The Oklahoma Supreme Court's New Rules on Attorneys' Trial Publicity: Realism and Aspiration

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THE OKLAHOMA SUPREME COURT'S NEW RULES ON ATTORNEYS' TRIAL PUBLICITY: REALISM AND ASPIRATION

LAWRENCE K. HELLMAN*

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In this article, the following abbreviations will sometimes be used to refer to certain entities: ABA = American Bar Association; OBA = Oklahoma Bar Association; RPC Committee = Rules of Professional Conduct Committee.
I. Introduction

On June 26, 1997, the Oklahoma Supreme Court promulgated significant amendments to the Oklahoma Rules of Professional Conduct regarding trial publicity generated by attorneys.\(^1\) The amendments, which became effective on October 1, 1997,\(^2\) effectuated a major rewriting of Oklahoma's Rule 3.6 and added a new section to Rule 3.8. An unedited presentation of the new versions of Rules 3.6 and 3.8 appears in part II of this article. A legislative formatted version of Oklahoma's revised Rules 3.6 and 3.8, showing additions to and deletions from the prior provisions, is presented in part III. The process by which these amendments were developed is described in part IV. Important documents comprising the legislative history of the amendments are contained in parts V, VI, and VII. The document reproduced in part VII constitutes a concise summary of the changes implemented by the 1997 amendments. Part VIII describes the most significant differences between the new Oklahoma rules and the current version of the ABA Model Rules of Professional Conduct.

The Oklahoma Supreme Court's action addressed a topic that has troubled American courts, lawyers, media, and citizens virtually since the founding of the nation,\(^3\) and it came as the attention of the country was focused on one of the most highly publicized trials in American history — a trial that held intense interest for Oklahomans.\(^4\) The approach taken by the new Oklahoma provisions departs significantly from Oklahoma's original Rule 3.6, which had been based on the influential American Bar Association's Model Rules of Professional Conduct (the Model Rules) first promulgated in 1983.\(^5\) While many features of the new Oklahoma rules are borrowed from the extensive 1994 amendments to ABA Model Rules 3.6 and 3.8, there is much that is unique to Oklahoma's amended Rule 3.6. Oklahoma's new Rule 3.6 takes a realistic approach regarding when lawyers' public comments should and can be effectively regulated. At the same time, it employs strong aspirational language to encourage attorneys to be responsible when commenting on pending proceedings. Its unusual combination of realism and aspiration makes Oklahoma's amended Rule 3.6 an alternative to ABA Model Rule 3.6 for other states to consider.\(^6\) This article is intended to encourage that

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2. See id.

3. See generally Douglas S. Campbell, Free Press v. Fair Trial: Supreme Court Decisions Since 1807 (1994) (discussing 30 United States Supreme Court cases and their common law predecessors grappling with the difficult problem of reconciling the interests of the public in information about noteworthy cases and the interests of the litigants in impartial tribunals).

4. The criminal trial of Timothy McVeigh, accused of bombing the Alfred P. Murrah Building in Oklahoma City, killing 168 people, began in Denver, Colorado, on March 31, 1997, and concluded with a verdict of guilty on June 3, 1997.


6. The highest court of each state, exercising authority that is said to be "inherent" in the judicial
consideration, and also to serve as a guide for attorneys whose practice before Oklahoma tribunals requires them to conform to the amended rules.7

II. Final Version of Oklahoma's New Rules 3.6 and 3.8

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.

(b) 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.

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

Committee Comments

[1] Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to litigation in which incarceration may result or lay persons will serve as fact-finders. While this proposition applies in civil cases, it is particularly salient with respect to criminal prosecutions. If there were no such limits, the result would be practical nullification of the protective effect of the constitutionally-grounded presumption of innocence and the exclusionary rules of evidence. At the same time, 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.

power, has the autonomy to establish rules to govern the practice of law in each respective jurisdiction. Although the ABA's Model Rules have been extremely influential in guiding the states, significant variations exist among the rules adopted from state to state. See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 20-27, 50 (1986) (describing the "inherent powers" doctrine and the "balkanization" of the details of professional regulation among the states).

7. Besides Oklahoma practitioners, lawyers from other states may be required to conform their conduct to Oklahoma's rules when participating in proceedings pending in Oklahoma tribunals. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(1) (1983) (providing choice of law rule for professional discipline cases arising from conduct "in connection with a proceeding in a court" that applies the law of "the jurisdiction in which the court sits," regardless of other jurisdictions in which the lawyer may be admitted).
[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Such rules may be adopted by a tribunal to be generally applicable, to apply to a specific class of litigation, or to govern a particular case, by way of special order. Rule 3.4(c) governs compliance with all such rules; however, a statement in violation of such a rule or order may constitute a violation of Rule 3.6(a), depending on the circumstances.

[3] 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] Notwithstanding paragraph (a), many statements about a matter made by participating lawyers and their associates are unlikely to materially prejudice the fact-finding process in an adjudicative proceeding. While circumstances can result in an otherwise innocuous statement's having a materially prejudicial effect, accurate, factual statements of the following matters will not ordinarily violate the standard of Rule 3.6(a):

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) the information contained in a public record; (3) that an investigation of the matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and (7) in a criminal case, in addition to items (1) through (6): (i) the identity and occupation 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. This list is illustrative, not exhaustive.

[5] There are, on the other hand, certain subjects which are more likely than others to have a materially 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 other 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;

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(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 an imminent and material risk of prejudicing an impartial trial; or
(6) 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 the defendant is presumed innocent until and unless proven guilty.

[6] The likelihood of prejudice due to a public statement is different depending on the type of proceeding and the timing of the statement. Statements which may be innocuous when not made in close proximity to an adjudicatory proceeding may be materially prejudicial if made on the eve or in the midst of the proceeding. Criminal jury trials in which laypersons serve as fact-finders and other proceedings that could result in incarceration are most sensitive to extra-judicial speech. Civil trials in which laypersons serve as fact-finder(s) may also be quite sensitive. Non-jury hearing and arbitration proceedings are far less prone to be affected by such speech. The rule places limitations on prejudicial comments only with respect to the most sensitive cases. However, regardless of the likelihood of public dissemination of a statement, regardless of the timing of the statement, regardless of the vulnerability of a proceeding to prejudice as a result of the dissemination of a particular statement, and regardless of whether a lawyer is involved in a proceeding or associated with a lawyer who is involved in it, a lawyer should aspire to refrain from making statements that pose a substantial likelihood of prejudicing the fairness of a proceeding or unjustifiably casting doubt on the fairness of the proceeding or the legal system in general. A lawyer should be especially mindful of the likelihood of such effects when the lawyer's statement is reasonably likely to be disseminated by means of public communication.

[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 reasonably necessary to mitigate undue prejudice created by the statements made by others.

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(b) 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) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
(d) 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) exercise reasonable efforts to prevent investigators, law enforcement personnel,
employees or other persons assisting or associated with the prosecutor in a criminal
case from making an extrajudicial statement that the prosecutor would be prohibited
from making under Rule 3.6;
(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,
refrain from making extrajudicial comments that have a substantial likelihood of
heightening public condemnation of the accused; and
(g) 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 an applicable
privilege and
(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.

The lawyer upon whom a subpoena is served shall be afforded a reasonable time
to file a motion to quash compulsory process of his/her attendance. Whenever a
subpoena is issued for a lawyer who then moves to quash it by invoking attorney/client privilege,
the prosecutor may not press further in any proceeding for the
subpoenaed lawyer's appearance as a witness until an adversary in camera hearing has
resulted in a judicial ruling which resolves all the challenges advanced in the lawyer's
motion to quash.

Committee Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that
of an advocate. This responsibility carries with it specific obligations to see that the
defendant is accorded procedural justice and that guilt is decided upon the basis of
sufficient evidence. Precisely how far the prosecutor is required to go in this direction
is a matter of debate and varies in different jurisdictions. Many jurisdictions have
adopted the ABA Standard of Criminal Justice Relating to Prosecution Function,
which in turn are the product of prolonged and careful deliberation by lawyers
experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing
ex parte proceedings, among which grand jury proceedings are included. Applicable
law may require other measures by the prosecutor, and knowing disregard of those
obligations or a systematic abuse of prosecutorial discretion could constitute a
violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval
of the tribunal. Nor does it forbid the lawful questioning of a 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] Rule 3.8 applies to all government lawyers. The prosecuting attorney has an affirmative duty to prevent law enforcement personnel and others associated with the prosecution from making extrajudicial statements.

[5] 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. Paragraph (f) prohibits such comments. Nothing in the Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b).

[6] Paragraph (g) 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. It ensures that a subpoena caused to be issued by a prosecutor to the lawyer requesting evidence about a past or present client of a lawyer will be subject to judicial review upon a timely challenge by the subpoenaed lawyer.

