In *In re Murphy*, 726 S.W.2d 509 (Tenn.1987), Judge Ira Murphy's law license had been suspended based upon Rule 9, Section 14 of the Disciplinary Rules governing the conduct of attorneys. He was appealing the judgment of the Court of the Judiciary which recommended that the General Assembly remove him from office. He had already had his law license suspended by this Court in a different proceeding; however, he was continuing to receive his full salary as a judge because the sole method of removal from office is impeachment by the Legislature under Article VI, Section 6.<sup>4</sup>

<sup>4</sup> Judge Murphy was convicted of a felony by a court of competent jurisdiction, and his law license was suspended by this Court pursuant to Rule 9, Section 14. This same rule applies to any attorney, be he judge, justice or district attorney general. If a district attorney were convicted of a felony and sentenced to imprisonment, his law license would be suspended, although he would still be entitled to his full salary unless removed from office by impeachment, Article VI, Section 6, or by the voters of his district at the next general election.

The issues of whether Judge Murphy's federal convictions were serious crimes so as to warrant "disbarment" and whether the convictions were grounds for "removal from office" were not identical. *Id.*, at 513, 514. Two separate and distinct procedures are involved in disbarment and impeachment. In *Schoolfield v. Tennessee Bar Ass'n*, 209 Tenn. 304, 353 S.W.2d 401 (Tenn.1961), the Senate "could not lawfully have passed upon the fitness of the judge to remain a member of the Bar; its powers as a Court of Impeachment are specifically limited to removal from office and disqualification." 209 Tenn. at 312, 353 S.W.2d at 404.

In response to Appellant's argument that he cannot be disbarred while serving as District Attorney General, the Court, in *Schoolfield*, specifically found that "[a] lawyer may be disbarred for misconduct occurring while he is acting as a judge...." 209 Tenn. at 313, 353 S.W.2d at 405. It follows that a lawyer may be disbarred for misconduct while acting as a district attorney.

Appellant avers that the Code of Professional Responsibility, Rule 8, Rules of the Supreme Court, at no point purports to regulate district attorneys. He is in error. Rule 8, DR 7-107 expressly applies to prosecutors. *See, In re John Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn.1989). The Appellant testified that when he ran for office he promised he would be accountable to the public and he would "speak to the press subject to the rules of pretrial publicity," and he pledged to those present at the hearing, "I will not talk about pending cases, DR 7-107,...." Although Appellant testified that he would follow the mandates of DR 7-107, he contends he is not subject to disciplinary action under the Rules. This position seems somewhat inconsistent. We hold that the Disciplinary Board, the hearing committees and this Court have jurisdiction over the Appellant and all District Attorneys General admitted to practice law in this State. Rule 9, Section 1.1.

## II

### DENIAL OF DUE PROCESS

[2] Appellant avers that the manner in which the proceedings were conducted before the Hearing Panel and the Chancellor violated the guarantees of procedural due process afforded by Article I, Section 8 of the Tennessee Constitution and the due process clause of the Fourteenth Amendment of the United States Constitution. He first avers that the Hearing Panel and the Chancellor were not neutral, detached, and impartial triers of fact. He alleges that the decision makers were tainted with the appearance of interest and bias. Appellant has made allegations of actual and apparent interest or bias on the part of the triers of fact, but the record fails to support these claims. Assuming, *arguendo*, that Appellant had proved interest or bias existed on the part of the Hearing Panel, this would have been cured by the de novo hearing in the Chancery Court. A de novo \*120 review in Chancery Court readjudicates the matter in a neutral forum, completely eliminating any interest or bias on the part of a Hearing Panel. *Cf. Cooper v. Williamson County Bd. of Educ.*, 746

S.W.2d 176, 183 (Tenn.1987); *Potts v. Gibson*, 225 Tenn. 321, 332, 469 S.W.2d 130, 135 (1971). Likewise, any interest or bias on the part of the Chancellor would be cured by our de novo review “upon the transcript of the record from the Circuit or Chancery Court, which shall include the transcript of evidence before the hearing committee.” Rule 9, Section 1.3, Rules of the Supreme Court. *See, Scruggs v. Bracy*, 619 S.W.2d 101, 103 (Tenn.1981).

[3] Appellant next asserts that due process requires that notice be given both of the charges and the facts which would support an adverse decision against an individual, and that the Petition for Discipline failed to meet the minimal standards of adequate notice. The first three paragraphs in the Petition set out the jurisdiction of the Board to consider this matter and the procedure by which the matter came before the Board. Paragraphs four through twelve set forth the facts, and paragraphs thirteen through fifteen set forth the various disciplinary rules which Appellant is accused of violating and a brief explanation of the reason for such violations. Counsel on direct examination of Appellant went over the allegations in the Petition paragraph by paragraph, and Appellant's answers to counsel do not indicate any misunderstanding by him as to what he was being charged with. We find that the Petition gave adequate notice to Appellant.

Appellant also contends that he was denied a true de novo hearing before the Chancellor, and that neither the Hearing Panel nor the Chancellor made a true judicial determination of his case. The record simply fails to support these contentions.

### III

#### CONSTITUTIONAL RIGHT TO FREE SPEECH

The Petition for Discipline charged the Appellant with making four impermissible “remarks to the public” that were “gross, disrespectful, knowingly false, derogatory, and damaging to the legitimacy of, and trust in, the judicial system—in violation of DR 1–102(A)(5) and [DR] 8–102(B).”<sup>5</sup> The Petition also charged that Appellant's remarks constituted “conduct adversely reflecting upon [his] fitness to practice law, unprofessional conduct, and conduct rendering [him] unfit to be a member of the bar” in violation of DR 1–102(A) (1)(5) and (6) and T.C.A. § 23–3–201(5).<sup>6</sup> The remarks were as follows:

5 DR 1–102. **Misconduct.**—(A) A lawyer shall not:  
(5) Engage in conduct that is prejudicial to the administration of justice.

DR 8–102. **Statements Concerning Judges and Other Adjudicatory Officers.**—(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

6 “DR1–102. **Misconduct.**—(A) A lawyer shall not: ... (1) Violate a Disciplinary Rule.... (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law.”

“T.C.A. § 23–3–201. **Grounds for disbarment or discipline.**—Any attorney, solicitor or counselor at law admitted to practice in the courts of the state may be disbarred or suspended from the practice of law: ... (5) Who shall be guilty of any unprofessional conduct, dishonesty, malpractice, or any conduct which renders him unfit to be a member of the bar.”

1. On February 23, 1979, Appellant was reported as having stated to *The Oak Ridger*: “My bottom line is that the judge is mucking up my cases and I can't stand for that.”

2. On October 24, 1979, Appellant was reported as having said to *The Oak Ridger*: “I don't have time for this horse manure.”

3. On March 30, 1981, Appellant wrote to *The Guinness Book of World Records* requesting inclusion in same as “The District Attorney with most contempt and disciplinary actions filed against him.”

4. On December 3, 1981, Appellant was reported by *The Clinton Courier News* as having said of [the November 1981 recommendation by a hearing panel of the Board of Professional Responsibility that he be \*121 suspended for 90 days]: “When I find that I'm suspended by Almighty God, I'll know that I'm guilty of wrongdoing, not before.”

The Hearing Panel found that although the “statements are crude and unbecoming of any licensed lawyer ... we do not believe they should be found to be violative of the Rules of Discipline. The right of free speech may not be absolute, but it

does appear to be broad enough to protect these expressions.” The Chancellor found, however, that the remarks “are simply not privileged” nor constitutionally protected. Disciplinary Counsel candidly points out that the remarks of Appellant are more impressive as indications of lack of remorse than as individual violations of the disciplinary rules. Disciplinary Counsel contends that “lack of remorse” is an aggravating factor in determining the type of discipline imposed or the degree of sanctions to be meted out.

Appellant admits making the above cited, out of court, public statements; however, he avers that the quote about “the judge is mucking up my cases” was creative journalism on the part of the reporter. He states that “I did not say those words. I do feel that's the case, however.” The remarks made by Appellant were disrespectful, ill-advised, and, as the Hearing Panel stated, they were “crude and unbecoming of any licensed lawyer.”

Appellant's principal argument is that each of his remarks is fully protected under the First Amendment of the United States Constitution and the Freedom of Speech clause of the Tennessee Constitution, Article I, Section 19.<sup>7</sup>

<sup>7</sup> “The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty....” Article I, Section 19.

In dealing with First Amendment questions, we must balance the right of the speaker to communicate and the right of the listener to receive his expressions with the need of the courts to enforce attorney discipline to the end that a lawyer will not engage in conduct that is prejudicial to the administration of justice, DR 1–102(A)(5), or degrading to a tribunal, DR 7–106(C)(6), and thereby diminishes the confidence of the public in our courts. There is thus a delicate balance between a lawyer's right to speak, the right of the public and the press to have access to information, and the need of the bench and bar to insure that the administration of justice is not prejudiced by a lawyer's remarks. In balancing these rights, we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights.

[4] The right of free speech and free discussion as it relates to the institution of the law, the judicial system and its operations, is of prime importance under our system and ideals of government. A lawyer has every right to criticize

court proceedings and the judges and courts of this State after a case is concluded, so long as the criticisms are made in good faith with no intent or design to willfully or maliciously misrepresent those persons and institutions or to bring them into disrepute. As stated by this Court in *In re Hickey*, 149 Tenn. 344, 386, 258 S.W. 417, 429 (1923), “the members of the bar have the best opportunity to become conversant with the character and efficiency of our judges. No class is less likely to abuse the privilege, as no other class has as great an interest in the preservation of an able and upright bench. The rule contended for by the prosecution, if adopted in its entirety, would close the mouths of all those best able to give advice, who might deem it their duty to speak disparagingly.”

Recently, the Oklahoma Supreme Court in addressing the free speech issue stated, “In keeping with the high trust placed in this Court by the people, we cannot shield the judiciary from the critique of that portion of the public most perfectly situated to advance knowledgeable criticism, while at the same time subjecting the balance of government officials to the stringent requirements of *New York Times Co. v. Sullivan* [376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)].” *State ex rel. Oklahomama \*122 Bar Ass'n v. Porter*, 766 P.2d 958, 968–69 (Okla.1988).

Statements made by a lawyer designed to willfully, purposely and maliciously misrepresent the judges and courts of this State, and to bring those persons and institutions into disrespect, will not be tolerated or condoned. There is no First Amendment protection for remarks critical of the judiciary when those statements are false. A statement shown to be false will subject a lawyer to disciplinary sanctions. False statements with reference to judges and courts can be prejudicial to the administration of justice and subject to disciplinary action under DR 1–102(A)(5).

It is the duty of an attorney to refrain from doing anything which will tend to destroy the confidence of the public in the courts, or to bring the courts into disrepute....

It is the duty of the lawyer to maintain toward the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor.

This is a duty which the attorney owes to his profession; an obligation to which he should subordinate his personal

animus toward the particular individual who happens to be filling the office.

*In re Hickey*, 149 Tenn. at 389, 258 S.W. at 430.

[5] The remarks made by Appellant were disrespectful and in bad taste; however, we agree with the Hearing Panel that the right of free speech is “broad enough to protect these expressions” made by the Appellant. Use of the Disciplinary Rules to sanction the remarks made by General Ramsey in this case would be a significant impairment of First Amendment rights.

#### IV

##### THE SUFFICIENCY OF THE EVIDENCE

Appellant concludes by arguing that “no evidence was presented and no proof adduced sufficient to find that Appellant had violated any of the disciplinary rules listed in the Petition.” We have before us concurrent findings of fact that Appellant violated DR1–102(A)(5) (conduct that is prejudicial to the administration of justice), and DR 7–106(C) (6) (undignified or discourteous conduct which is degrading to a tribunal).

The Hearing Panel made findings of fact which were adopted by the Chancellor. Our review of the record supports their findings. We shall describe some of the incidents in outline form, for a detailed recitation of the facts is unnecessary. On February 21, 1979, Judge Scott deferred action on a motion to suppress in a case involving Sally Davis. Appellant argued that if the confession in question was not suppressed before the trial commenced, jeopardy would attach and he would be unable to build a case without the confession. Appellant then stated that he would then file a *nolle prosequi*. Judge Scott then indicated that he would not allow the State to dismiss the action and the Appellant responded that he refused to prosecute the case. Judge Scott then announced to the jury that the State did not wish to prosecute the case. While the court was so announcing to the jury, the Appellant rose from his chair and “in a noisy and hostile fashion” slammed the door as he left the courtroom. Appellant admitted before Chancellor Inman that he did in fact slam the door. The court ordered the Appellant to appear on February 26, 1979, to show cause why he should not be held in contempt. Judge Joseph Nigro was designated to hear the contempt matter. At the hearing, Judge Nigro found Appellant guilty of contempt “in that he

has been guilty of willful and deliberate attacks that attack the dignity of the court and show disrespect for the authority of the court.” Judge Nigro ordered the Appellant to pay a \$50.00 fine and serve five days in jail. The jail sentence was suspended, and no appeal was taken.