III. 1997 Amendments to Oklahoma's Rules 3.6 and 3.8
Presented in Legislative Format

[NOTE: SHADED TEXT IS NEW. STRIKE-THROUGHS SHOW DELETIONS. COMPARISONS SHOW CHANGES FROM ORIGINAL OKLAHOMA RULES, FIRST ADOPTED IN 1988.]

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make, participate in making, counsel or assist another person to make an extrajudicial statement that a reasonable person lawyer 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, including an administrative proceeding; an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.

(b) A statement referred to in paragraph (a) 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:

(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;

(2) 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;

(5) 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

(6) the fact 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.

(e) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to an administrative proceeding, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party to a proceeding, or a witness in a proceeding;

(2) 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;

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

(d) Notwithstanding paragraphs (a) and (b)(1-5) and (e), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) 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;

(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:

(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.
(e) The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(b) 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.

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

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. litigation in which incarceration may result or laypersons will serve as fact-finders. While this proposition applies in civil cases, it is particularly salient with respect to criminal prosecutions. If there were no such limits, the result would be the practical nullification of the protective effect of the constitutionally-grounded presumption of innocence rules-of-forensic-decennum and the exclusionary rules of evidence. On the other hand, At the same time, 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] No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press as amended in 1978.

[3] [2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Such rules may be adopted by a tribunal to be generally applicable, to apply to a specific class of litigation, or to govern a particular case, by way of special order. Rule 3.4(c) requires governs compliance with all such rules; however, a statement in violation of such a rule or order may constitute a violation of Rule 3.6(a), depending on the circumstances.

1997 ADDITIONS TO OKLAHOMA COMMENT TO RULE 3.6 SHOWING COMPARISON TO ABA 1994 COMMENT

[NOTE: PARAGRAPHS 3 THROUGH 7 ARE ALL NEW TO THE OKLAHOMA RULE. THOUGH BASED ON CHANGES TO THE COMMENT ADOPTED BY

[3] The Rule sets forth a basic general prohibition against a lawyer’s making statements that the lawyer knows or 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).

Notwithstanding paragraph (a), many statements about a matter made by participating lawyers and their associates are unlikely to materially prejudice the fact-finding process in an adjudicative proceeding. While circumstances can result in an otherwise innocuous statement’s having a materially prejudicial effect, accurate, factual statements of the following matters will not ordinarily violate the standard of Rule 3.6(a):

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) the information contained in a public record; (3) that an investigation of the matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to items (1) through (6): (i) the identity and occupation 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. This list is illustrative, not exhaustive.

[5] There are, on the other hand, certain subjects which are more likely than others not to have a materially 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;

(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; or

(6) 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.

[6] Another important relevant factor in determining prejudice is the nature of the proceeding involved. The likelihood of prejudice is different depending on the type of proceeding and the timing of the statement. Statements which may be innocuous when not made in close proximity to an adjudicatory proceeding may be materially prejudicial if made on the eve of or in the midst of the proceeding. Criminal jury trials in which laypersons serve as fact-finders and other proceedings that could result in incarceration possibly will be more sensitive to extra-judicial speech. Civil trials in which laypersons serve as fact-finder(s) may also be less sensitive. Non-jury hearings and arbitration proceedings are far less prone to be affected by such speech. The Rule will still places limitations on prejudicial comments only with respect to the most sensitive in these cases. The likelihood of prejudice may be different depending on the type of proceeding. However, regardless of the likelihood of public dissemination of a statement, regardless of the timing of the statement, regardless of the vulnerability of a proceeding to prejudice as a result of the dissemination of a particular statement, and regardless of whether a lawyer is involved in a proceeding or associated with a lawyer who is involved in it, a lawyer should aspire to refrain from making statements that pose a substantial likelihood of prejudicing the fairness of a proceeding or unjustifiably casting doubt on the fairness of the proceeding or the legal system in general. A lawyer should be especially mindful of the likelihood of such effects when the lawyer's statement is reasonably likely to be disseminated by means of public communication.

[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 reasonably necessary to mitigate undue prejudice created by the statements made by others.

**Rule 3.8 Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) 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) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) 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; and

(e) exercise reasonable efforts to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;

[NOTE: SECTION (f) IS NEW. STRIKE-THROUGHS SHOW DELETIONS FROM THE ABA'S 1994 AMENDMENT, FROM WHICH THIS SECTION IS DERIVED. SHADOED TEXT HAS BEEN ADDED TO THE ABA VERSION.]

(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, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused; and

(g) 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 an applicable privilege and

(2) the evidence sought is essential to the successful completion of an on-going investigation or prosecution and

(3) there is no other feasible alternative to obtain the information.

The lawyer upon whom a subpoena is served shall be afforded a reasonable time to file a motion to quash compulsory process for his/her attendance. Whenever a subpoena is issued for a lawyer who then moves to quash it by invoking attorney/client privilege, the prosecutor may not press further in any proceeding for the subpoenaed lawyer's appearance as a witness until an adversary in camera hearing has resulted in a judicial ruling which resolves all the challenges advanced in the lawyer's motion to quash.
Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a 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] Rule 3.8 applies to all government lawyers. The prosecuting attorney has an affirmative duty to prevent law enforcement personnel and others associated with the prosecution from making extrajudicial statements.


[5] Paragraph (g) supplements Rule 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. Paragraph (f) prohibits such comments. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(e).

[6] Paragraph (f) (g) 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. The prosecutor is required to obtain court approval for the issuance of the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are met. It ensures that a subpoena caused to be issued by a prosecutor to the lawyer requesting evidence about a past or present client of a lawyer will be subject to judicial review upon a timely challenge by the subpoenaed lawyer.
IV. The Rule-Making Process

The process that led to the Oklahoma Supreme Court's action began with the Oklahoma Bar Association's Rules of Professional Conduct Committee. That body is charged with monitoring developments in the field of legal ethics nationwide and recommending modifications of the Oklahoma rules, as deemed appropriate. In 1996, as part of the normal course of the Committee's ongoing review function, this writer was asked to canvass developments regarding the regulation of attorneys' trial publicity since the Oklahoma Rules of Professional Conduct were put into effect in 1988, with an eye toward recommending any changes to the Oklahoma rules that those developments might warrant. It is worth noting that the subject of trial publicity was not taken up because of any request from any quarter. The Oklahoma Supreme Court did not request this review, nor did the Board of Governors of the Oklahoma Bar Association. The OBA's General Counsel's Office did not ask for clarification or modification of the existing rules, nor was any dissatisfaction with those rules communicated to the Committee from any source. Yet, the Committee was aware that the United States Supreme Court, in Gentile v. State Bar of Nevada, had recently considered the constitutionality of some aspects of the ABA's Model Rule 3.6, on which Oklahoma's original Rule 3.6 was based, and that the ABA, in 1994, had modified Model Rule 3.6 in response to the Supreme Court's decision in that case. It thus seemed appropriate to consider the issue.

The trial publicity rules were on the agenda for the July 12, 1996, meeting of the RPC Committee. To facilitate an informed discussion at that meeting, on July 1, 1996, this writer circulated a memorandum proposing a complete revision of Oklahoma Rule 3.6 and the addition of a new subsection into Oklahoma Rule 3.8. The July 1 memorandum analyzed Oklahoma's then-current rules in light of judicial developments around the country, rules changes at the ABA and in other states, scholarly commentary, and public policy. It set out the issues that had been considered in formulating the proposal and articulated the rationale underlying each specific change.


9. The "Aims and Objectives" of the Oklahoma Bar Association's Rules of Professional Conduct Committee include the following mandates:
   1. To study all developments, court decisions and revisions made nationwide to or concerning the Model Rules of Professional Conduct and to determine what impact if any these matters have on the Oklahoma Rules of Professional Conduct; . . . .
   4. To consider and make appropriate recommendations on any changes and/or revisions to the Oklahoma version of the Rules of Professional Conduct.


that was included in it. Ultimately, this proposal was adopted virtually unchanged. An edited version of the July 1 memorandum is set forth in part V of this article.

The July 1 proposal was extensively discussed by the RPC Committee at its July 12, 1996, meeting and again at the Committee's meeting of September 27, 1996. A "roundtable format" was employed at the July meeting, where Committee members gave their initial, tentative reactions to the proposed changes. The tenor of remarks was overwhelmingly supportive of the proposal, but the matter was put off for further discussion at the September meeting. At the September meeting, the Committee "unanimously approved" the proposed modifications of Oklahoma's Rules 3.6 and 3.8 "for forwarding to the [OBA] Board of Governors with the request that they be published in the [Oklahoma] Bar Journal for comment."12 During the discussion, "[i]t was also recommended that copies [of the proposal] be specifically directed to the Prosecutors' and Defense Attorneys' associations requesting their comments."13

The Committee's action was taken with the understanding that any Committee proposal would have to be approved by the OBA's Board of Governors before it could be forwarded to the Oklahoma Supreme Court for action. While the September 27 minutes do not explicitly reflect this, it was also anticipated that the Committee would have one more chance to review the proposal in light of any comments that might be generated by its publication before asking the Board of Governors to act formally on the matter.14 In particular, the Committee deferred a final decision on the drafting of the list of presumptively permissible statements enumerated in the fourth paragraph of the redrafted comment to Rule 3.6. The parallel ABA Model Rule provision condones disclosure by prosecutors of "the identity, residence, occupation and family status" of a person who has been accused of a crime.15 The proposal forwarded by the RPC Committee to the Board of Governors highlighted this provision and specifically requested comment on whether the Oklahoma rules should condone public statements regarding the residence and family status of a person accused of a crime.16 The RPC Committee planned to take a position on this issue when it finally considered the proposal following the comment period. Relevant portions of the minutes of the July and September meetings of the RPC Committee are presented in part VI of this article.

The Board of Governors unanimously approved publication of the proposed new rules for comment at the Board's meeting of October 18, 1996,17 and they were in

13. Id. at 1.
14. This understanding is reflected in the RPC Committee's year-end report: "[Proposed revisions of Rules 3.6 and 3.8] were approved for submission to the Board of Governors with the request that they be published in the Oklahoma Bar Journal. Comments will be specifically invited from the District Attorneys' Association and the Criminal Defense Lawyers Association." 1996 Committee Report of Rules of Professional Conduct Committee, 67 OKLA. B.J. 3614, 3615 (1996).
fact published in the Oklahoma Bar Journal on November 9, 1996, and again on November 16, 1996. With each publication, there appeared a "Notice" soliciting comment from the bar by December 15, 1996. The "Notice" suggested the RPC Committee had formally proposed the adoption of the new rules (not just their publication) and that the Board of Governors was soliciting comment for its own benefit.

While the RPC Committee awaited the anticipated responses from the comment period, the leadership and membership of the Committee underwent some changes. Members of the Committee are appointed for staggered, three-year terms, so that roughly one-third of the Committee turns over at the end of every calendar year. Because the Annual Meeting of the Oklahoma Bar Association occurs in November, and all of the committees are asked to submit their annual reports for publication in advance of that meeting, it is not unusual for committees to consider their year's work completed in November, as they await the expiration of retiring members' terms on December 31 and the commencement of the new members' terms on January 1. At the end of 1996, one of the expiring terms was held by John Arrington, who had served as RPC Committee Chair for several years and was stepping down from that position. Former Judge William Means, the 1996 Vice-Chair of the Committee, was appointed to assume the position of Chair effective January 1, 1997. In the midst of this transition, the functioning of the comment period was not carefully monitored by the Committee. When the newly-constituted committee convened for the first time on February 28, 1997, the new Chair had not yet been apprised of the results of the comment period, so it was agreed that the Chair would inquire into the status of the proposal and report back at the next meeting.

When the Committee next met, on April 11, 1997, the results of the comment period had not yet been determined. Believing that, regardless of the comments, the next step in the approval process would entail a final vote by the RPC Committee, the matter was placed on the agenda for the May meeting. Because none of the twenty-

20. There is no record of comment having been solicited from any other potentially interested parties, such as the media or the general public. Nor is there a record of a specific solicitation of comment having been directed to the District Attorneys' Association or the Criminal Defense Lawyers' Association, as the RPC Committee had requested.
22. The "Notice" appeared as follows:
The OBA Rules of Professional Conduct Committee has proposed new Rules 3.6 and 3.8 of the Rules of Professional Conduct to replace existing Rules on Trial Publicity and Special Responsibilities of a Prosecutor. The Board of Governors directed the publication of the proposed rules for comment by OBA members. Comments regarding the rules should be made to the Executive Director by DECEMBER 15, 1996.

By highlighting the issue with an asterisk, the published notice specifically solicited comment regarding the appropriateness of discouraging public comment regarding the residence and family status of an accused.

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seven members of the 1997 Committee had not been involved in the 1996 deliberations, all of the members of the Committee were distributed a copy of the proposed new version of Rules 3.6 and 3.8 and the minutes of the two meetings in 1996 where the proposal had been discussed. New members were advised of the existence of the extensive background memorandum of July 1, 1996, and they were invited to request a copy if they wanted to consider it.\textsuperscript{24} No copies were requested.

When the Committee met on May 16, 1997, it was advised that, despite the far-reaching nature of some of the changes that would be implemented by the proposal and the fact that the proposal had generated some publicity in the general media,\textsuperscript{26} not a single comment had been submitted to the OBA.\textsuperscript{27} The Committee was uncertain as to how to interpret the bar’s silence. Without comments to react to, the Committee decided to put off a final vote on the rules changes until the June 1997 meeting, to allow time for the Committee members to study the matter and perhaps solicit personal reactions from other members of the bar.\textsuperscript{28}

However, before the RPC could meet again, the OBA Board of Governors took action on the proposal. Meeting on May 17, 1997, the Board of Governors formally approved the proposal and forwarded it to the Oklahoma Supreme Court with a recommendation that the Court approve it.\textsuperscript{29} The proposal that was sent to the Supreme Court was in the exact same form as the one that the RPC Committee had submitted to the Board of Governors for publication purposes in September of 1996. It included the unresolved language regarding the presumptive permissibility of public

\begin{itemize}
  \item 11, 1997 (on file with author).
  \item 25. See Memorandum from Lawrence K. Hellman, member of Oklahoma Bar Association Rules of Professional Conduct Committee, to Oklahoma Bar Association Rules of Professional Conduct Committee (Apr. 21, 1997) (on file with author).
  \item 26. Following publication of the proposal in the Oklahoma Bar Journal, an interview with the author aired on the Oklahoma City affiliate of the Fox Television Network, and another interview was published in an Oklahoma City daily business newspaper. See Leigh Jones, New Rules May Loosen Attorneys' Tongues, JOURNAL RECORD (Oklahoma City), Nov. 27, 1996, at 1. Interestingly, this same newspaper article quoted a state district judge who expressed concerns about the proposal, see id., yet these concerns apparently were never conveyed to the Bar.
  \item 27. See Letter from Marvin Emerson, Executive Director of Oklahoma Bar Association, to William W. Means, 1997 Chair of Rules of Professional Conduct Committee (April 15, 1997) (on file with Oklahoma Bar Association).
  \item The dearth of comments may be partially explained by the nature of the "Notice." Rule 3.6, in both its original and amended formats, is lengthy and complex. The "Notice" consisted only of a presentation of Rules 3.6 and 3.8 as they would appear if the amendments were approved. There was no explanation of the changes that would be implemented by the amendments, nor was there a handy way for a reader to compare the original Rules with the proposed new rules. While each current member of the Oklahoma Bar Association received a copy of the Oklahoma RULES OF PROFESSIONAL CONDUCT when they first went into effect in 1988, those rules have undergone a number of changes since then. A practitioner's best access to a current version of the rules in force is in an appendix to Title 5 of the Oklahoma Statutes Annotated. See 5 OKLA. STAT. ANN. ch. 1, app. 3-A (West 1996 & Supp. 1998).
  \item 28. See Minutes of the Oklahoma Bar Association Rules of Professional Conduct Committee 2 (May 16, 1997) (on file with author).
  \item 29. See Summary of the Actions Taken by Board of Governors [of the Oklahoma Bar Association], 68 OKLA. B.J. 1809, 1811 (1997).
\end{itemize}
statements regarding an accused person's residence and family status.30 Obviously, the Board of Governors did not realize that the RPC Committee had intended to review the proposal once more after the comment period before formally recommending its adoption.

The Oklahoma Supreme Court moved expeditiously on the proposal. The Court requested the Executive Director of the OBA and representatives of the RPC Committee to appear at its weekly conference on June 19, 1997. Besides Executive Director Marvin Emerson, RPC Committee Chair William Means and the author of this article attended that conference. All members of the Court were in attendance. The oral presentation covered the RPC Committee's reasons for reviewing Rule 3.6 at this time, highlighted the changes that the proposal would implement, and explained the drafter's reasons for recommending those changes (as set out in the drafter's July 1, 1996, memorandum). A number of Justices asked questions. Several of the questions focused on the unresolved issue that had been flagged in the version of the RPC Committee's proposal that had been submitted for publication.31 In the course of the question and answer period, it became clear that the Court had not been furnished any background materials on the proposal. The Justices had not been given the July 1, 1996, background memorandum, nor did they have a "red-lined" version of the amendments which would allow a full appreciation of the changes that the proposal would implement. They only had an unedited version of the proposed new Rules 3.6 and 3.8 as they would appear if the RPC Committee's draft were approved by the Court.