On October 15, 1979, Roger Ridenour was representing a criminal defendant named Culbertson. After a phone conversation \*123 with Appellant, Mr. Ridenour believed that a plea-bargain had been agreed upon. The next day, after much confusion, Judge Scott asked Appellant if he had discussed a plea bargain agreement with Mr. Ridenour. Appellant refused to answer the question. Judge Scott again ordered Appellant to answer the question. Appellant again refused to answer. Appellant was then held in contempt and placed in jail pending his answer to the question. Appellant filed an appeal. The Court of Criminal Appeals affirmed Judge Scott's determination that Appellant acted in total disobedience to a lawful order of the Court. The Court of Criminal Appeals found “the trial judge exercised patience and restraint necessary before taking action for the administration of his court. Furthermore, the refusal to answer the question was in direct contempt.” No further appeal was sought by Appellant.

On April 25, 1983, the Appellant was asked a direct question by Judge Scott and he refused to answer. Judge Scott found Appellant in contempt and fined him \$50.00. An appeal was taken and the Court of Criminal Appeals, in affirming Judge Scott, held: “The transcript before us contains sufficient evidence to justify a rational trier of facts in finding General Ramsey guilty of contempt beyond a reasonable doubt.” This Court denied Appellant's Rule 11 Application for Permission to Appeal.

The final incident which we will discuss has been termed the “capias contempt.” Judge James Witt was appointed by this Court to hear this matter, which involved a contempt by Appellant of an order of Judge Scott. On April 15, 1985, Judge Witt found Appellant in contempt of court and fined him \$50.00 and ordered him to serve 10 days in jail. No appeal was taken.

##### CONCLUSION

[6] Based upon the above-described incidents, we find that an attorney who fails to abide by court orders and fails to respond to questions from the court while appearing



before the court, and who slams courtroom doors during hearings has not only degraded that court, but acted in a manner prejudicial to the administration of justice. We find the evidence sufficient to support the decision of the Hearing Panel and the decision of the Chancellor that the Appellant violated DR 1-102(A)(5) and DR 7-106(C) (6). The next issue concerns sanctions. Notwithstanding the judgments below, upon determining the existence of aggravating or mitigating circumstances, this Court may modify the judgment of the trial court. *Disciplinary Bd. of Supreme Court v. Banks*, 641 S.W.2d 501, 504 (Tenn.1982).

We are of the opinion that the foregoing violations are sufficient to justify the imposition of a suspension from the practice of law for 180 days, and the judgment of the Chancery Court is affirmed. However, under all of the circumstances of this case, we are of the opinion that it would be appropriate to have the Appellant's license suspended for only 45 of the 180-day period, and the remaining 135 days will be suspended provided the Appellant is not again found in contempt of court and in violation of the disciplinary

rules of this Court during the remainder of his term of office ending August 31, 1990. If Appellant is again found to have violated Rule 8 of this Court, then his license to practice law will be automatically suspended for the remaining 135 days. Counsel for the parties shall agree upon the beginning date for Appellant's 45-day suspension. The suspension shall be completed on or before September 4, 1989. If the parties are unable to agree upon a beginning date, the Court will fix the time of commencement.

The judgment of the trial court, as modified, is affirmed at the cost of Appellant.

COOPER, HARBISON and O'BRIEN, JJ., and  
McLEMORE, Special Justice, concur.

**All Citations**

771 S.W.2d 116

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## H. Closure of Court Proceedings


West's Tennessee Code Annotated  
State and Local Rules Selected from West's Tennessee Rules of Court  
Rules of the Supreme Court of the State of Tennessee

Sup.Ct.Rules, Rule 30


Rule 30. Media Guidelines

Currentness

**A. Media Access.**



(1) *Coverage Generally.* Media coverage of public judicial proceedings in the courts of this State shall be allowed in accordance with the provisions of this rule. The coverage shall be subject, at all times, to the authority of the presiding judge to i) control the conduct of the proceedings before the court; ii) maintain decorum and prevent distractions; iii) guarantee the safety of any party, witness, or juror; and iv) ensure the fair and impartial administration of justice in the pending cause.



(2) *Requests for Media Coverage.* Requests by representatives of the media for such coverage must be made in writing to the presiding judge not less than two (2) business days before the proceeding is scheduled to begin. The presiding judge may waive the two-day requirement at his or her discretion.

(3) *Notification of Request.* Notification that the media has requested such coverage shall be provided by the Clerk of the particular court to the attorneys of record in the case. Such notification may be waived by the judge at the clerk's request if the request is made for media coverage of all or part of a docket. If the judge waives notification, the clerk shall post a notice with the docket in a conspicuous place outside the courtroom. The notice must state that the proceedings will be covered by the media, and that any person may request a continuance when the docket is called. Such continuance shall be granted only if the person can show that he or she was prejudiced by the lack of notice, and that there is good cause to refuse, limit, terminate or temporarily suspend media coverage pursuant to section D(2).

**B. Definitions.**

(1) “*Coverage*” means any recording or broadcasting of a court proceeding by the media using television, radio, photographic, or recording equipment.

(2) “*Media*” means legitimate news gathering and reporting agencies and their representatives whose function is to inform the public, or persons engaged in the preparation of educational films or recordings.

(3) “*Proceeding*” means any trial, hearing, motion, argument on appeal, or other matter held in open court that the public is entitled to attend. For the purposes of section C of this rule, proceeding includes any activity in the building in which the judicial proceeding is being held or any official duty performed in any location as part of the judicial proceeding.

(4) “*Presiding Judge*” means the judge, justice, master, referee or other judicial officer who is scheduled to preside, or is presiding, over the proceeding.

(5) “*Minor*” means any person under eighteen (18) years of age.

### **C. Prohibitions.**

(1) *Minor Participants*. Media coverage of a witness, party, or victim who is a minor is prohibited in any judicial proceeding, except when a minor is being tried for a criminal offense as an adult.

(2) *Jury Selection*. Media coverage of jury selection is prohibited.

(3) *Jurors*. Media coverage of jurors during the judicial proceeding is also prohibited.

(4) *Closed Proceedings*. Media coverage of proceedings which are otherwise closed to the public by law is prohibited.

(5) *Juvenile Court Proceedings*. In juvenile court proceedings, if the court receives a request for media coverage, the court will notify the parties and their counsel of the request, and prior to the beginning of the proceedings, the court will advise the accused, the parties, and the witnesses of their personal right to object, and that if consent is given, it must be in writing. Objections by a witness will suspend media coverage as to that person only during the proceeding, whereas objections by the accused in a criminal case or any party to a civil action will prohibit media coverage of the entire proceeding.

(6) *Conferences of Counsel*. There shall be no audio pickup, recording, broadcast, or video closeup of conferences, which occur in a court facility, between attorneys and their clients, between co-counsel of a client, between counsel and the presiding judge held at the bench or in chambers, or between judges in an appellate proceeding.

### **D. Limitations.**

(1) *Discretion of Presiding Judge*. The presiding judge has the discretion to refuse, limit, terminate, or temporarily suspend, media coverage of an entire case or portions thereof, in order to i) control the conduct of the proceedings before the court; ii) maintain decorum and prevent distractions; iii) guarantee the safety of any party, witness, or juror; and iv) ensure the fair administration of justice in the pending cause. Such exercise of the presiding judge's discretion shall be made following the procedures established in section D(2).

(2) *Evidentiary Hearing*. Before denying, limiting, suspending, or terminating media coverage, the presiding judge shall hold an evidentiary hearing, if such a hearing will not delay or disrupt the judicial proceeding. In the event that an evidentiary hearing is not possible, affidavits may be used. The burden of proof shall be on the party seeking limits on media coverage. If there is no opposition to media coverage, the presiding judge may consider matters that are properly the subject of judicial notice. Media requesting coverage shall be allowed to present proof, either at the evidentiary hearing or by affidavit. Any finding that media coverage should be denied, limited, suspended or terminated must be supported by substantial evidence that at least one of the four interests in section D(1) is involved, and that such denial, limitation, suspension, or termination is necessary

to adequately reach an accommodation of such interest. The presiding judge shall enter written findings of fact detailing the substantial evidence required to support his or her order.

**E. Appellate Review.** Appellate review of a presiding judge's decision to terminate, suspend, limit, or exclude media coverage shall be in accordance with Rule 10 of the Tennessee Rules of Appellate Procedure.

**F. Equipment and Personnel.**

(1) *Limitations.* At least one, but no more than two television cameras with one operator each, two still photographers using not more than two cameras each, and one audio system for radio broadcast purposes, will be permitted in any judicial proceeding.

(2) *Pooling Arrangements.* When more than one request for media coverage is made, the media shall select a representative to serve as a liaison and be responsible for arranging “pooling” among the media that may be required by these limitations on equipment and personnel. The identity of the person selected, including name, business address, phone and fax number, shall be filed with the clerk of the court in which the proceeding is to be held. Pooling arrangements shall be reached when the court is not in session and shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. Such pooling arrangements shall include the designation of pool operators, procedures for cost sharing, access to and dissemination of material, and selection of a pool representative if appropriate. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(3) *Personal Recorders.* Media personnel may use hand-held cassette tape recorders that are no more sensitive than the human ear without complying with section (A)(2) of this rule. Such recorders are to be used for the making of sound recordings as personal notes of the proceedings, and shall not be used for any other purpose, including broadcast. Usage shall not be obtrusive or distracting, and no change of tape shall be made during court sessions.

(4) *Print Media.* This rule does not govern the coverage of a proceeding by a news reporter or other person who is not using a camera or electronic equipment.

**G. Sound and Light Criteria.**

(1) *Distractions.* Only television, photographic and audio equipment which does not produce distracting sound or light shall be employed to cover proceedings in a court facility. Signal lights or devices to show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden light changes shall not be used.

(2) *Courtroom Light Source.* If possible, lighting for all purposes shall be accomplished from existing court facility light sources. If no technically suitable lighting exists in the court facility, modifications and additions may be made in light sources existing in the facility, provided such modifications and additions are unobtrusive, located in places designated in advance of any proceeding by the presiding judge, and without public expense.

(3) *Audio Pickup.* Audio pickup for all purposes shall be accomplished from existing audio systems present in the court facility or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones

and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judge.

(4) *Technical Difficulties.* Court proceedings shall not be interrupted by media personnel because of a technical or equipment problem. If any problem occurs, that piece of equipment shall be turned off while the proceeding is in session. No attempt shall be made to correct the technical or equipment problem until the proceeding is in recess or has concluded.

#### **H. Location of Equipment and Conduct of Media Personnel.**

(1) *Location of Equipment and Personnel.* The presiding judge shall designate the location in the courtroom for media equipment and operators to permit reasonable coverage without disruption of proceedings.

(2) *Alterations.* No permanent installation shall be made nor shall any court facility be altered, unless approved in advance by the presiding judge. Expenses for alterations shall be borne by the media.

(3) *Movement During Proceedings.* During proceedings, operating personnel shall not move about nor make any adjustment or change of any equipment which disrupts or distracts from the proceeding. Media broadcast, photographic or audio equipment shall not be placed in or removed from the court facility except prior to commencement or after adjournment of proceedings each day, or during a recess in the proceeding.

(4) *Conduct of Media Personnel.* Media personnel assigned to cover a judicial proceeding shall attire and deport themselves in such a way that will not detract from the proceeding.

**I. Impermissible Use of Media Material.** None of the film, videotape, still photographs, or audio recordings of proceedings under this Rule shall be admissible as evidence in the proceeding out of which it arose, any proceedings subsequent and collateral thereto, or upon any retrial or appeal of such proceeding.

**J. Ceremonial Proceedings.** This Rule shall not limit media coverage of investiture, ceremonial, or non-judicial proceedings conducted in court facilities under such terms and conditions as may be established by prior consent of the presiding judge.

**K. Compliance.** Media personnel who fail to comply with this rule shall be subject to an appropriate sanction as determined by the presiding judge.

#### **Credits**

[Adopted for a one-year period beginning on January 1, 1996 and ending on December 31, 1996. Amended and made permanent by order filed December 30, 1996; amended December 6, 1999.]

Notes of Decisions (3)

Sup. Ct. Rules, Rule 30, TN R S CT Rule 30

The state court rules are current with amendments received through July 15, 2015.

12 S.W.3d 410  
Supreme Court of Tennessee,  
at Jackson.

Coretta Scott KING, Martin Luther  
King, III, Bernice King, Dexter Scott  
King, and Yolanda King, Plaintiffs,  
v.