Following the June 16, 1997, conference with the Court, the OBA delegation that had appeared at the conference agreed that it would be helpful for the Court's consideration of the proposal if the Justices had a "red-lined" version of the amendments and a written summary of the changes that the proposal would implement. A brief memorandum was prepared by the author of this article and delivered to each member of the Supreme Court on June 23, 1997, along with a "red-lined" version of the proposed amendments. The June 23, 1997 memorandum is reproduced in part VII of this article.

The Oklahoma Supreme Court then met in conference on June 26, 1997, and voted to implement the proposal as it had been recommended by the RPC Committee and the Board of Governors. The Court's order adopting the amendments to Rules 3.6 and 3.8 noted that all nine Justices of the Court had concurred in this decision.32 The Court resolved the question that had been flagged regarding the disclosure of an accused person's residence and family status by deleting residence and family status from the list of presumptively permissible statements listed in the fourth paragraph of the comment to amended Rule 3.6. The Supreme Court's order was published in three consecutive issues of the Oklahoma Bar Journal.33

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30. See supra notes 15-16 and accompanying text.
31. See supra notes 15-16 and accompanying text.
33. The new version of Rules 3.6 and 3.8 appeared at 68 OKLA. B.J. 2524 (1997), 68 OKLA. B.J.
The fact that the RPC Committee had not considered its drafting complete when it forwarded its proposal for comment meant that the draft adopted by the Court did not contain a revised "Oklahoma Modifications" section to accompany the amendments. When the Oklahoma Rules of Professional Conduct were first adopted in 1988, they included an Oklahoma Modifications section after each rule, to highlight those issues on which the Oklahoma version of each rule departed from the position taken in the parallel section in the ABA Model Rules, on which the Oklahoma rules were based.\textsuperscript{34} Since that time, it has been customary to amend the Oklahoma Modifications section each time an Oklahoma rule has been amended. After the Oklahoma Supreme Court's swift adoption of the 1997 amendments to Rules 3.6 and 3.8, the RPC Committee approved new Oklahoma Modifications sections for those rules, pointing out the differences between the latest version of the Oklahoma rules and the version of the ABA Model Rules that was in force in 1997 at the time the Oklahoma rules were amended.\textsuperscript{35} The Supreme Court has not yet approved the new Oklahoma Modifications sections, but the RPC Committee's proposal for those sections is presented in part VIII of this article.

The remaining parts of this article present the background material and a record of the deliberations that resulted in the 1997 amendments to Oklahoma's Rules 3.6 and 3.8. These materials should be of assistance for those who must attempt to conform their conduct to the amended rules. Beyond that, however, they may stimulate rule drafters in other jurisdictions to reconsider their own rules regulating trial publicity to determine whether they are realistic and appropriate for the American legal system at the beginning of the twenty-first century.

\textit{V. July 1, 1996, Memorandum Describing Amendments and Explaining Their Rationale}\textsuperscript{36}

\textbf{TO: RULES OF PROFESSIONAL CONDUCT COMMITTEE}
\textbf{OKLAHOMA BAR ASSOCIATION}
\textbf{FROM: LAWRENCE K. HELLMAN}
\textbf{RE: PROPOSED AMENDMENT OF TRIAL PUBLICITY REGULATIONS: RULES 3.6 AND 3.8}
\textbf{DATE: JULY 1, 1996}

Recommended changes to the Oklahoma Rules of Professional Conduct with respect to trial publicity are attached. This memorandum summarizes the proposed changes, identifies the issues considered in preparing the proposal, and explains the reasons for recommending that those issues be resolved as they are in the proposal.

\textsuperscript{2444} (1997), and 68 OKLA. B.J. 2323 (1997).
\textsuperscript{35} See Minutes of Oklahoma Bar Association Rules of Professional Conduct Committee Meeting (Oct. 24, 1997) (on file with author).
\textsuperscript{36} This memorandum has been edited and updated somewhat, in some cases noting developments in the law that occurred after July 1, 1996. In particular, some of the footnotes have been elaborated. The footnotes in this memorandum have been renumbered for purposes of presentation in this article.
I. ORIENTATION: A QUESTION OF DEFINING THE OBJECTIVE

Historically, attempts to regulate trial publicity generated by attorneys have not fared well when challenged in the courts. The original ABA Canons of Professional Ethics, promulgated in 1908, sought in Canon 20 to discourage "newspaper discussion of pending litigation" because of the possibility that such publicity might interfere with a fair trial in the courts and otherwise prejudice the due administration of justice." Canon 20, however, was purely aspirational; it was not considered binding and was not sought to be enforced through the disciplinary process. In 1969, the ABA abandoned the aspirational approach of the Canons of Ethics and enacted the Model Code of Professional Responsibility (the Model Code), which included black letter Disciplinary Rules (DRs) upon which professional discipline could be based. Disciplinary Rule 7-107 set out an elaborate enumeration of permissible and impermissible statements that attorneys were to heed, with the list of unacceptable utterances varying depending on the nature and stage of legal proceedings. For example, during the jury selection or trial phase of a suit, DR 7-107(D) forbade the attorneys involved to make statements that they might reasonably expect to be disseminated by means of public communication if the statements were "reasonably likely to interfere with a fair trial . . . ." On several occasions, federal courts found the speech-suppressing provisions of DR 7-107 to unconstitutionally restrict attorneys' freedom of speech. "Practically every court that considered constitutional challenges to DR 7-107 said that rule was overbroad." As a result, since most state supreme courts, including Oklahoma's, had dutifully adopted DR 7-107 on the recommendation of the ABA and the state bars, most states were left with rules that were, in large part, unenforceable.

37. The ABA Canons were based on the Alabama Ethics Code of 1887. See Wolfram, supra note 6, at 54 n.21 (noting ABA's reliance on Alabama Ethics Code). The Alabama Ethics Code, first adopted in 1887, can be found at 118 Ala. xxiii (1899). The ABA's Canons of Ethics, first adopted in 1908, can be found in Thomas D. Morgan & Ronald D. Rotunda, Selected Standards on Professional Responsibility 616 (1998 ed.).


39. Id. In keeping with the aspirational tone of the original Canons of Professional Ethics, Canon 20 stated simply that newspaper discussion was "generally . . . to be condemned," adding that if it were to be engaged in, it should not be done "anonymously." We thus have an early condemnation of attorneys' "leaking" information to the press. See id.


41. See Model Code of Professional Responsibility DR 7-107 (1980).

42. Id. DR 7-107(D).


45. Trial publicity is not the only area that the ABA and the states have sought to regulate in
Despite the substantial case authority casting doubt on the constitutionality of speech restrictions directed at attorneys engaged in litigation, when the ABA voted in 1983 to replace the Model Code with the Model Rules, it was sufficiently motivated to retain some restrictions on trial publicity that it included a refined section addressing that topic. Model Rule 3.6 was drafted as yet another effort to limit trial publicity without transgressing the First Amendment. Once again, the ABA's efforts faltered, and, once again, all the states, like Oklahoma, which had followed the ABA's lead on this issue, have been left with rules whose constitutionality and enforceability are open to serious question.

The difficulties with the ABA version of Rule 3.6 were demonstrated in 1991 in *Gentile v. State Bar of Nevada*. There, the United States Supreme Court examined Nevada's Rule 3.6, which, in relevant respects, followed ABA Model Rule 3.6, as did the original Oklahoma Rule 3.6. The Supreme Court held that, while the general standard employed in Model Rule 3.6(a) is not unconstitutional on its face, another provision, contained in Model Rule 3.6(c)(1) and Oklahoma's Rule 3.6(d)(1), is void for vagueness, at least as it was applied by the Nevada Supreme Court.

One of the leading treatises on legal ethics describes the scope of the *Gentile* holdings as "not clear." This is partly because there are two separate majority opinions that resolve two separate issues. Justice Kennedy, writing for himself and Justices Stevens, Blackmun, and Marshall, and with whom Justice O'Connor concurred, drafted an opinion which concluded that Nevada's version of Rule 3.6, "[a]s interpreted by the Nevada Supreme Court," was "void for vagueness." However, Chief Justice Rehnquist, writing for himself and Justices Scalia, White, and Souter, with whom Justice O'Connor also concurred, upheld the constitutionality of the general standard regarding attorneys' trial publicity embodied in Model Rule 3.6(a). Justice Kennedy's opinion (on behalf of himself and three other Justices) stated that Rule 3.6(a) is not necessarily flawed, adding that the central issue in the case was not the constitutionality of the Rule's standard but, rather, "Nevada's interpretation of that standard." Yet, Justice O'Connor's opinion, which provided the deciding vote

unconstitutional ways. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (holding that blanket advertising restrictions violated the First Amendment). Some might find it ironic that virtually every voluntary and official bar organization in the country and every state supreme court has been so insensitive to First Amendment jurisprudence and values that it has promulgated and attempted to enforce for decades provisions that the federal courts have had little difficulty in branding "unconstitutional."

46. MODEL RULES OF PROFESSIONAL CONDUCT (1983).
50. See *Gentile*, 501 U.S. at 1048.
51. 1 Hazard & Hodes, supra note 43, at 666.2 (Supp. 1998).
52. *Gentile*, 501 U.S. at 1048 (Kennedy, J.) (emphasis added); see also id. at 1082 (O'Connor, J., concurring) (agreeing with Justice Kennedy's opinion, in part).
53. See id. at 1075-76 (Rehnquist, C.J.); see also id. at 1081-82 (O'Connor, J, concurring) (agreeing with Chief Justice Rehnquist's opinion, in part).
54. Id. at 1036 (Kennedy, J).
55. Id. at 1034 (Kennedy, J.) (emphasis added); see also id. at 1037 ("[T]his case demonstrates [that]

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with respect to both rulings announced by the Court, concluded that the safe harbor provision of the rule, not its interpretation, was void for vagueness.56

Consequently, the Gentile opinion does little to clarify the range of constitutionally permissible regulation in this area.57 The Court was badly split over an issue that Professors Hazard and Hodes (and even Justice Kennedy) have described as nothing more than a "semantical" disagreement.58 However, analyzing the three opinions generated by the case,59 one can only conclude that (1) discipline cannot constitutionally be premised on Model Rule 3.6(c)(1) (which is mirrored in Oklahoma's Rule 3.6(d)(1)), and (2), even though the Court has accepted the facial constitutionality of Model Rule 3.6(a) (which is mirrored in Oklahoma's Rule 3.6(a)), discipline premised on that provision must be closely scrutinized to determine if it has been applied constitutionally. This means, at a minimum, that the ABA and each state, like Oklahoma, which bases its rules on the ABA Model Rules must rework the trial publicity restrictions to address the vagueness pitfall identified by five Justices of the Supreme Court. Beyond that, application of the general standard contained in Rule 3.6(a) and its relationship to other provisions found in Rule 3.6 are sufficiently suspect to warrant a complete review of existing trial publicity regulations. The ABA has already determined that aspects of Model Rule 3.6 which Oklahoma has adopted must be amended in response to Gentile, and in 1994 the ABA House of Delegates did amend Model Rule 3.6 and one section of Model Rule 3.8 toward that end.60

It is in light of this background of unsuccessful bar efforts, led by the ABA, to regulate trial publicity involving attorneys that Oklahoma's current rule has been reviewed. After over 100 years of failed attempts,61 the state bars and state supreme courts must acknowledge that extensive regulation of trial publicity (1) is constitutionally suspect, because it discourages speech whose harm cannot be demonstrated; (2) it is likely to be challenged, if not facially, at least in its application, thus breeding unseemly litigation over state efforts to muzzle what can often be characterized as political speech;62 and (3) it is neither necessary nor wise. At the same time, litigants - especially criminal defendants - have a constitutional right to a fair trial, and it should be the goal of the legal system to deliver to all litigants a fair

Rule [3.6] has not been interpreted in conformance with [First Amendment] principles by the Nevada Supreme Court." (emphasis added).

56. See id. at 1082 (O'Connor, J., concurring).
57. See supra text accompanying note 51.
59. See supra text accompanying notes 48-56.
60. See GILLERS & SIMON, supra note 11, at 228.
61. Canon 20 in the original ABA CANONS OF ETHICS was adopted in 1908. It, in turn, was based on the Alabama Code of Ethics, which was published in 1887. See Gentile, 501 U.S. at 1066 (Rehnquist, C.J.); supra note 37.
62. Justice Kennedy described the attorney's challenged statements in Gentile as "political speech." Gentile, 501 U.S. at 1034 (Kennedy, J.). The statements there were strictly about the appropriateness of a criminal prosecution. Criticism of the exercise of prosecutorial discretion by government officials is fairly characterized as "political speech." So, too, is comment regarding the uses of the governmentally operated civil court system.
trial. While regulating attorneys' trial publicity is likely to be insufficient to ensure the fairness of trials,\(^\text{63}\) that goal is important enough to justify the effort to try to devise a more limited rule which, within the confines of the First Amendment, is calculated at least to ease the task of delivering fair trials.

Trial publicity commonly becomes controversial only with respect to cases in which there is, intrinsically, significant public interest (which includes many, but by no means all, criminal trials).\(^\text{64}\) Even though such cases constitute only a tiny fraction of all litigation, criminal and civil, when one arises there inevitably will be extensive publicity, both prior to and during the trial; whether attorneys speak to the press or not. Frequently, the attorneys involved in such cases insert themselves or are thrust into the media spotlights.\(^\text{65}\) In criminal trials, especially high profile ones, it is widely believed that information unfavorable to the defendant is commonly "leaked" to the press by law enforcement officers, with or without the knowledge or condonation of prosecutors. Notwithstanding the increasingly abundant availability of detailed pretrial publicity in such high profile criminal cases (whose fairness, presumably, is entitled to the greatest degree of protection), our jurisprudence is highly skeptical of the claim that publicity is a serious impediment to fair trials. Courts in this country routinely deny requests for changes of venue and affirm criminal convictions despite abundant evidence of massive amounts of pretrial publicity adverse to a criminal defendant.\(^\text{66}\)

In the entire history of the United States, there have been but four cases\(^\text{67}\) in which the Supreme Court has reversed a conviction because of a determination that trial publicity tarnished the fairness of the proceeding sufficiently to cast doubt on the

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63. See infra text accompanying note 82.

64. In recent years, there has been substantial discourse regarding trial publicity with respect to a number of criminal trials that have captured the public's attention. The criminal trials of Mike Tyson, William Kennedy Smith, Lorena Bobbitt, O.J. Simpson, Timothy McVeigh, and Terry Nichols have all generated substantial criticism of, and judicial efforts to curtail, the efforts of involved attorneys to provide to the public information about the positions of the parties in those cases.

65. See generally Peter R. Jarvis, Legal Ethics Limitations on Pretrial Publicity and the Case of Ron Hoevet, 31 WILLAMETTE L. REV. 1 (1995) (describing how one attorney was drawn into the public spotlight).


correctness of the outcome. Even in those cases, the contribution of the participating attorneys to the flow of publicity was not a substantial factor.\textsuperscript{68}

Some may point to the recent (unpopular) transfer of the trial of the Oklahoma City bombing suspects, Timothy McVeigh and Terry Nichols,\textsuperscript{69} as rebutting the suggestion that pretrial publicity is not generally viewed as an impediment to a fair trial. There are two responses to this argument. First, the granting of the transfer motions was highly unusual, in part, because those cases are highly unusual. It should be noted that even the prosecution agreed that transfers were in order in those cases.\textsuperscript{70} Trials for other notorious crimes, for example the bombing of the World Trade Center and the intentional drowning of two children in a lake near a small community in South Carolina, have been conducted near the site of the crime and in spite of massive pretrial publicity, with no judicial finding that the fairness of the trial was in jeopardy. Second, the transfers in the Oklahoma City bombing cases were based, not on the amount of pretrial publicity, but on the basis of Judge Matsch's finding that virtually all Oklahomans comprising the presumptive jury venire felt as though they had "a personal stake in the outcome" of the impending trial:

Extensive publicity before trial does not, in itself, preclude fairness. In many respects media exposure presents problems not qualitatively different from that experienced in earlier times in small communities where gossip and jurors' personal acquaintances with lawyers, witnesses and even the accused were not uncommon. Properly motivated and carefully instructed jurors can and have exercised the discipline to disregard that kind of prior awareness. Trust in their ability to do so diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.\textsuperscript{71}

The transfer order in this atypical case thus does not stand for the proposition that pretrial publicity is frequently a serious impediment to the ability of the courts to hold fair trials. More typical was Judge Matsch's denial of defendant McVeigh's motion to delay the trial in Denver because of publicity, on the eve of trial, regarding an alleged


\textsuperscript{70} See id. at 1470.

\textsuperscript{71} Id. at 1473.
confession by the defendant, and his denial of Mr. McVeigh's new trial motion following his conviction.

The general reluctance of courts to treat trial publicity as a serious problem is totally consistent with an observation of Chief Justice Rehnquist, who, writing for the Supreme Court in another context, reminded us that the Constitution guarantees only fair trials, not perfect ones. It is also consistent with the available empirical evidence relating to the claim that trial publicity can cause a trial to be prejudiced.