Loyd JOWERS, and other unknown  
co-conspirators, Defendants,  
and

Memphis Publishing Company, Intervenor.

Dec. 13, 1999.

Family of assassinated civil rights activist brought wrongful death suit against alleged conspirator in assassination. Newspaper publisher intervened after trial court sua sponte closed jury selection to the press. The Circuit Court, Shelby County, James Swearingen, J., denied publisher's requests for access to voir dire and for release of transcript of voir dire. Publisher filed application for permission to appeal, and the Court of Appeals denied application. Publisher filed application to appeal to Supreme Court. The Supreme Court held that: (1) rule prohibiting media coverage of jury selection and providing that presiding judge has discretion to refuse, limit, terminate, or temporarily suspend media coverage of case did not apply to newspaper's request that did not seek to record, photograph, or broadcast proceedings, and (2) no justification existed for closing of jury selection proceedings.

Reversed, and trial court order vacated.

#### Attorneys and Law Firms

\*410 William F. Pepper, Juliet Hill Akines, Memphis, TN, for Plaintiffs.

Lucian T. Pera, Kathy Laughter Laizure, Memphis, TN, for Intervenor.

Lewis K. Garrison, Sr., Memphis, TN, for Defendants.

#### OPINION

PER CURIAM.

We granted the application for permission to appeal filed by Memphis Publishing Company,<sup>1</sup> doing business as *The Commercial Appeal* ("MPC"), to consider whether the trial court had authority to deny MPC access to jury selection in a trial ongoing in the Circuit Court of Shelby County. For the reasons discussed, we \*411 find that the trial court did not have authority to deny the newspaper access to voir dire, and we therefore vacate the order of the trial court denying MPC access to the voir dire and to the transcript of the voir dire proceedings.

<sup>1</sup> Memphis Publishing Company publishes *The Commercial Appeal*, a daily newspaper of general circulation in Memphis, Tennessee and the surrounding area.

The plaintiffs, Coretta Scott King, Martin Luther King, III, Bernice King, Dexter Scott King, and Yolanda King, the family of Dr. Martin Luther King Jr., have brought a wrongful death suit against the defendant Loyd Jowers, one of a number of alleged conspirators in the assassination of Dr. King. The trial of the case began on November 15, 1999, in the Circuit Court of Shelby County. On that date, the trial court, apparently acting sua sponte, closed jury selection proceedings to the press. MPC intervened in the proceedings on that date to object to the closure. The trial court refused to allow access to voir dire, stating:

This case is such that I feel that the jurors should be protected from public scrutiny and that the public shall not be aware of who they are. I don't want—and I'm going to assure them when we voir dire them that they will remain anonymous. And for that reason they will feel free to participate in the trial process. That's my ruling.

The next morning, MPC again appeared to present for entry an order denying its request for access and reflecting the court's granting of permission to file an interlocutory appeal. Because voir dire had been completed the preceding day, MPC requested that the trial court release the transcript of the proceedings, but the motion was denied.

MPC thereafter filed an application for permission to appeal pursuant to Tenn. R.App. P. 9 and 10, alternatively. On November 19, 1999, the Court of Appeals denied the application. On November 22, 1999, MPC filed an application for permission to appeal pursuant to Tenn. R.App.

10 or 11, alternatively, in this Court. MPC also sought expedited review of the application. On November 24, 1999, this Court granted the application. We now reverse and vacate the trial court's order refusing MPC access to voir dire and the transcript of the voir dire proceedings.

[1] The trial court relied upon Tennessee Supreme Court Rule 30 (Media Guidelines) to close the jury selection proceedings. It cited Rule 30(C)(2) which provides that “[m]edia coverage of jury selection is prohibited,” and section (D)(2) which provides, in part, that

[t]he presiding judge has the discretion to refuse, limit, terminate, or temporarily suspend, media coverage of an entire case or portions thereof, in order to (i) control the conduct of the proceedings before the court; (ii) maintain decorum and prevent distractions; (iii) guarantee the safety of any party, witness, or juror; and (iv) ensure the fair administration of justice in the pending cause.

[2] What the trial judge overlooked, however, is that Rule 30 pertains to *broadcast and recording* media coverage of court proceedings. “Coverage” is specifically defined in the rule to mean “any recording or broadcasting of a court proceeding by the media using television, radio, photographic, or recording equipment.” Supreme Court Rule 30(B)(1). In this case MPC sought to have its employees attend and report on the court proceedings. Rule 30 does not apply to print

coverage. Because the request for access did not seek to record, photograph, or broadcast the proceedings, Rule 30 was inapplicable.

[3] We have reviewed the appendix filed with the application for permission to appeal and can find no justification for the closing of jury selection proceedings in this trial proceeding. *See State v. James*, 902 S.W.2d 911, 914 (Tenn.1995) (discussing closure of juvenile proceedings and holding that the court shall not close proceedings unless it determines that failure to do so would result in particularized prejudice to the party seeking closure that would override the public's compelling interest in \*412 open proceedings); *State v. Drake*, 701 S.W.2d 604, 608 (quoting *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216, 81 L.Ed.2d 31 (1984), and stating that before closure of a proceeding may occur, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced).<sup>2</sup> Accordingly, the orders of the Court of Appeals and trial court are reversed. The order denying MPC access to voir dire and a transcript of voir dire is vacated.

<sup>2</sup> *State v. Drake* involved closure of pre-trial proceedings in a criminal trial; however, the United States Supreme Court has noted that “historically both civil and criminal trials have been presumptively open.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, n. 17, 100 S.Ct. 2814, 2829, n. 17, 65 L.Ed.2d 973 (1980).

#### All Citations

12 S.W.3d 410, 28 Media L. Rep. 1380



## **PUBLIC TRIAL ( restriction on seeing some exhibits)**

The Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution afford an accused the right to a “public trial.” *See In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *State v. Sams*, 802 S.W.2d 635 (Tenn.Crim.App.1990). This right is regarded as “a shared right of the accused and the public, the common concern being the assurance of fairness.” *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 106 S.Ct. 2735, 2739, 92 L.Ed.2d 1 (1986). “Transparency,” it has been said, “is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused.” *Smith v. Doe*, 538 U.S. 84, 99, 123 S.Ct. 1140, 1150, 155 L.Ed.2d 164 (2003). The right to a public trial is not absolute, however, and in certain cases must yield to other rights or interests. *See Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984).

The defendant in this case constructs an argument that his due process and public trial guarantees under the federal and state constitutions were abridged because the trial judge excluded the public from viewing the videotapes of gymnastics which showed the victim. The public was excluded, the defendant insists, because when the videotapes were identified and played, the trial judge forced the public spectators on numerous occasions to “shift” to another part of the courtroom to ensure that they could not see the evidence. The State, for its part, does not dispute that the trial judge screened the media and public from viewing videotapes of the victim by arranging the courtroom so that only the jury, witnesses, the defendant, and attorneys could see the videotapes. Instead, the State maintains that the defendant waived the issue by failing to object and, indeed, by being the instigator of the seating arrangement. The State also asserts that the trial judge's actions conformed to Tennessee Supreme Court Rule 30(C)(1) which forbids media coverage in any judicial proceeding “of a witness, party, or victim who is a minor.” Tenn. Sup.Ct. R. 30(C)(1).

We begin by examining the context in which this issue arose. In a jury-out hearing during Detective Breedlove's testimony, the parties and the court discussed various aspects of how and what portions of the videotapes would be played for the jury. Defense counsel addressed the trial court as follows:

MR. JOHNSON: Your Honor, please, one of the reasons that in an earlier hearing General White raised about providing copies to us was the potential revictimization of the victim if it got released outside. I know there [are] members of the public sitting out there, and they are obviously interested in the tapes. And what is—is it

Your Honor's intention for them also to be allowed to see the tapes in light of the General's objection that she didn't want the victim to be revictimized by this? Or does the public have the right to see the video tapes? ...

GENERAL WHITE: The public has a right to be in the courtroom. There is no provision from barring them from being in the courtroom. I will defer to the court on the other issue whether or \*115 not Your Honor wants to make them sit down. But I know that in these type of cases there's always public in the courtroom and there is no provision in the law to bar them from a public courtroom.

MR. JOHNSON: As I indicated earlier my only concern was that earlier the General had argued against us getting copies based on the potential for revictimizing the victim, by letting other people outside of the immediate parties see these video tapes.

THE COURT: All right. I guess I'll first start with the media. Who here is from the media? Stand up. All right, and ma'am you're the last person from the media that is here?

UNIDENTIFIED SPEAKER: They are out in the hallway.

THE COURT: In the hallway? You're with whom?

UNIDENTIFIED SPEAKER: With Channel 4.

THE COURT: You're with Channel 4. Probably, the other media folks ought to come in here because I am just going to ask y'all what y'all want and that will tell me what I need to decide....

....

THE COURT: I appreciate you bringing that up, Mr. Johnson, that was very nice. Okay. Is that everybody? We got Channel 4, we got FOX 17.... So. 4 and 17. Now 2 and 5 are not here, they were here yesterday.

....

THE COURT: Right, I was going to let y'all sit over there and you can hear and watch the jury, but Mr. Johnson has a good point, we don't want a, quote revictimization, or alleged revictimization of alleged victim at this time. This case is in progress and it is hard enough as it is. So but the rule—I'm giving deference to Supreme Court Rule 30, so I'm wondering if you have any problem with it, sitting over here and not watching this?

UNIDENTIFIED SPEAKER: I would just say if the public at large is allowed to watch, we should be allowed to watch too.... That would be my only argument.

THE COURT: I can make a decision about the public at large without asking. I think Mr. Johnson has a good point. I don't want to see this child or another child, we used the term revictimized and ... I'm also by saying that that I am recognizing that the defendant is presumed innocent.... So by saying all that I'm ruling that I'm going to ask the public and media, you may stay in the courtroom during this process but I don't want you seeing this video tape. You can hear about it, but I

don't want you watching it at this time. So maybe if I can get you all over in that section. Thanks. So the camera and the audio pickup is off.

....

THE COURT: Once we start we need to have a deputy posted at the door and stop them until a break.... So, why don't I get the court officers to go out there and see if there is anyone [who] wants to be in the courtroom now, they need to come in....

Mr. Johnson, if you want to weigh in on any of these instructions up to now, you may. Do have any objection to the way the Court has handled it up to now.

MR. JOHNSON: No, Your Honor.

The trial transcripts also reflect several additional times when the court directed members of the audience to move.

We are not persuaded initially that a complete or partial closure of the courtroom occurred in this case.

A complete closure has the effect of excluding everyone from the courtroom with the exception of the parties, the attorneys, court personnel, and the witnesses. A complete closure may be for the entire trial or proceeding, or a portion of the proceedings such as the testimony of a particular witness. A partial closure results in the exclusion of certain members of the public while other members of the public are permitted to remain in the courtroom.

*Sams*, 802 S.W.2d at 639.

No members of the media or public were barred from the courtroom in this case, and the State noted specifically on the record that the public had a right to be in the courtroom. To be sure, the trial court arranged the courtroom to screen the media and public from viewing videotapes of the victim, but courtroom spectators often are disadvantaged in viewing trial exhibits as they are offered and introduced. Furthermore, the record discloses that the only media objection was couched in terms of equal treatment for the media and the public. *See Wilbert Rogers v. State*, No. W2004-00654-CCA-R3-PC, slip op. at 3-4, 2005 WL 525268 (Tenn.Crim.App., Jackson, Feb. 22, 2005) (declining to find closure of judicial proceedings because trial judge had his court open, even though other courts were apparently closed due to weather; weather-related closing of other court-rooms did not result in denial of a public trial).

The defense cites to no authority describing what happened in this case as a complete or partial closure of trial proceedings. However, even if the right to a

public trial was somehow implicated, we believe the issue is resolved by the defendant's failures to object to the trial court's actions or otherwise make known his concern. Therefore, we conclude that the defendant waived his right to a public trial to the extent that what occurred can even be characterized as a "closure." *State v. Tizard*, 897 S.W.2d 732 (Tenn.Crim.App.1994) (finding waiver when defendant failed to object to trial court's exclusion of journalism students during the cross-examination of the victim involving vulgar references to masturbation).

The defendant insists that he did not waive any rights and that the State has taken "completely out of context" his negative response to the trial court's inquiry whether he objected "to the way the Court has handled it up to now." We disagree; from the transcript, it is altogether reasonable to conclude that a waiver occurred. At any rate, even if the trial court and defense counsel were discussing some other matter, such as instructions to the media, the record plainly discloses that the defense did *not* object when the seating arrangement was being discussed at an earlier point. Finally, even if the defense broached the subject tongue-in-cheek to highlight the inequity of the trial court's restrictions on defense discovery, the defense was not thereby relieved of the obligation of formally objecting to the seating arrangement orchestrated by the trial court.