The trial publicity restrictions contained in the ethics codes since 1887 are ostensibly premised solely on the belief that such publicity is likely to make it unreasonably difficult to have a fair trial. Yet, there is utterly no empirical evidence supporting this assumption. Chief Justice Rehnquist's discussion in *Gentile* declaring that states have a legitimate interest in ensuring that trials are fair contains not a single citation to an empirical study relating trial outcomes to trial publicity. In contrast, there are empirical studies that cut the other way. Justice Kennedy, in the dissenting portion of his opinion in *Gentile*, took note of these. After observing that extensive pretrial publicity occurs with respect to only a tiny fraction of all trials, he wrote:

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75. There is cause to doubt whether the stated justification truly explains the original promulgation of trial publicity restrictions. See infra notes 83-85 and accompanying text.

76. In identifying the "legitimate state interest" which justifies the states' efforts to restrict trial publicity generated by attorneys involved in a trial, Chief Justice Rehnquist has referred to the states' interests in preserving "the right to a fair trial by 'impartial' jurors." Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) (plurality opinion) (Rehnquist, C.J.). It was on the basis of this state interest that he conditioned state efforts to avoid "(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." Id. The Chief Justice suggested that the attorneys involved in a case may be in a unique position to influence the jury venire and the petit jury because they "have special access to information through discovery and client communications," thus making their extrajudicial statements appear "especially authoritative." Id. at 1074. To the extent Chief Justice Rehnquist's opinion justifies speech restraints, then, it would appear that the justification extends only in the context of jury trials. Among jury trials, the most critical concern is with trial publicity that is adverse to defendants in criminal prosecutions.

77. Chief Justice Rehnquist referred to the recommendations of the ABA Advisory Committee on Fair Trial and Free Press (1964), known as the Reardon Committee, and the report of the Warren Commission that investigated the assassination of President Kennedy. See id. at 1067 (plurality opinion) (Rehnquist, C.J.). Neither report cited empirical evidence of the relationship between trial publicity and the ability of the courts to deliver a fair trial comporting with due process. An earlier report of an ABA study conducted by the Medina Committee consisted of nothing more than a compilation of news stories about crimes and trials; it did not link news coverage to convictions or acquittals.

78. See id. at 1054 (Kennedy, J., dissenting).
Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court. 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).²⁹

To these citations, Justice Kennedy might have added a reference to Crime and Publicity, a methodical study that found no correlation between trial publicity and conviction rates. He might also have referred to some noteworthy acquittals in high profile criminal trials that have been conducted in an atmosphere colored by large amounts of pretrial publicity adverse to the defendant. This list could have started with the acquittal of Aaron Burr in 1807 and ended with the acquittal of O. J. Simpson in 1996. As a Ninth Circuit Judge and former Deputy Attorney General of the United States once wrote:

Juries time and time again surprise us with their ability and willingness to penetrate the confusion created by counsel, both within and without the courtroom, witnesses [and] the press . . . . Their verdicts generally are fair.

Thus, it can be argued that there is no need to shelter jurors from what the press reports about the statements of counsel before and during the trial.⁶¹

Thus, when Chief Justice Rehnquist's majority upheld the principle that the states may restrict attorneys' speech in some circumstances without violating the First Amendment, it did so on the basis of an unproven and doubtful assumption. So viewed, state policy makers should carefully consider, not whether regulation is conceivably constitutional, but whether it is necessary or wise.

If trial publicity is seldom a serious problem, broad prohibitions seem unnecessary to serve a substantial state interest. Courts have ample tools with which to protect the fairness of those exceptional cases that generate substantial trial publicity: voir dire, transfer of venue, instructions, judicial comment, sequestration, and new trial orders. Even in those rare cases where publicity presents a serious problem, attorney speech restrictions are unlikely to ameliorate it. As Professors Hazard and Hodes put it:

[A] series of highly publicized cases (combined with the advent of televised courtroom proceedings in many states) [have] made it clearer still that even severe regulation of lawyer speech would do little to stem the tide of pretrial publicity. In an era in which lay witnesses sell their stories to the media even before testifying in court, it is bootless to prevent lawyers from commenting on that testimony. And when pretrial

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⁷⁹ Id. at 1054-55 (Kennedy, J., dissenting).
⁸⁰ ALFRED FRIENDLY & RONALD L. GOLDFARB, CRIME AND PUBLICITY (1967).
proceedings involving contested evidentiary matters are routinely televised, surely comment by the lawyers in the case pales in significance. . . . In a sea of pretrial publicity, the droplets of information contributed by the lawyers are in fact very unlikely to materially prejudice a trial.\footnote{82}

Another reason to doubt the necessity for the traditional restrictions on attorney speech is to examine the motivations surrounding their original adoption. Although the stated rationale for restricting the public statements of attorneys has always been that such limits are necessary to ensure fair trials,\footnote{83} one researcher has suggested that the real motivation of the bar in proposing such restrictions was not so noble:

[T]he history of bar association restrictions on attorney speech should make us skeptical that the bar rules are based on lofty ideals . . . . The restrictions began as rules promulgated by elite corporate lawyers whose effect was to limit the activities of their less affluent brethren who were representing criminal defendants and other impoverished clients. The purpose of the rules was to enhance the image of the corporate lawyers not to protect the public.\footnote{84}

This historical insight makes the absence of empirical evidence documenting the need for speech restrictions all the more telling. It should force policy makers to see that

\footnote{82} 1 Hazard & Hodes, supra note 43, at 666.4 (Supp. 1998).
\footnote{84} Snyder, supra note 68, at 359 (footnote omitted). Professor Snyder's summary statement is supported by careful analysis of studies of the history of the American Bar Association, which first brought the idea of restricting attorneys' public comment to national attention with the adoption of the Canons of Ethics in 1908. See id. at 362-63 nn.18-31. On the basis of this research, he points out that the restriction on trial publicity incorporated into Canon 20 reinforced the bar's antipathy toward attorney advertising and the competitive pressures associated with it, while leaving corporate lawyers free to cultivate business and advance their clients' interests in ways that were acceptable to "gentlemen":

[R]estrictions on trial or litigation publicity had little impact on corporations. Often the leaders of powerful corporate enterprises did not want their conduct to be widely publicized. However, when they did want publicity, corporate lawyers were well able to hire flacks who could whisper sympathetic information in the ears of friendly reporters. Attorneys could advise their corporate clients about when and how to generate favorable publicity without speaking to reporters personally.

Id. at 363. By the same token, trial publicity restrictions left corporate lawyers free to cultivate clients through networks provided by social and country clubs. From this perspective, modern trial publicity restrictions are best explained as incidental to the interests of the early organizers of the American Bar Association to advance the elitist posturing of the turn-of-the-century corporate bar. Professor Snyder's view may sound harsh and cynical, yet it finds support in several studies of the early organized bar. See generally Monroe H. Freedman, Under-standing Lawyers' Ethics (1990) (suggesting elitist tendencies influence contents of "ethics codes"); Jerold S. Auerbach, Unequal Justice (1976) (same); Edson R. Sunderland, History of the American Bar Association and Its Work (1953) (noting elitist origins of American Bar Association).
the whole effort to control attorney speech has been based more on "assumption and opinion" than legitimate public need.

If there is little to be gained from such rules in terms of trial fairness, any costs attributable to them in terms of First Amendment values is especially troubling. Because of the threat of discipline associated with trial publicity rules, they are likely to discourage significant amounts of speech that does not imperil a legitimate state interest. Because unfettered speech, especially truthful speech critical of the government, is considered to be beneficial to the public interest, unnecessary restrictions are unwise. Case-by-case orders, capable of being molded to particular circumstances, are more likely to be effective in serving the state's interest in delivering fair trials without unnecessarily suppressing the speech of attorneys associated with other trials or limiting the public's ability to be informed about matters of legitimate interest.