In summary, the defendant is not entitled to a new trial regarding any claimed violation of his right to a public trial.

*State v. Schiefelbein*, 230 S.W.3d 88, 114-17 (Tenn. Crim. App. 2007)

## I. Gag Orders

929 S.W.2d 409  
Court of Criminal Appeals of Tennessee,  
at Jackson.

STATE of Tennessee, Appellee,  
v.  
James MONTGOMERY and Tony Carruthers,  
v.  
MEMPHIS PUBLISHING  
COMPANY, Intervenor–Appellant.

May 24, 1996. | No Permission to  
Appeal Applied for to the Supreme Court.

Publishing company applied for extraordinary appeal to determine whether Criminal Court, Shelby County, Joseph B. Dailey, J., properly barred media from publishing name of prosecution witness who appeared in open court during public trial and used true or given name while testifying. The Court of Criminal Appeals, Jones, P.J., held that prior restraint placed on name of witness violated First Amendment and free press guarantees of State Constitution.

Reversed and remanded.

**Attorneys and Law Firms**

\*410 S. Russell Headrick, Memphis, Paul E. Prather, Memphis, Armstrong, Allen, Prewitt, Gentry, Johnson & Holmes, of counsel, for Appellants.

Charles W. Burson, Attorney General & Reporter, Amy L. Tarkington, Assistant Attorney General, Nashville, John W. Pierotti, District Attorney General, Phillip Gerald Harris, J. Robert Carter, Assistant District Attorneys General, Memphis, for Appellee.

**OPINION**

JONES, Presiding Judge.

This Court granted Memphis Publishing Company's application for an extraordinary appeal<sup>1</sup> to determine whether a trial court can bar the media from publishing the name of a prosecution witness when the witness appears in open court during a public trial and uses his true or given name while testifying. In this case, the prior restraint placed upon

the name of Andre Johnson violated the rights guaranteed to Memphis Publishing Company by the First Amendment to the United States Constitution and Article I, § 19 of the Tennessee Constitution. Therefore, this cause is reversed and remanded for further proceedings consistent with this opinion.

1 Tenn.R.App.P. 10.

**I.**

On Saturday morning, April 20, 1996, the Honorable Joseph B. Dailey ruled *sua sponte* that the media was barred from publishing the names of nine prosecution witnesses, who were to testify in the capital murder trial of *State v. James Montgomery and Tony Carruthers*. This prior restraint did not impede the media from printing the testimony given by these witnesses.

Counsel for the Memphis Publishing Company arrived at the courtroom shortly after the ruling. Judge Dailey and counsel engaged in a discussion of the facts and the law governing prior restraints. Counsel asked Judge Dailey to reconsider his ruling. Judge Dailey refused to relent. However, Judge Dailey agreed to meet with counsel later in the day after counsel had the opportunity to research the law controlling the issue in controversy.

Judge Dailey and counsel for the Memphis Publishing Company met after the trial had recessed for the day. Again, Judge Dailey and counsel discussed the facts and the law. Counsel brought to Judge Dailey's attention that approximately one-half of the names on the list distributed by Judge Dailey had already appeared in articles contained in the *Memphis Commercial Appeal*, \*411 the newspaper owned and published by Memphis Publishing Company. Judge Dailey subsequently ruled that the Memphis Publishing Company could publish the names of eight of the nine prosecution witnesses. However, Judge Dailey kept the prior restraint in place on the name of Andre Johnson. Judge Dailey stated that he would read the brief and materials furnished by counsel over the weekend and would announce his ruling as to Andre Johnson on Monday morning, April 22, 1996, at 9:00 a.m.

Judge Dailey conducted the hearing on Monday morning. He permitted the Memphis Publishing Company to intervene in the criminal case. He announced that he was maintaining the prior restraint on Andre Johnson's name.

Shortly after the hearing, the Memphis Publishing Company filed an application for extraordinary appeal pursuant to Rule 10, Tenn.R.App.P. This Court granted the application on April 23, 1996. The State of Tennessee filed an “Answer in Opposition to the Application for Extraordinary Appeal” on April 26, 1996. No other party has expressed an interest in this litigation. Furthermore, the parties have agreed that they do not wish to make oral argument in support of their respective positions.

The case of *State v. Montgomery and Carruthers* terminated on Friday, April 26, 1996. The jury convicted both Montgomery and Carruthers of three counts of murder in the first degree, especially aggravated kidnaping, and especially aggravated robbery. The jury subsequently returned three death sentences for both defendants, one for each victim.

## II.

[1] The proper way to test a prior restraint is by motion to intervene. An interested person or media representative must seek permission to intervene before the party has standing to contest the prior restraint, and, ultimately, test it in the appellate court.<sup>2</sup>

<sup>2</sup> *State v. Drake*, 701 S.W.2d 604, 608 (Tenn.1985).

[2] If a person or entity has been permitted to intervene and the trial court refuses to dissolve the prior restraint, the intervenor may seek appellate review pursuant to Rule 10, Tenn.R.App.P.<sup>3</sup> Recently, the Tennessee Supreme Court adopted Rule 30, which governs media coverage in the courtroom. This rule provides an aggrieved party with the right to seek appellate review pursuant to Rule 10, Tenn.R.App.P. See Tenn.Sp.Ct.R. 30(E).<sup>4</sup>

<sup>3</sup> *Drake*, 701 S.W.2d at 608; see *State v. James*, 902 S.W.2d 911 (Tenn.1995).

<sup>4</sup> This rule exempts the print media who are not using cameras in the courtroom. Tenn.Sup.Ct.R. 30(F)(5).

In this case, the Memphis Publishing Company sought permission and was granted the right to intervene in the criminal case. When the trial court refused to remove the prior restraint, the Memphis Publishing Company sought appellate review in this case pursuant to Rule 10, Tenn.R.App.P. This

Court granted the application. In summary, the Memphis Publishing Company is properly before this Court.

## III.

### A.

Judge Dailey did not conduct a hearing or hear evidence before placing the prior restraint upon the name of Andre Johnson. It appears that a potential prosecution witness saw the name of a prior prosecution witness named in a newspaper article, exited the back door of his home, and went into hiding. The potential witness failed to appear in court as required. An investigator for the District Attorney General's Office sought the potential witness. The investigator in turn told an assistant district attorney general what had occurred, and the assistant district attorney general told the trial court what had been reported to him.<sup>5</sup> Judge Dailey stated that placing the name of Andre Johnson in the newspaper might scare other witnesses from appearing to testify.

<sup>5</sup> Judge Dailey acknowledged that the information he was relating was “third hand” hearsay.

The prior restraint did not preclude the Memphis Publishing Company from printing \*412 the testimony, or excerpts of the testimony, given by Andre Johnson. Moreover, the name of Andre Johnson can be printed by the Memphis Publishing Company after the trial has been concluded.

This was a public trial where the families of the accused, the families of the victims, and interested spectators were permitted to enter the courtroom and listen to the testimony of all of the witnesses. When Andre Johnson appeared as a prosecution witness, he identified himself as Andre Johnson; the people inside the courtroom heard him state his true or given name as well as the testimony that he gave. Ironically, Johnson was well known—a personal acquaintance—of both defendants, Montgomery and Carruthers. Johnson, like Montgomery and Carruthers, was a member of a gang. He, like the defendants, trafficked in narcotics, and he had been previously convicted of a criminal offense and served time for the offense. The Memphis Publishing Company printed the substance of Johnson's testimony, but did not print Johnson's name.

## B.

[3] It has long been established that what occurs in a public courtroom constitutes public property.<sup>6</sup> Equally well-established is that a court does not have special rights “which enables it, as distinguished from other institutions of democratic government, to suppress ... or censor events which transpire [in public] proceedings before it.”<sup>7</sup> Thus, “[t]hose who see and hear what transpired [in open court] can report it with impunity.”<sup>8</sup>

<sup>6</sup> *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947).

<sup>7</sup> *Craig*, 331 U.S. at 374, 67 S.Ct. at 1254.

<sup>8</sup> *Craig*, 331 U.S. at 374, 67 S.Ct. at 1254.

The United States Supreme Court has reiterated what it said in *Craig* on numerous occasions; when there is an open, public trial, the media has an absolute right to publish any information that is disseminated during the course of the trial.<sup>9</sup> This Court will discuss the salient portions of these decisions.

<sup>9</sup> See *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

In *Sheppard v. Maxwell*, the United States Supreme Court was concerned with the right of the accused to receive a fair trial. There was enormous media coverage surrounding the prosecution of Dr. Sheppard for the murder of his wife. In ruling, the court said in part:

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong

measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, *there is nothing that proscribes the press from reporting events that transpire in the courtroom.*<sup>10</sup>

<sup>10</sup> 384 U.S. at 362–63, 86 S.Ct. at 1522, 16 L.Ed.2d at 620 (emphasis added).

In *Nebraska Press Ass'n v. Stuart*, the preliminary hearing was open to public. However, the court entered an order that prohibited everyone in attendance from “releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced” during the preliminary hearing.<sup>11</sup> The Supreme Court, citing *Sheppard*, held that this prior restraint violated the First Amendment. In ruling, the court said:

<sup>11</sup> 427 U.S. at 542, 96 S.Ct. at 2795, 49 L.Ed.2d at 688.

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: “there is nothing \*413 that proscribes the press from reporting events that transpire in the courtroom....” The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but “*once a public hearing had been held, what transpired there could not be subject to prior restraint.*”<sup>12</sup>

<sup>12</sup> 427 U.S. at 568, 96 S.Ct. at 2807, 49 L.Ed.2d at 703 (emphasis added) (citations omitted).

In *Oklahoma Publishing Co. v. District Court*, the trial court entered a pretrial order which “enjoined members of the news media from ‘publishing, broadcasting, or disseminating in any manner, the name or picture of [a] minor child.’ ”<sup>13</sup> The Oklahoma Publishing Company challenged the prior restraint created by the trial court. In ruling, the court said:

<sup>13</sup> 430 U.S. at 308, 97 S.Ct. at 1045, 51 L.Ed.2d at 357.

Petitioner asks us to only hold that the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at



court proceedings which were in fact open to the public. We think this result is compelled by our recent decisions in *Nebraska Press Assn. v. Stuart*...., and *Cox Broadcasting Corp. v. Cohn* ....

\* \* \* \* \*

The court below found the rationale of these decisions to be inapplicable here because a state statute provided for closed juvenile hearings unless specifically opened to the public by court order and because “there is no indication that the judge distinctly and expressly ordered the hearing to be public.” We think *Cox* and *Nebraska Press* are controlling nonetheless. Whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel. No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were “publicly revealed in connection with the prosecution of the crime....” Under these circumstances, the District Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments.<sup>14</sup>

<sup>14</sup> 430 U.S. at 310–12, 97 S.Ct. at 1046–47, 51 L.Ed.2d at 358–59 (citations omitted).

In *San Antonio Express-News v. Roman*,<sup>15</sup> a case strikingly similar to this case, two minor witnesses testified as defense witnesses. When the minors completed their respective testimony, “the trial court ordered ... the news media in general not to broadcast, report, or publish the names of these two minor witnesses.”<sup>16</sup> In holding that the order of the trial court violated the constitutional rights of the media, the Texas Court of Appeals said:

<sup>15</sup> 861 S.W.2d 265 (Tex.Ct.App.1993).

<sup>16</sup> 861 S.W.2d at 266.

In the instant case, the trial was open to the public and was attended by the general public as well as the media. The testifying minors identified themselves by first and last names and gave public testimony. No request to conceal their identities was made prior to their giving testimony. Once their names were placed in the public record, before a courtroom of spectators, no constitutionally valid reason

to limit access to that information existed.... The trial court clearly abused its discretion in entering the gag order.<sup>17</sup>

<sup>17</sup> 861 S.W.2d at 268 (citations omitted).

[4] In summary, once Andre Johnson testified in open court and revealed his first and last name, no valid reason existed for the prior restraint on Johnson's name. The trial court's refusal to remove the prior restraint violated the First Amendment rights of the Memphis Publishing Company and its employees. The law is crystal clear: the media may publish the names and testimony of witnesses testifying in open court during a public trial with impunity. Any restraint \*414 placed on this right is violative of the First Amendment.

#### IV.

The State of Tennessee has filed a motion to dismiss this appeal. The motion alleges that the issue to be decided is moot because the trial has ended and the prior restraint on the name of Andre Johnson has been removed. The trial court ruled that the Memphis Publishing Company could publish Johnson's name after the trial had ended. The Memphis Publishing Company, relying on the exceptions to the mootness doctrine, argues that this Court should address the issue on the merits since it involves a constitutional right.

[5] This jurisdiction recognizes two exceptions to the mootness doctrine. First, if the error is capable of repetition but may evade appellate review, an appellate court may address the issue on the merits. Second, if the issue to be decided is of great public interest and important to the administration of justice, an appellate court may address the issue on the merits. Both of these exceptions were recognized in the recent case of *State v. Morrow and Meredith Corp.*,<sup>18</sup> where this Court addressed a violation of Rule 30, Tennessee Supreme Court. This Court addressed the issue notwithstanding the fact the trial had ended and the relief sought could not be implemented.

<sup>18</sup> Robertson County No. 01-C-01-9601-CC-00022, slip op. at 4, n. 2, 1996 WL 170679 (Tenn.Crim.App., Nashville, April 12, 1996).

#### A.

The United States Supreme Court addressed the first exception to the mootness rule in *Gannett Co. v. DePasquale*.<sup>19</sup> As the Court said in *Gannett*:

19 443 U.S. 368, 377, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608, 620 (1979).

To meet that test, two conditions must be satisfied: “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.”<sup>20</sup>

20 443 U.S. at 377, 99 S.Ct. at 2904, 61 L.Ed.2d at 620 (quoting from *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350, 353 (1975)).

This exception is recognized in *McIntyre v. Traugher*<sup>21</sup> and *LaRouche v. Crowell*.<sup>22</sup>

21 884 S.W.2d 134, 137 (Tenn.App.1994).

22 709 S.W.2d 585, 587 (Tenn.App.1985).

[6] These conditions have been met in this case. The ruling came within the last week of the trial. It expired at the conclusion of the trial. Thus, it was too short in duration to permit full review. If this procedure is not corrected at

this time, there is certainly a reasonable expectation that the procedure in question could be repeated.<sup>23</sup>

23 See *Nebraska Press Ass'n*, 427 U.S. at 546–47, 96 S.Ct. at 2797, 49 L.Ed.2d at 690.

**B.**

The second exception, issues of great public interest and importance to the administration of justice, has been recognized in several cases.<sup>24</sup> The First Amendment rights of the press are always of great public interest and are of vital importance to the administration of justice in this state. As a result, the appellate courts of this state have zealously guarded the First Amendment rights of the print and electronic media.

24 See *Walker v. Dunn*, 498 S.W.2d 102, 104 (Tenn.1972); *New Rivieria Arts Theatre v. State ex rel. Davis*, 219 Tenn. 652, 658, 412 S.W.2d 890, 893 (1967); *McIntyre*, 884 S.W.2d at 137.

SUMMERS and HAYES, JJ., concur.

**All Citations**

929 S.W.2d 409, 24 Media L. Rep. 2172

35 S.W.3d 516  
Supreme Court of Tennessee,  
at Jackson.

STATE of Tennessee

v.

Tony V. CARRUTHERS & James Montgomery.

Dec. 11, 2000.

Defendants were convicted after joint jury trial in the Criminal Court, Shelby County, Joseph B. Dailey, J., of capital murder and were sentenced to death. They appealed. The Court of Criminal Appeals affirmed. On automatic appeal, the Supreme Court, Drowota, J., held that: (1) in a question of first impression, one defendant both forfeited and implicitly waived his right to appointed counsel and was properly required to proceed pro se; (2) reversible error was committed by not severing pro se defendant's trial from that of the codefendant; (3) error was harmless in gag order's being overly broad; and (4) death sentence imposed upon pro se defendant was not disproportionate to similar capital murder cases.

Affirmed in part, and reversed in part, and remanded for new trial as to one defendant.

Birch Jr., J., filed a concurring and dissenting opinion.

#### Attorneys and Law Firms

\*523 Stephen R. Leffler and Lee A. Filderman, Memphis, TN, for the appellant, Tony V. Carruthers.

Robert C. Brooks and Edward W. Chandler, Memphis, TN, for the appellant, James Montgomery.

Michael E. Moore, Solicitor General; Amy Tarkington, Senior Counsel; Phillip Gerald Harris; Assistant District Attorney General; and J. Robert Carter, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

DROWOTA, J., delivered the opinion of the court, in which ANDERSON, C.J., HOLDER, and BARKER, JJ., joined.

Tony Carruthers and James Montgomery were each convicted of three counts of first degree premeditated murder and were sentenced to death on each conviction. The Court of

Criminal Appeals affirmed the convictions and sentences of both Carruthers and Montgomery. Thereafter, the cases were docketed in this Court. After carefully reviewing the record \*524 and the relevant legal authorities, we conclude that none of the errors raised by Tony Carruthers require reversal, that the evidence is sufficient to support the jury's findings of the aggravating circumstances, and that the sentences of death are not excessive or disproportionate considering the circumstances of the crimes and the defendant. With respect to James Montgomery, we conclude that the trial court erred in denying him a severance and that the error resulted in Montgomery being deprived of a fair trial. Accordingly, we reverse Montgomery's convictions and sentences and remand for a new trial.

#### OPINION

The defendants, Tony V. Carruthers and James Montgomery, were each convicted of first degree murder for killing Marcellos "Cello" Anderson, his mother Delois Anderson, and Frederick Tucker in Memphis in February of 1994.<sup>1</sup> All of the victims disappeared on the night of February 24, 1994. On March 3, 1994, their bodies were found buried together in a pit that had been dug beneath a casket in a grave in a Memphis cemetery.<sup>2</sup>

<sup>1</sup> They were also each convicted of three counts of especially aggravated kidnapping and one count of especially aggravated robbery of Marcellos Anderson.

<sup>2</sup> James Montgomery's younger brother Jonathan Montgomery was also charged on all counts involved in this case. However, several months prior to trial, Jonathan Montgomery was found hanged in his cell in the Shelby County jail.

#### *The Guilt Phase*

The proof introduced at the guilt phase of the trial showed that one of the victims, Marcellos Anderson, was heavily involved in the drug trade, along with two other men, Andre "Baby Brother" Johnson and Terrell Adair.<sup>3</sup> Anderson wore expensive jewelry, including a large diamond ring, carried large sums of money on his person, and kept a considerable amount of cash in the attic of the home of his mother, victim Delois Anderson. When his body was discovered, Anderson was not wearing any jewelry and did not have any cash on

which may be drawn from the evidence. *See Hall*, 8 S.W.3d at 599; *Bland*, 958 S.W.2d at 659.

At the time this offense was committed, first degree murder was defined as an “intentional, premeditated and deliberate killing of another.” Tenn.Code Ann. § 39–13–202(a)(1)(1991).<sup>43</sup> “Intentional” is defined as the “conscious objective or desire to engage in the conduct or cause the result.” Tenn.Code Ann. § 39–11–106(a)(18) (1991). Premeditation, on the other hand, requires “the exercise of reflection and judgment.” Tenn.Code Ann. § 39–13–201(b) (2) (1991). Finally, deliberation requires proof of a “cool purpose” that includes some period of reflection during which the mind is free from passion and excitement. *See* Tenn.Code Ann. § 39–13–201(b)(1) (1991).

<sup>43</sup> The statute has since been amended and no longer requires proof of deliberation. *See* Tenn.Code Ann. § 39–13–202(a)(1) (1999 Supp.) (“(a) First degree murder is: (1)[a] premeditated and intentional killing of another....”).

[50] [51] [52] The elements of premeditation and deliberation are questions of fact to be resolved by the jury. *See Bland*, 958 S.W.2d at 660. These elements may be established by proof of the circumstances surrounding the killing. *Id.*; *see also State v. Brown*, 836 S.W.2d 530, 539 (Tenn.1992). As we stated in *Bland*, there are several factors which tend to support the existence of these elements including: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing. *See State v. Pike*, 978 S.W.2d 904, 914 (Tenn.1998); *Bland*, 958 S.W.2d at 660; *Brown*, 836 S.W.2d at 541–42; *State v. West*, 844 S.W.2d 144, 148 (Tenn.1992).

[53] [54] Having reviewed the proof in the light most favorable to the State, as we are required to do, we agree with the Court of Criminal Appeals that the evidence is legally sufficient to support the jury's verdicts as to each defendant. The trial proof has been thoroughly and fully summarized. With respect to Carruthers' challenges to the State's witnesses, suffice it to say that, through cross-examination, the jury was made aware that some of the witnesses had prior felony records, that some of the witnesses admitted to past drug dealing, and that some of the witnesses had given inconsistent statements to the police regarding the events of February 24 and 25, 1994. However, the jury resolved these issues of

credibility in favor of the State, and an appellate court may not reconsider the jury's credibility assessments. Moreover, while we have already resolved the severance issue in favor of Montgomery, we reject his claim that the circumstantial evidence was legally insufficient. In our view, the evidence is legally sufficient. *See* Footnote 39, *supra* (discussing the applicability of the co-conspirator hearsay exception).

### *Issuance of Gag Order*

Carruthers next argues that the trial court committed reversible error by issuing a “gag order” preventing him from speaking to the media.<sup>44</sup> The trial court's \*559 order, issued about a month before the trial began, states:

<sup>44</sup> The trial court also issued a gag order preventing the media from publishing the names of certain prosecution witnesses, which was later modified to prevent the publication of only one prosecution witness. The Court of Criminal Appeals vacated this order, holding that it was a prior restraint in violation of the First Amendment to the United States Constitution. *State v. Montgomery*, 929 S.W.2d 409 (Tenn.Crim.App.1996). The gag order prohibiting the attorneys and Carruthers from talking to the media, however, remained in place throughout trial.

The Constitutions of the United States and the State of Tennessee guarantee defendants in all criminal cases due process of law and the right to a fair and impartial jury. It is the duty of the trial court to see that every defendant is afforded all his constitutional rights.

In order to safeguard those rights, this Court is of the opinion that the following rule is necessary to constitutionally guarantee an orderly and fair trial by an impartial jury. Therefore, this Court orders the following:

All lawyers participating in this case, including any defendants proceeding pro se, the assistants, staff, investigators, and employees of investigators are forbidden to take part in interviews for publicity and from making extra-judicial statements about this case from this date until such time as a verdict is returned in this case in open court.

Because of the gravity of this case, because of the long history of concerns for the personal safety of attorneys, litigants and witnesses in this case, because of the

potential danger—believed by this Court to be very real and very present—of undermining the integrity of the judicial system by “trying the case in the media” and of sullyng the jury pool, this Court feels compelled to adopt this extraordinary pretrial measure.

Carruthers challenges this order as violating his right to a fair trial, guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution. Carruthers is correct to rely upon the Sixth Amendment. We note, however, that the United States Supreme Court has stated that a “right to fair trial” claim also implicates the Fifth and Fourteenth Amendment Due Process Clauses. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 684–85, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.”). Nonetheless, numerous courts have referred simply to the Sixth Amendment right to a fair trial in this context, and we will do the same. *See, e.g., In re Dow Jones & Co., Inc.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied*, 488 U.S. 946, 109 S.Ct. 377, 102 L.Ed.2d 365 (1988); *United States v. Ford*, 830 F.2d 596, 600 (6th Cir.1987).

Carruthers also raises First Amendment concerns, which is understandable given that gag orders exhibit the characteristics of prior restraints. *See United States v. Brown*, 218 F.3d 415, 424 (5th Cir.2000). *But see Dow Jones*, 842 F.2d at 608 (noting a “substantial difference” between a restraint on the press and a restraint on trial participants). Yet the crux of Carruthers' argument on appeal is that his defense was inhibited because he could not respond to the media's coverage of the trial; he could do nothing to alter the jurors' preconceptions about the case gained from their exposure to news reports. Carruthers also argues that his inability to speak to the press may have prevented potential witnesses from coming forward to his defense. Properly stated, then, his argument asserts that the gag order interfered with his right to a fair trial. To the extent Carruthers' brief raises a First Amendment claim, however, we find it moot. By its own terms, the trial court's order ceased to exist upon the return of the verdict, which occurred several years ago. Of course, since a gag order is by definition a restriction on speech, our review of Carruthers' Sixth Amendment claim demands consideration of First Amendment principles. As is clear from the case law, discussed below, the proper standard governing the validity of gag orders explicitly incorporates these principles, as do we in our analysis.

The Court of Criminal Appeals rejected Carruthers' arguments and upheld the gag order in its entirety. As noted in its opinion, the following circumstances were considered \*560 by the trial court as reasons for issuing the gag order: numerous threats to attorneys; the death of one of the co-defendants; the highly-charged emotional climate of the trial (e.g., the courtroom was guarded by S.W.A.T. team members); the gunning down of a deputy jailer in his driveway, which the trial judge thought was related to the case; the fleeing of one witness after reading about the case in the newspaper; and the statements of two witnesses who had already testified that defendant Montgomery threatened to kill them if they talked about the case. Also, as the Court of Criminal Appeals noted, Alfredo Shaw testified that Carruthers threatened him and made arrangements to have a reporter interview him about recanting his story. Thus, the court held that the trial judge was properly concerned about the media's influence on the potential jury pool and the safety of all involved in the trial. The court also held that the public was certainly aware of the trial from the media's coverage and that Carruthers' statements to the press would not likely have led to unknown witnesses coming forward.