There are other costs associated with the effort to regulate attorney speech to the maximum extent the First Amendment will allow. Obvious costs include those associated with litigation likely to be generated by extensive restrictions that test constitutional limits. Such litigation inevitably would strain bar budgets already limited in terms of what can be allocated to disciplining egregious conduct directly harmful to clients. Besides potential litigation costs, there are costs in terms of the public spectacle of attorneys' accusing each other of "unethically trying the case in the press." From such episodes, public cynicism regarding lawyers and the ethics of the profession may well be heightened, and public confidence in the integrity of the judicial system may well be lowered. Perhaps even worse, the legal profession's own respect for the entire regime of the Model Rules of Professional Conduct suffers when regulations of questionable value and questionable constitutionality are included (and only rarely enforced). Such regulations also invite spurious grievances to be filed against lawyers, which impose further costs of the underfunded lawyer disciplinary

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85. Snyder, supra note 68, at 359.
86. The Supreme Court's opinion in Gentile includes a transcript of a portion of the press conference for which the State Bar of Nevada sought to discipline the attorney involved. Repeatedly, Mr. Gentile noted that, despite false statements about the accused that allegedly had been publicly disseminated by the prosecution team, he did not feel free to communicate what he and his client believed (and would later demonstrate in court) to be the true facts, because he felt constrained by the Nevada Rules of Professional Conduct. See Gentile v. State Bar of Nev., 501 U.S. 1030, 1049 & n.2 (1991).
87. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 1 (1983) ([T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves.);
88. Despite frequent verbal and written condemnation by courts and lawyers regarding the public comments of other lawyers, there are no reported incidents of an Oklahoma attorney's having been disciplined for violating the long-standing trial publicity rules. The Oklahoma Court of Criminal Appeals once found a state District Attorney to have violated the trial publicity rules, but, rather than impose sanctions or reverse the defendant's conviction, the court referred the matter to Oklahoma's disciplinary authorities. See Harvell v. State, 742 P.2d 1138, 1142 (Okla. Crim. App. 1987). Despite this public referral of a complaint, there is no record of public discipline of the District Attorney involved in that case. Discipline in other jurisdictions is exceedingly rare and most likely to be imposed only when a lawyer has violated a case-specific "gag" order. See, e.g., United States v. Cutler, 840 F. Supp. 959, 971 (E.D.N.Y. 1994), aff'd, 58 F.3d 825 (2d Cir. 1995).
system. The costs of attempting to micro-manage and extensively restrict attorney-generated trial publicity thus seem to be far greater than any potential benefits traditional regulation promises in terms of enhancing the fairness of trials.

Because Gentle really settles very little in terms of the maximum regulation that can be constitutionally defended by a state, any restrictions on trial publicity should be based, not on what the constitution will allow, but, instead, on a level-headed policy analysis. What harms can the state clearly identify, effectively deter, and constitutionally punish — without generating unnecessary and demoralizing disputes over the proper interpretation or legitimacy of the rules? This is the objective to which generally applicable state regulation should be addressed. At the same time, any such regulation should seek to avoid unduly chilling public discussion of matters in which there is legitimate public interest.

89. In one recent highly publicized case, over two dozen bar complaints were filed against the attorney for Jeff Gillooly, who pled guilty to racketeering in connection with the clubbing of ice skater Nancy Kerrigan allegedly at the behest of her competitor, Tonya Harding. Many of the complaints were filed by attorneys, whose embrace of the professional obligation to report ethical breaches of other lawyers customarily has not been enthusiastic. Mr. Gillooly's attorney, having had his professional reputation besmirched and his practice handicapped by the burden of defending himself against the complaints, was ultimately exonerated by the Oregon State Bar Professional Responsibility Board. See Jarvis, supra note 65, at 2 n.3.

90. It is sometimes suggested that states have a substantial interest in preserving public confidence in the legal profession. See, e.g., Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2379 (1995) (noting that the state has a substantial interest in "forestall[ing] the outrage and irritation with the state-licensed legal profession . . . [and avoiding] . . . demonstrable detrimental effects [that certain speech may have] on the profession it regulates"). Chief Justice Rehnquist, in Gentle, writing for four Justices, suggested that lawyers may have less protection than others under the First Amendment because of their status as "officers of the court," whose conduct affects the public's perception of the administration of justice. Gentle, 501 U.S. at 1074 (plurality opinion) (Rehnquist, C.J.) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (1976)). Justice O'Connor concurred in this approach to the constitutional question presented in Gentle. See id. at 1081-82 (O'Connor, J., concurring). While this concern with the deprivation and image of lawyers may well support the constitutionality of restrictions on the speech of attorneys that could not be imposed on the media or citizens at large, this mode of analysis begs the question of whether such additional restrictions should be pursued. Because attorney speech that falls within the parameters of "trial publicity" often affects interests and rights other than those of the attorney involved, public policy should take those other interests into account in deciding whether a state should regulate attorneys to the outer boundaries of the constitution. For example, Mr. Gentle's client had an interest in clearing his good name and preserving the possibility of seating an impartial jury that would not be overly influenced by adverse publicity that had already been disseminated. Limiting Mr. Gentle's right to speak in those circumstances likely had a bigger impact on the client than on Mr. Gentle or the image of the legal profession. As Justice Kennedy put it in Gentle, "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." Id. at 1043 (Kennedy, J.).

It is interesting to note that Chief Justice Rehnquist has not always seized the opportunity to punish attorney speech — speech inside a courtroom, at that — when an "officer of the court" has been found to have transgressed constitutionally-permissible limitations on the attorney's speech. See United States v. Young, 470 U.S. I, 20 (1985) (then-Justice Rehnquist joined in the Court's opinion declining to reverse a conviction obtained in trial accompanied by what the Court conceded to be improper prosecutorial argumentation to the jury).
Oklahoma's Rule 3.6 contains several modifications from the original ABA Model Rule 3.6. Some of these alterations anticipated changes subsequently incorporated into the 1994 amendments of the ABA's Model Rules, but others are quite idiosyncratic. The proposed revisions presented here retain the substance of some of Oklahoma's original modifications but abandon others, for reasons that will be explained in the section-by-section analysis.

II. ISSUES REQUIRED TO BE ADDRESSED IN REVIEWING RULE 3.6

The following issues were addressed in formulating this proposal. Their resolutions will be identified in the section-by-section commentary.

1. Should the "substantial likelihood of material prejudice" standard be retained, or should some variation of the "clear and present danger" standard be adopted as the statement of the general prohibition?

2. Should the old "safe harbor" language of Oklahoma Rule 3.6(d) (ABA Model Rule 3.6(c)) be restated, or should it be abandoned?

3. Should the ABA's proposed new safe harbor provision (ABA revised Model Rule 3.6(c)) be adopted?

4. Should the rule retain a list of types of statements defined as per se permissible?

5. Should the rule retain a list of presumptively impermissible statements?

6. Should the general prohibition be applicable only to those lawyers actually involved in a matter, or also to lawyers associated with those who are involved, or even to all lawyers - including those not involved?

7. How should an attorney's responsibility to deter statements or "leaks" by others be defined?

8. With respect to which types of proceedings should the general standard be applicable: all adjudications (including administrative adjudications), or all jury adjudications, or only criminal adjudications heard by lay jurors?

9. How detailed should the rule's comment be? Should it include aspirational language, detailed examples of presumptively permissible and impermissible statements, or simply guidance for interpreting the black letter standard?

10. Should all attempts to directly regulate attorneys' trial publicity by general rule be abandoned, leaving control of such speech to the more general provisions of Rule 3.4(c) and 8.4(d)?

This would force reliance on case-by-case common law to

91. In the small percentage of cases generating extensive trial publicity, trial courts might be left to regulate attorney speech through case-specific orders (which could also be directed to other participants, within constitutional limits), following evolving Supreme Court guidance regarding "gag orders." Under such an approach, violations of such case-specific orders could be discouraged and, if unsuccessfully discouraged, disciplined, by operation of, not only the court's contempt power, but also by Model Rule 3.4(c), which states: "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c) (1983). Similarly, Model Rule 8.4(d), which authorizes discipline for "conduct that is prejudicial to the administration of justice," could be invoked for patently prejudicial statements, regardless of the existence of a case-specific gag order. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1983). The availability of discipline on the basis of Model Rule 8.4(d) could deter plaintly prejudicial out-of-court statements as effectively as a constitutionally
develop definitions of what comments are impermissible. Even without Rule 3.6, discipline could certainly follow a judicial finding that an attorney had violated a constitutional court order regarding trial publicity entered in a particular case. The threat of such discipline would provide deterrence against disregard of such orders, which, presumably, would only be entered in those cases in which a court had determined that the specific circumstances caused unrestricted attorney comment to present a serious threat to the fundamental fairness of the proceedings.

III. SECTION-BY-SECTION ANALYSIS

Rule 3.6(a)

Four issues are presented by this section: (1) the general standard to be incorporated in the definition of what is prohibited; (2) which lawyers are subject to the rule; (3) a lawyer's responsibility for statements by others; (4) the types of proceedings to which the standard should apply.