We agree with the Court of Criminal Appeals' judgment that under these circumstances a gag order was proper. We hold, however, that under the constitutional standards discussed below, the scope of that order was too broad. Nevertheless, given the circumstances of this case, the error is harmless.

Numerous courts have recognized that the correct standard by which to evaluate the constitutionality of gag orders depends upon who is being restrained: the press or trial participants. *See, e.g., Brown*, 218 F.3d at 425; *Dow Jones*, 842 F.2d at 608. If the gag order is directed to the press, the constitutional standard is very stringent. *See Montgomery*, 929 S.W.2d at 414 (discussing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)). Carruthers' appeal before this Court, however, concerns the trial court's gag order directed to him, a defendant, representing himself at trial.

As the United States Court of Appeals for the Fifth Circuit has recently determined, the federal circuit courts are split as to the correct constitutional standard governing gag orders on trial participants. *See Brown*, 218 F.3d at 425–28. For example, the Sixth Circuit has held that gag orders on trial participants must meet the exacting “clear and present danger” test for free speech cases enunciated in *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). *See Ford*, 830 F.2d at 598 (“We see no legitimate reasons for

a lower standard for individuals [as compared to the press].”). *Accord Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir.1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976) (applying a “serious and imminent threat” test); *Levine v. United States District Court*, 764 F.2d 590, 595–96 (9th Cir.1985), *cert. denied*, 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986) (same). In contrast, the Second, Fourth, and Tenth Circuits analyze the validity of gag orders on trial participants under the less stringent standard of whether the participant’s comments present a “reasonable likelihood” of prejudicing a fair trial. *See Dow Jones*, 842 F.2d at 610; *In re Russell*, 726 F.2d 1007, 1010 (4th Cir.), *cert. denied*, 469 U.S. 837, 105 S.Ct. 134, 83 L.Ed.2d 74 (1984); *United States v. Tijerina*, 412 F.2d 661, 666–67 (10th Cir.), *cert. denied*, 396 U.S. 990, 90 S.Ct. 478, 24 L.Ed.2d 452 (1969). *See also News–Journal Corp. v. Foxman*, 939 F.2d 1499, 1512–15 (11th Cir.1991) (discussing the case law authority for the less stringent standard). Without deciding whether to adopt the “reasonable likelihood” standard, the Fifth Circuit determined that the “clear and present danger” test was not required, and analyzed the case before it under a “substantial likelihood” test. *See Brown*, 218 F.3d at 427–28.

[55] Although this Court has upheld restraints on trial participants, *see State v. \*561 Hartman*, 703 S.W.2d 106 (Tenn.1985) (order restraining counsel from talking with the public or media about the facts of the case), we have never discussed the underlying constitutional issues. We therefore decide this issue based on our own interpretation of United States Supreme Court precedent and the Tennessee Constitution with guidance from the federal circuit courts.<sup>45</sup> We note that the Court of Criminal Appeals’ opinion emphasizes that “[t]he twist in this case, however, is that Carruthers was representing himself during trial.” Although this fact is relevant in applying the constitutional standard to determine whether Carruthers’ right to a fair trial was breached, our review of the case law indicates that the constitutional standard is the same regardless of which trial participant is restrained.

<sup>45</sup> Though they are persuasive authority when interpreting the United States Constitution, this Court is not bound by decisions of the federal district and circuit courts. We are bound only by decisions of the United States Supreme Court. *See Strouth v. State*, 999 S.W.2d 759, 769 n. 9 (Tenn.1999); *State v. McKay*, 680 S.W.2d 447, 450 (Tenn.1984).

The *Brown* court’s decision to follow a “substantial likelihood” test rather than the “clear and present danger” test

rests on its interpretation of *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The *Brown* court determined that *Gentile* rejected the clear and present danger test for trial participants and that *Gentile* is the Supreme Court’s latest discussion of the issue. *See Brown*, 218 F.3d at 426–28 (noting that the cases endorsing the more stringent test predated *Gentile* ). We agree with the *Brown* court’s holding.

*Gentile* involved an attorney who held a press conference the day after his client was indicted on criminal charges. *See Gentile*, 501 U.S. at 1063–65, 111 S.Ct. at 2738–40 (discussing the facts). The attorney proclaimed his client’s innocence, strongly suggested that a police detective was in fact the perpetrator, and stated that the alleged victims were not credible. Although the trial court “succeeded in empanelling a jury that had not been affected by the media coverage and [the client] was acquitted on all charges, the [Nevada] state bar disciplined [the attorney] for his statements.” *Id.* at 1064, 111 S.Ct. at 2739. The Nevada Supreme Court upheld the state bar’s disciplinary action, finding that the attorney “knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client’s case.” *Id.* at 1065, 111 S.Ct. at 2739. Although the Supreme Court reversed this judgment because it found the Nevada Supreme Court’s construction of the disciplinary rule “void for vagueness,” *id.* at 1048–51, 111 S.Ct. at 2731–32, a majority of the Court held that the “substantial likelihood of prejudice” test struck the proper constitutional balance between an attorney’s First Amendment rights and the state’s interest in fair trials. *Id.* at 1065–76, 111 S.Ct. at 2740–45.<sup>46</sup>

<sup>46</sup> In *Zimmermann v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn.1989) we upheld Disciplinary Rule 7–107(B) and (E), which govern extrajudicial statements made by attorneys in criminal cases, under the Tennessee and United States Constitutions. The *Zimmermann* holding was, in part, based on a decision of the New Jersey Supreme Court analyzing the balance between First Amendment rights and the need to ensure the fair administration of justice. *Zimmermann*, 764 S.W.2d at 761 (discussing *In re Rachmiel*, 90 N.J. 646, 449 A.2d 505 (1982)). Both *Zimmermann* and *In re Rachmiel*, however, were decided before *Gentile*. In light of *Gentile*, we have reconsidered the constitutional issues at stake under both the Tennessee and United States Constitutions.

In so doing, the Court held that the stringent standard governing restraints on the press articulated in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) should not apply to restraints on lawyers whose clients are parties to the proceeding. *Id.* at 1074, 111 S.Ct. at 2744. *See also News-Journal Corp.*, 939 F.2d at 1512–13 (noting that the Supreme Court has suggested \*562 restricting trial participants as an *alternative* to a prior restraint on the media). The Court quoted with approval from *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) in which the defendant's conviction was overturned because of prejudicial publicity that prevented him from receiving a fair trial:

The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. 384 U.S. at 363, 86 S.Ct. at 1522.

*Id.* at 1072, 111 S.Ct. at 2743.

As the *Brown* court held, however, *see Brown*, 218 F.3d at 426, the Court in *Gentile* did not conclude that the “substantial likelihood of prejudice” test was required; it held only that this test complies with the First Amendment. *See Gentile*, 501 U.S. at 1075, 111 S.Ct. at 2745 (“We agree with the majority of the States that [this standard] constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.”). Moreover, *Gentile* involved a restraint on an attorney's speech; in this case, Carruthers was a party as well as his own attorney. It is necessary, therefore, to decide whether the *Gentile* rationale applies to parties.

Although unnecessary to its holding, we find significant evidence in the *Gentile* opinion that the clear and present danger test is not required for gag orders restraining parties or other trial participants. The Court emphasized the distinction between “participants in the litigation and strangers to it” as

recognized by an earlier case, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). *Id.* at 1072–73, 111 S.Ct. at 2743–44. As characterized by the *Gentile* Court, the Court in *Seattle Times* “unanimously held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery.” *Id.* at 1073, 111 S.Ct. at 2744. The *Gentile* Court then quoted from *Seattle Times* as follows: “[a]lthough litigants do not ‘surrender their First Amendment rights at the courthouse door,’ those rights may be subordinated to other interests that arise in this setting” (citation omitted); and further, “on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant.” *Id.* The Court also stated that “[f]ew, 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.” *Id.* at 1075, 111 S.Ct. at 2745 (citing *Sheppard*, 384 U.S. at 350–51, 86 S.Ct. at 1515–16).

We conclude that the concerns raised in *Gentile* and *Sheppard* are applicable regardless of whether a party or his or her attorney is being restrained. A prejudicial statement made to the press by an attorney is not somehow less prejudicial if made by a party. In short, what matters is *what* is being said and not *who* is saying it. *See Brown*, 218 F.3d at 428 (“As the district court pointed out, trial participants, like attorneys, are ‘privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties.’ ”). If anything, as one court has reasoned, extrajudicial comments made by trial participants have the potential to be more harmful than comments made by attorneys:

*Gentile* involved a state supreme court rule governing the conduct of members of the bar of that state, while we examine \*563 a state trial court's restrictive order entered in a particular case and directed to all trial participants. Because of their legal training, attorneys are knowledgeable regarding which extrajudicial communications are likely to be prejudicial. The other trial participants encompassed by the restrictive order in this case did not have such legal

discernment and expertise. Given the public attention generated by this case, defendants, witnesses and law enforcement personnel were eager to talk with the press concerning their particular views. While attorneys can be governed by state supreme court or bar rules, other trial participants do not have these guidelines. *News-Journal Corp.*, 939 F.2d at 1515 n. 18.

Thus, we conclude that for purposes of the constitutional right to a fair trial, *Gentile's* rationale applies to all trial participants, meaning that the more stringent clear and present danger test is not required.

[56] Having decided that the clear and present danger test is not constitutionally mandated, we must now decide which test to adopt: the “substantial likelihood of prejudice” test or, as some courts have employed, the “reasonable likelihood” test. As noted, *Gentile* held only that the substantial likelihood test was constitutional, not that it was required. *See Brown*, 218 F.3d at 426–28; *News-Journal Corp.*, 939 F.2d at 1515 n. 18. Nonetheless, we conclude under both the state and federal constitutions that the substantial likelihood test strikes a constitutionally permissible balance between the free speech rights of trial participants, the Sixth Amendment right of defendants to a fair trial, and the State's interest in a fair trial. *Cf. Gentile*, 501 U.S. at 1070, 111 S.Ct. at 2742. Accordingly, we hold that a trial court may constitutionally restrict extrajudicial comments by trial participants, including lawyers, parties, and witnesses, when the trial court determines that those comments pose a substantial likelihood of prejudicing a fair trial.

[57] Under this constitutional standard, we hold that the trial court was justified in imposing a gag order on Carruthers. At trial, this case garnered a significant amount of media coverage, raising the concerns expressed in *Sheppard*. As Carruthers himself notes in his brief:

This trial was charged with emotion from start to finish. There were allegations of gang affiliations and testimony of large scale narcotics dealings. The courtroom was guarded by S.W.A.T. team members and by Sheriff's deputies who were authorized to search those entering the courtroom. Representatives of news organizations

were present daily to record the proceedings.

In addition to its concerns about media coverage, the trial court was presented with the problem of witness intimidation. The trial judge found that witnesses who had already testified stated that defendant Montgomery threatened to kill them if they talked. Moreover, Alfredo Shaw testified that Carruthers had threatened him and made arrangements to have a reporter interview him about recanting his story. Under these unusual circumstances, the trial court was justified in employing heightened measures to ensure that a proper jury could be found and to prevent Carruthers from manipulating the media so as to intimidate witnesses. The trial judge could not ignore these issues. Indeed, he had a constitutional duty under the state and federal constitutions to ensure a fair trial.

Before a gag order can be entered, however, the case law suggests that a trial court should consider reasonable alternative measures that would ensure a fair trial without restricting speech. In the context of restraints on the press, the United States Supreme Court has specifically held that a trial court should consider such measures. *See Nebraska Press*, 427 U.S. at 563–64, 96 S.Ct. at 2804–05. These measures include: a change of trial venue; postponement of the trial to allow public attention to subside; searching questions \*564 of prospective jurors; and “emphatic” instructions to the jurors to decide the case on the evidence. *Id.* (discussing *Sheppard*, 384 U.S. at 357–62, 86 S.Ct. at 1519–22).

Although it is not clear whether the need to consider alternatives is also necessary in the context of restraints on trial participants, some federal circuit courts have assumed so, *see, e.g., Brown*, 218 F.3d at 430–31; *Dow Jones*, 842 F.2d at 611–12, and the trial judge considered several of the alternatives. The trial court found that neither a change of venue nor a continuance was practical because the case was several years old and one attempt to try the case had already been made. The court appropriately gave careful attention to voir dire and jury instructions, but determined that these alternatives alone were insufficient.

Given the extraordinary nature of this case, we hold that the trial court was entitled to make this judgment. We also note that in addition to and apart from the concerns about pretrial publicity interfering with the task of finding an unbiased jury, the trial court was concerned about witness intimidation and Carruthers' potential manipulation of the press. None of the alternatives mentioned in *Nebraska Press* and *Sheppard* would likely have alleviated these concerns.



The trial court reasonably concluded that only a gag order would be effective. Finally, we note that the alternatives mentioned above are not free of cost to the judicial system. As the *Gentile* Court wrote:

Even if a fair trial can ultimately be ensured through voir dire, change of venue, or some other device, these measures entail serious costs to the system. Extensive voir dire may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by the petitioner. *Gentile*, 501 U.S. at 1075, 111 S.Ct. at 2745.

[58] Having decided that the trial court did not err in issuing the gag order, the final issue to consider is the scope of the order. As discussed above, Carruthers' argument on appeal is properly construed as a "right to fair trial" claim rather than a First Amendment claim. Nevertheless, a gag order by definition restricts speech. In determining whether a gag order is appropriate, therefore, a court must be mindful that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989); see also *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974) (the limitation on speech "must be no greater than is necessary or essential to the protection of the particular governmental interest involved") (quoted in *Brown*, 218 F.3d at 429).

On its face, the trial court's order has no exceptions or limitations: it prohibits the defendants and their attorneys from making *any* comments to the press about the case. This gag order is considerably broader than any upheld in the cases discussed above. *Gentile*, though not a gag order case, involved a limitation on attorney speech which prohibited only statements "substantially likely to prejudice" the adjudication of the case. See *Gentile*, 501 U.S. at 1064, 111 S.Ct. at 2739. *Brown* involved an order which "left available to the parties various avenues of expression, including assertions of innocence, general statements about the nature of an allegation or defense, and statements of matters of public record." *Brown*, 218 F.3d at 429–30. The

order in *Dow Jones* was similar. See *Dow Jones*, 842 F.2d at 606.

[59] Given the history of this trial, we certainly understand why the trial court crafted such a broad order. Indeed, in certain cases, as where a defendant takes \*565 advantage of a limited gag order or fails to comply with it, an order of such breadth may be justified. Nonetheless, we hold that initial gag orders on trial participants should ordinarily contain the exceptions found in the *Brown* order and allow trial participants to make general statements asserting innocence, commenting on the nature of an allegation or defense, and discussing matters of public record.

[60] We find the trial court's failure to include these exceptions in the gag order was harmless error. We fail to see how limited statements made by Carruthers to the media about his innocence, allegations or defenses, or matters in the public record would have altered the result of the trial. We do not think that allowing Carruthers to make such statements would have furthered the goal of finding an impartial jury, nor do we think it probable that any new witnesses would have come forward. We also point out that these crimes occurred in 1994, and the gag order was issued only one month before trial in 1996. In the two years preceding issuance of the gag order, Carruthers had access to the media. The record shows both that he availed himself of that access and that the media responded by actively covering the trial and events leading up to the trial. Under these circumstances, the error below was harmless.

#### *Sentencing: Non-Capital Offenses*

[61] Citing state and federal constitutional provisions and Tennessee Rule of Criminal Procedure 43, Carruthers next contends that his right to be present at a crucial stage of his criminal proceeding was violated when the trial judge conducted the sentencing hearing on his convictions for especially aggravated robbery and especially aggravated kidnapping in his absence. The State responds that Carruthers waived his right to be present because he was voluntarily absent from the sentencing hearing. We agree.

The record reflects that immediately after the sentencing verdict was rendered on the capital offenses, the trial judge announced that the sentencing hearing for the non-capital offenses would be held on May 20, 1996. Carruthers was present when this announcement was made. The trial judge

## J. Change of Venue

**IN THE CIRCUIT COURT FOR DICKSON COUNTY, TENNESSEE  
AT CHARLOTTE**

<b>STATE OF TENNESSEE</b>	)	
	)	
<b>v.</b>	)	<b>Case No. CR7990</b>
	)	
<b>MITCHELL WAYNE BOWERS</b>	)	

**MOTION FOR CHANGE OF VENUE**

Mr. Mitchell Bowers asserts that he cannot receive a fair and impartial trial in Dickson County because of the sheer number of citizens in this community who have indicated a prejudice and bias against him and who have presumably expressed their prejudices and biases to other Dickson County residents who will serve on the jury. Thus, Mr. Bowers requests that this Court transfer this case to another venue. As required by Rule 21(b), Tenn. R. Crim. P., and as recognized in *State v. Davidson*, 121 S.W.3d 600, 611 (Tenn. 2003), this motion is accompanied by affidavits demonstrating the prejudice.

A.

Mr. Bowers is a truck driver. On July 8, 2005 he departed from the lane of traffic and struck and killed a trooper who was standing out of the right-of-way, some short distance over the fog line, while the trooper was writing a ticket to a motorist. After stopping his truck and telling an assisting officer that he was the driver involved, Mr. Bowers was arrested at the scene.

Mr. Bowers was charged with a non-alcohol related vehicular homicide in violation of Tenn. Code Ann. § 29-13-213, a Class C Felony. Mr. Bowers was later charged with a violation of Tenn. Code Ann. § 55-8-132 – the so-called move-over law – which is a Class C Misdemeanor punishable by the terms of Tenn. Code Ann. § 55-8-132 with a \$50.00 fine. On July 11, 2005 the general sessions judge fixed a bond at one million dollars. The matter was bound over to the grand jury on July 15th, and the grand jury indicted Mr. Bowers in September. On September 12, 2005 Mr. Bowers was arraigned in this Court, and his bond was reduced to a quarter of a million dollars following an evidentiary hearing. Mr. Bowers was released four days later through a professional bonding company.

The victim, Trooper Todd Larkins, was a young, popular law enforcement officer whose tragic death inflamed the community. In preparation for the trial the defense became aware of pervasive publicity surrounding the case, which has continued unabated in this county of approximately 45,000 souls.

The accident occurred on the interstate and, as is becoming more common, a huge seven-foot cross was erected at the scene within days of the tragedy. More recently, the government erected a large “move-over” sign, which was intentionally located within a mile of the location of the officer’s death (and the seven-foot cross). Source: Department of Safety Website noting that the sign was erected on “I-40 east, Dickson Co., mile marker 173, near Trooper Larkin accident site.” See page 36 of the attachment to the Raybin Affidavit. These publicly visible signs are intended to catch the attention of all drivers as they pass by. However, they are particularly meaningful to members of the Dickson

County community and can have nothing but an adverse effect on Mr. Bowers' chances for a fair trial in Dickson County.

The defense commissioned a public opinion survey to gauge community sentiment. Of those 124 persons who responded to the survey, only two individuals had not heard of the case. The investigators inquired whether Mr. Bowers could have a fair trial in Dickson County. From the 124 individuals who responded to the survey, the following statistics emerge: 58.9% believed that it would be fairer for the trial to be moved out of Dickson County, 20.1% either did not know or had no opinion as to whether a fair trial could be conducted in Dickson County, and only 21.0% believed that a fair trial could be conducted in Dickson County. The survey is unassailable given that ALL of the those surveyed had been members of the Dickson County jury pools between March and July of this year.

The survey was completed just prior to the October 8, 2005 rally staged by the trooper's friends in Dickson to raise money and publicize the move-over law. The rally – attended by hundreds of people – included tee-shirts and bumper stickers containing the trooper's name and badge number. Naturally this event was subject to wide media attention in the local press and on televised broadcasts to the community.

Rule 22 of the Tennessee Rules of Criminal Procedure requires that a motion for change of venue “be made at the earliest date after which the cause for the change of venue is said to have arisen.” The October 8 rally for Trooper Larkins was the proverbial “last straw,” and thus this motion is promptly tendered to promote the fair administration of justice.

B.

Under the United States Constitution, a defendant must receive a fair trial consistent with constitutional due process. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966). “The constitutional standard of fairness requires that a defendant have a ‘panel of impartial, indifferent jurors.’” *Murphy v. Florida*, 421 U.S. 784, 799, 95 S.Ct. 2031 (1975), quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639 (1961). If a defendant cannot obtain such a jury in the county where the charges are brought, the defendant is entitled to a change of venue, see e.g., *Groppi v. Wisconsin*, 400 U.S. 505, 510-11, 91 S.Ct. 490 (1971). Indeed, Justice Black has stated that “our system of justice has always endeavored to prevent even the probability of unfairness.” *In re Murchinson*, 349 U.S. 133, 136, 75 S.Ct. 623 (1955).

The Tennessee constitution also affords a defendant a fair trial consistent with Due Process. Article I, § 9 of the Tennessee Constitution states that “in all criminal prosecutions, the accused hath the right to...a speedy public trial, by an impartial jury of the County in which the crime shall have been committed....” See also, Tenn. R. Crim. P. 18(a). Where an impartial jury cannot be had in such a county, Rule 21 of the Tennessee Rules of Criminal Procedure sets forth the standard, stating, in relevant part: “In all criminal prosecutions the venue may be changed upon motion of the defendant, or upon the court’s own motion with the consent of the defendant, if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had.”

The decision whether to change venue falls within the discretion of the trial court. *State v. Smith*, 857 S.W.2d 1, 6 (Tenn. 1993); *State v. Melson*, 638 S.W.2d 342, 360 (Tenn.

1982); *Rippy v. State*, 550 S.W.2d 636, 638 (Tenn. 1977). In the context of a pretrial motion, the view of the trial court is necessarily prospective:

The rule is preventative. It is anticipatory. It is not solely curative as is a post-conviction constitutional attack. Thus, the rule evokes foresight, always a more precious gift than hindsight, and for this reason the same certainty which warrants the reversal of a conviction will not always accompany the change of venue. Succinctly, then, it is well-grounded fear that a defendant will not receive a fair and impartial trial which warrants the application of the rule.

*United States v. Marcello*, 280 F. Supp. 510, 513 (E.D. La. 1968), aff'd, 423 F.2d 993 (5th Cir. 1970).

Notably, the right to a trial by an impartial jury and in the same county wherein the crime has been committed is the defendant's right. *State ex rel. Lea v. Brown*, 64 S.W.2d 841, 849 (Tenn. 1933). Specifically, the Tennessee Constitution, as well as Rule 21 of the Tennessee Rules of Civil Procedure, confer this right only to the defendant. The purpose of the venue rule is to protect the defendant from being tried in some distant location and with the attendant difficulties in obtaining witnesses.

To establish that a change of venue is merited, it has been said that the defendant must prove that the pre-trial publicity is so excessive and inflammatory that a fair trial probably cannot be had. It is clear that the law does not require the defendant to establish proof of actual prejudice; the applicable test is whether a "fair trial *probably* could not be had." Tenn. R. Crim. P. 21(a) (emphasis added).

C.

The United States Supreme Court has stated that the decision to grant or deny a motion for a change of venue is a fact-oriented determination that depends upon the “totality of the circumstances.” *Murphy*, 421 U.S. at 799. This fact-oriented determination requires the trial court to examine the content and tone of the publicity, as well as the extent to which it has been disseminated to the public where the cause for transfer of venue is undue excitement. See e.g., *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980).

Tennessee courts have identified numerous factors which should be considered in determining whether a change of venue should be granted. Those factors relevant to the pretrial assessment include:

1. The nature, extent, and timing of pretrial publicity.
2. The nature of publicity as fair or inflammatory.
3. The particular content of the publicity.
4. The degree to which the publicity complained of has permeated the area from which the venire is drawn.
5. The degree to which the publicity circulated outside the area from which the venire is drawn.
6. The time elapsed from the release of the publicity until the trial.
7. The participation by police or by prosecution in the release of publicity.
8. The severity of the offense charged.
9. The absence or presence of threats, demonstrations, or other hostility against the defendant.
10. Size of the area from which the venire is drawn.
11. Affidavits, hearsay or opinion testimony of witnesses.

*State v. Hoover*, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979), citing 33 A.L.R.3d 1.

Several of the factors identified in *Hoover* are relevant here.

The severity of the offense and the public reaction are best demonstrated by the unreasonable bond originally set by the general sessions court. Mr. Bowers presented no



risk of flight, yet his bond was fixed at a million dollars, which this Court remarked during the bond reduction hearing, was no bond at all. The original bond amount was published in the media, clearly reinforcing the animosity and uproar of the community regarding the allegations against Mr. Bowers.

The fact that Trooper Larkins lived in and served the Dickson County community enhanced public interest as to the circumstances surrounding his death. Admittedly, when a law enforcement officer loses his life in the line of duty, the tragedy immediately grabs the attention of the public. Moreover, when another person causes a law enforcement officer's death, the public is even more attentive. However, mere attentiveness is not the situation in this case. This case represents an entire community of people outraged or shocked at the death of a beloved public servant, seeking to vindicate their loss.

There has been extensive media coverage of the "facts" and progression of this case since July 8, 2005. From the moment the accident occurred, the media has covered the circumstances of Trooper Larkins' death and Mr. Bower's alleged role in the accident. The press disseminated to the public at large has been unduly inflammatory to Mr. Bowers given the charitable view given to the trooper and the hostile tone to the accused:

**Trooper's family urges attention to move-over law  
Hearing testimony indicates suspect veered toward trooper, DA says**

By PATRICIA LYNCH KIMBRO *The Dickson Herald*  
Published: Wednesday, 07/13/05

As they prepared to bury their loved one yesterday, Tennessee Highway Patrol Trooper Todd Larkins' family urged more public awareness of the new "move-over" law and said that,

had it been obeyed by a trucker Friday, it could have prevented the trooper's death.

The 31-year-old trooper was struck and killed Friday afternoon after he pulled over a motorist in the eastbound lane on Interstate 40 in Dickson County.

A Robertson County man, Mitchell Wayne Bowers, 46, is charged with vehicular homicide in Larkins' death.

Yesterday, as plans were under way for a second day of visitation with the trooper's family, they took time out to speak to the media.

Larkins' sister, Dianna Murphy, along with his widow, Alicia Larkins, his parents and other loved ones, stood in a flower-filled room in Spann Funeral Home, where they spoke of his love and dedication for his work.

“We thank each one of you for your sympathy during this tragic and senseless loss of our loved one,” Murphy said.

“This was senseless. My daughter won't have her father there for her sweet-16th birthday. He won't be there for her college graduation,” Alicia Larkins said.

“This is something we should not be going through.

“We're going to miss him, but we at the same time are going to do all we can to push for more public awareness of the move-over law.”

Sgt. Jim Hutcherson, Todd Larkins' supervisor, explained that the new law, which went into effect July 1, 2004, requires motorists whenever possible to move away from the emergency lane into the left lane when they see emergency lights of any kind.

Apparently, that didn't happen in this case, officials said.

In fact, District Attorney General Dan Alsobrooks said it came out at a bail hearing for Bowers on Monday that the trooper “was at least two feet on the right side of the fog line and that the truck driver came down the road and appeared to veer off on the right side of the road, striking the trooper.”

Although Trooper Larkins lived his life “with faith instead of fear,” his family said that was one of his biggest concerns.

“My husband did not fear being shot,” Alicia Larkins said.

“His biggest fear was being hit rather than being shot. Sometimes they (motorists) would drive by close enough to see if they could knock his hat off.”

Murphy added: “Todd lived with faith, not fear. He loved what he did.

“His heart's desire was to serve with the Tennessee Highway Patrol.”

The family, who said they have received condolences from Gov. Phil Bredesen, said they will work for more funding or whatever it takes to ensure that the move-over law receives more attention.

“This is what he would have wanted,” Alicia Larkins said.

Published: Wednesday, 07/13/05

Numerous grassroots efforts, as well as statements by Trooper Larkins’s family and friends, have fostered the message that drivers of tractor-trailers should be more careful by yielding to officers who are involved in traffic stops by changing lanes. Trooper Larkins’ widow, Alicia Larkins, has been actively promoting the “move-over” law as a pivotal law for the protection of law enforcement officials. This has all been publicized in the media as demonstrated in the numerous articles attached to the Raybin affidavit.

The press has continued unabated. Most recently, a “Biker’s Rally” in honor of Trooper Larkins was conducted in Dickson County, and coverage broadcast on News Channel 5 at 10:00 p.m. on October 8, 2005. See page 47 of the attachment to the Raybin Affidavit. The event was used to raise awareness of the “Move-Over” law and to educate drivers in an effort to prevent future deaths. Alicia Larkins spoke in the news segment as well. As noted in the affidavit of Ron Lax, tee-shirts and bumper stickers were sold at the rally. The tee-shirts were black with Trooper Larkins’ badge on the front and back. This

demonstration has permeated the entire county regarding Trooper Larkins' death given that event was also printed in the Dickson County newspaper:

Wednesday, 10/12/05

**Bikers ride in memory of Larkins** By Tim Adkins *Editor*

Family and friends of the late Tennessee Highway Patrol Trooper Todd Larkins came out in full force Saturday to remember the fallen officer and spread the word of the state's "move over" law.

They did so by jumping on their motorcycles for a poker run. "He was a real good friend," said Doug Pendergrass, a childhood friend of the fallen trooper and who organized the event at Thunder Alley in Dickson.

Larkins, a five-year veteran of the THP, was struck and killed in July by a tractor-tractor on Interstate 40 in Dickson County during a routine traffic stop. Family and friends of Larkins want to prevent this from happening to others by bringing attention to the "move over" law.

The law, which went into effect in July 2004, requires all motorists when possible to move over when they see the flashing lights of law enforcement or other emergency vehicles. "If we can save just one life, then all this work will be worth it," said Alicia Larkins, the late trooper's wife. Organizers estimate the poker run raised about \$5,500 and more is expected. The money will go toward buying bumper stickers and billboard advertisements to promote the law. Pendergrass, who manages the bar at Thunder Alley, was pleased with the huge turnout, which attracted about 200 people. "A lot of people knew Todd," he said. "And we want to help push the 'move over' law." As a part of the poker run, the bikers stopped at five locations in Middle Tennessee and picked up a card at each one. At the end of the day, they determined who had the best poker hand. A trial date for Mitchell Wayne Bowers, the trucker charged in Larkins' death, is set for February.

In addition, there is a large cross marking the place on I-40 where Trooper Larkins lost his life. Such a marker serves as a constant reminder to all who pass by, and especially

all Dickson County residents operating a car on the interstate, that Trooper Larkins died there. The cross is approximately seven and a half feet tall and five feet wide. See pages 1 and 2 of the attachment to the Raybin Affidavit (photograph of the cross). As has been noted, there is a “Move Over” sign intentionally posted at approximately mile marker 173 on I-40 East, near the Trooper Larkins’ accident site. See pages 36 and 37 of the attachment to the Raybin Affidavit.

While Mr. Bowers and his counsel certainly agree that the “move-over” law is worthwhile legislation, there has been no evidence establishing that Mr. Bowers could have avoided the accident by taking the action required in the “move-over” law. Therefore, the statements associating Alicia Larkins with the prevention of future officer deaths in this manner are unnecessarily suggestive. Such statements have reinforced the belief that Mr. Bowers’ acted recklessly in causing the death of Trooper Larkins. See also pages 37-40 of the attachment to the Raybin affidavit showing the Governor’s Website with Move-Over press release and photographs.

Here there is clearly adverse publicity. The defense can also demonstrate the impact of that publicity on the community and, specifically, how that adverse publicity affects potential jurors. *See, State v. Davidson*, 121 S.W.3d 600 (Tenn.,2003) (“While the defendant did produce evidence of publicity, he presented no affidavits or other evidence that this publicity affected or infected the community.”). To that end, the defense commissioned the aforementioned public opinion survey. The result of the survey, described more fully in the affidavit of Ron Lax which accompanies this Motion, is perhaps

the most conclusive proof that Mr. Bowers cannot be fairly and impartially tried in Dickson County.

Research has demonstrated that general public opinion surveys of people in the community are subject to the valid criticism that those interviewed may not have qualified as potential jurors and thus their opinions are irrelevant. *See, State v. Thacker*, 164 S.W.3d 208 (Tenn.2005)(“On cross-examination, Ms. Hudgings admitted that she did not attempt to determine whether or not those persons polled were actually qualified to sit on a jury panel.”), and *State v. Davidson*, 121 S.W.3d 600(Tenn.,2003)(the state presented the testimony of a criminal investigator and a court clerk who had conducted “informal” surveys in Dickson and Cheatham Counties).

In our case the investigators wanted to avoid some random survey of fifty folks walking out of Kroger or Wal-Mart. Thus, they compared “apples to apples.” The investigators went to the courthouse and acquired the names of 237 persons who had most recently qualified to be in the pool of those called for jury service in Dickson County between March and July of this year. The investigators attempted to contact all 237 names by telephone and interview them. The investigators managed to reach 144 persons of whom 16 refused to participate and 4 would not complete the survey. Of the remaining 124 persons surveyed , 58.9% believed it would be fairer for the trial to be conducted away from Dickson County, while 20.1% either did not know or had no opinion as to whether a fair trial could be conducted in Dickson County. The survey revealed that a minority of 21% believed the case could be tried in Dickson County. An overwhelming 98.4% of those surveyed had heard of the Trooper Larkins’ case.

Lastly, while judicial convenience is not a factor in a change of venue determination, it is a practical consideration. In this case preliminary discovery has disclosed that none of the eye-witnesses to the accident reside in Dickson County. Several live or work in Davidson or Williamson counties. One of the government's experts lives in Nashville. The motorist whom Trooper Larkins was ticketing now lives in Knoxville. Naturally, none of the proposed defense witnesses reside in Dickson county. A change of venue is not an intolerable burden.

To try Mr. Bowers in Dickson County – where the community feeling is so strongly set against him – will violate Mr. Bower's right to a fair trial by an impartial jury. Moreover, a change of venue will not place an undue burden on witnesses. Therefore, Mr. Bowers respectfully requests that this Court grant this Motion for Change of Venue.

Respectfully submitted,

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David L. Raybin, #3385

Financial Center, 22nd Floor  
424 Church Street

## K. Speaking to Jurors



West's Tennessee Code Annotated  
State and Local Rules Selected from West's Tennessee Rules of Court  
Rules of the Supreme Court of the State of Tennessee  
Rule 8. Rules of Professional Conduct (Refs & Annos)  
Chapter 3. Advocate

Sup.Ct.Rules, Rule 8, RPC 3.5

Rule 3.5. Impartiality and Decorum of the Tribunal

Currentness

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
  - (1) the communication is prohibited by law or court order;
  - (2) the juror has made known to the lawyer a desire not to communicate; or
  - (3) the communication involves misrepresentation, coercion, duress, or harassment;
- (d) conduct a vexatious or harassing investigation of a juror or prospective juror; or
- (e) engage in conduct intended to disrupt a tribunal.

**Credits**

[Adopted September 29, 2010, effective January 1, 2011. *Comment* amended February 19, 2015, effective May 1, 2015.]

**Editors' Notes**

**COMMENT**

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Tennessee Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. For example, a lawyer shall not give or lend anything of value to a judge, judicial officer, or employee of a tribunal, except as permitted by Canon 4(D)(5) of the Code of Judicial Conduct. A lawyer, however, may make a contribution to the campaign fund of a candidate for judicial office in conformity with Canon 5(B) of the Code of Judicial Conduct.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. Unless such a communication is otherwise prohibited by law or court order, paragraph (b) of this Rule would not prohibit a lawyer from communicating with a judge on the merits of the cause in writing if the lawyer promptly delivers a copy of the writing to opposing counsel and to parties who are not represented by counsel because that would not be an ex parte communication.

[3] Paragraph (b) also does not prohibit a lawyer from communicating with a judge in an ex parte hearing to establish the absence of a conflict of interest under RPC 1.7(c). In such proceedings, the lawyer is of course bound by the duty of candor in RPC 3.3(a)(3).

[4] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order entered in the case or by a federal court rule, but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication. As the Court stated in *State v. Thomas*, 813 S.W. 2d. 395 (Tenn. 1991): “After the trial, communication by a lawyer with jurors is permitted so long as he [or she] refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he [or she] could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected.” *Id.* (quoting *Tenn. Sup. Ct. R. 8, EC 7-29*). The Court went on to state in *Thomas* that “Rule 8 therefore allows post-trial interviews by Counsel with jurors on these matters without the prior approval of the trial court.” *Id.* at 396. Although the Court’s analysis in *Thomas* was based on an earlier version of Rule 8 (i.e., the Code of Professional Responsibility), the foregoing principles quoted from *Thomas* remain valid in the context of RPC 3.5.

[4a] A communication with, or an investigation of, the spouse, child, parent, or sibling of a juror or prospective juror will be deemed a communication with or an investigation of the juror or prospective juror.

[5] The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[6] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See RPC 1.0(m).

#### **DEFINITIONAL CROSS-REFERENCES**

“Known” See RPC 1.0(f)

“Tribunal” See RPC 1.0(m)

Notes of Decisions (3)

Sup. Ct. Rules, Rule 8, RPC 3.5, TN R S CT Rule 8, RPC 3.5

The state court rules are current with amendments received through July 15, 2015.

## Post-Verdict Interrogation of Jurors FEDERAL RULE

Jurors.

(2) Post-Verdict Interrogation of Jurors. No attorney, party, or representative of either may interrogate a juror after the verdict has been returned without prior approval of the court. Approval of the Court shall be sought only by an application made by counsel orally in open court, or upon written motion which states the grounds and the purpose of the interrogation. If a post-verdict interrogation of one or more members of the jury should be approved, the scope of the interrogation and other appropriate limitations upon the interrogation will be determined by the Judge prior to the interrogation.