1. What should be the general standard defining prohibited statements? This proposal uses a narrower prohibition than the one presently contained in the rule. The present rule uses a "substantial likelihood of material prejudice" standard. A five-Justice majority of the Supreme Court ruled in Gentile that this standard is not unconstitutional on its face. These Justices reached this result on the ground that states have an interest in regulating the speech of lawyers that is more substantial than their interest in regulating the speech of the news media. In their view, this interest justifies a prophylactic rule to ensure the fairness of trials. At the same time, four other Justices were convinced that the "substantial likelihood" standard is too strict, since it justifies punishing lawyers for statements that cannot be demonstrated to have materially prejudiced a proceeding. These Justices preferred a standard that would punish statements only if, when they were made, they posed a "clear and present danger" that they would materially prejudice a trial. The dissenters' concern was that the present standard, justifying discipline on the basis of possible prejudice that does not in fact occur and that, when the statement was made, was not virtually certain to occur, intimidates lawyers from making statements that would be harmless and of legitimate public interest. Professors Hazard and Hodes take the view that the debate in Gentile over whether the current standard is constitutional was something of a tempest in a teapot, merely a semantic debate. These authorities suggest that the proper interpretation of the "substantial likelihood of material prejudice" standard would treat it as essentially implementing a "clear and present danger" test. In other

acceptable prohibition that might be inserted into Model Rule 3.6.
93. See id. at 1048 (Kennedy, J).
94. Id. at 1036.
95. See id. at 1034-35.
96. See 1 HAZARD & HODES, supra note 43, at 666.2 (Supp. 1998).
97. Id. at 666.4.
words, punishment based merely on post hoc evaluation of what a lawyer should have thought about the likelihood a statement would cause prejudice should be rare, because the standard essentially means only rarely can it be said that there was a substantial likelihood of material prejudice if it turns out that, in fact, there was no material prejudice. As Professors Hazard and Hodes put it, before the "substantial likelihood" standard can be invoked, "the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)." On the basis of this interpretation, which Professors Hazard & Hodes say is grounded in the legislative history of the Model Rules, these authors defend the "substantial likelihood" standard, suggesting that it is worth retaining to be applied in those rare cases where one intends to create material prejudice but such prejudice cannot be confidently demonstrated. They contend that the fact that material prejudice cannot be demonstrated does not obviate the fact that the lawyer tried to cause material prejudice, and Gentile holds that states may legitimately seek to curtail such efforts. Since proof of intent is always problematic, retention of the broadest prophylactic rule that is constitutionally permissible is therefore justified, they contend, to deter purposeful attempts to sabotage a proceeding.

Notwithstanding this defense of the present standard, a number of states have narrowed their standards. Their standards are worded so that, before a lawyer is sanctioned for having made a statement, there should be a finding that there was more certainty that the statement would have caused prejudice than the notion of "substantial likelihood" conveys. These states have apparently decided that it would be quite rare for a statement that cannot be shown to have, in fact, caused material prejudice to have been, in fact, intended to cause material prejudice. These states seem to fear that a "substantial likelihood" standard chills a significant amount of speech that really does not, in fact, have a substantial likelihood of causing material prejudice. They have decided to err, if at all, on the side of not unduly inhibiting lawyers' speech. The Rule proposed here for Oklahoma follows this more cautious approach.

Whether this Committee accepts the "serious and imminent" standard in the proposal or retains the "substantial likelihood" standard, the comment should make clear that the proper interpretation of the Rule approaches the traditional "clear and present danger" test that is familiar in First Amendment jurisprudence. The comment should also mention factors that are relevant to the case-by-case application of the standard that is selected.

2. Which lawyers should be subject to the standard of Rule 3.6? Rule 3.6(a) presently applies to any lawyer, regardless of whether the lawyer is participating

98. 1 Hazard & Hodes, supra note 43, at 668 (Supp. 1994).
99. See id. at 666 ("According to the research notes to the Proposed Final Draft of Rule 3.6 [in 1983], the [substantial likelihood of material prejudice] standard was meant to approximate the traditional 'clear and present danger' test regarding speech, and required a case-by-case inquiry into the effect of each statement in question.").
100. See id. at 669-70.
101. The states which have done so include Florida, Illinois, Maine, North Dakota, Oregon, and the District of Columbia.

https://digitalcommons.law.ou.edu/olr/vol51/iss1/2
in the matter in question. Literally, then, a lawyer serving as a news analyst or commentator could be disciplined under the present rule. This broad reach of the rule significantly curtails the First Amendment freedom of all lawyers as well as the public’s access to relevant and helpful information. The 1994 ABA amendment suggests that such a broad sweep extends too far. The language proposed here which restricts the applicability of the Rule to lawyers participating in the relevant matter (and, through proposed Rule 3.6(c), to lawyers associated with participating lawyers) is taken verbatim from the ABA's approved 1994 amendment.

3. To what extent should a lawyer be responsible for statements made by others which would be sanctionable if made by a lawyer participating in a matter? Rules 8.4(a), 3.8(e), 5.1, and 5.2 are sufficient to prevent a lawyer from seeking to violate Rule 3.6(a) by "counseling or assisting" another person (including another lawyer who is not participating in the matter) to make a statement in behalf of a lawyer that the lawyer personally is prohibited from making. In addition, since clients and news media have First Amendment freedoms that, according to Chief Justice Rehnquist's majority opinion in *Gentile*, are broader than lawyers', it is inappropriate to prohibit lawyers from "counseling or assisting" such non-lawyers with respect to their freedom to make statements that are foreclosed to lawyers. Hence, this proposal deletes the current blanket prohibition regarding assistance in statements made by others.

4. With respect to what types of proceedings should the restriction on attorney speech apply? Oklahoma's current rule applies with respect to "any adjudicatory proceeding, including an administrative proceeding." The amended ABA rule applies to "any adjudicative proceeding." Oklahoma's explicit reference to administrative proceedings appears to be unique. A few states (Minnesota, New Mexico, and Virginia) limit their rules to criminal trials. Criminal trials almost always involve lay fact-finders. But so do many civil trials. The "substantial state interest" that the *Gentile* court found to justify any restrictions on attorney-generated trial publicity is the interest in preserving the fairness of adjudicative proceedings. While the constitutional aspects of criminal trials, including even non-jury proceedings that hold the possibility of resulting in incarceration, elevate concern with the fairness of such proceedings to the highest possible level, it must be acknowledged that civil litigants and the public at large have interests in the fundamental fairness of all adjudicative proceedings. Thus, this proposal does not restrict the Rule's coverage to criminal proceedings.

However, an adjudicative proceeding's vulnerability to the taint of unfairness associated with publicity has generally been thought to be present only when the fact-finders are not judges or administrative law judges. Oklahoma's present Rule 3.6(b) recognizes that matters triable to a jury are those with which the Rule is primarily concerned. The amendment suggested here would confine the reach of Oklahoma's Rule 3.6 to proceedings which may result in incarceration or in which a layperson or laypersons will serve as fact-finder(s). Judges are presumed to know the law of evidence and to be above influence by public opinion. The
proposed narrowing of the Rule is based on the belief that this presumption is warranted.

**Old Rule 3.6(b)**

Oklahoma's present Rule 3.6(b) is a verbatim copy of the original ABA Rule 3.6(b). It contains a list of descriptions of presumptively impermissible speech. The list is not intended to be exhaustive.

In light of the flexible, case-specific standard incorporated in Rule 3.6(a), and also considering the Supreme Court's implicit criticism in *Gentile* of indefinite black letter rules, the ABA's 1994 amendment to Rule 3.6 moved the text of what previously had been in Rule 3.6(b) into the comment. This move was explained as follows:

> [T]he Committee believes that the black letter text of a Rule should be reserved for clear standards, deviation from which may result in discipline. . . . This list of statements [in Rule 3.6(b)] likely to be prejudicial is more appropriately located in the commentary to the Rule, where it will serve as guidance to practitioners in deciding whether to speak or what to say. The changes we propose, requiring the application of reasoned judgment to specific facts in each circumstance, will more likely result in an appropriate balance between First Amendment rights and the need for fairness in adjudicative proceedings. ¹⁰²

This Oklahoma proposal follows the ABA recommendation to move the substance of Oklahoma's present Rule 3.6(b) to the comment.

**Old Rule 3.6(c)**

It appears that Oklahoma is alone among the jurisdictions in providing a separate section of Rule 3.6 to apply to administrative proceedings. As noted above, since the fact-finder in such proceedings is an Administrative Law Judge (ALJ) who is presumed to be beyond the influence of public opinion, it is recommended that this aspect of Oklahoma's Rule be deleted. The provisions of Rules 3.5 and 8.4 are adequate for the task of deterring or punishing efforts to improperly influence ALJs.

By the same token, if the Committee retains Rule 3.6(a)'s present scope reaching all "adjudicative proceedings, including an administrative proceeding," then the general standard of Rule 3.6(a), construed in light of the comment (which will highlight factors which may be relevant to the case-by-case application of that standard), should be sufficient for dealing with publicity generated with respect to such proceedings. So even in that event, present Rule 3.6(c) would be unnecessary.

Old Rule 3.6(d)

This portion of Oklahoma's Rule contains a list of statements explicitly identified as permissible. Like Oklahoma's current Rule 3.6(b), this section follows the language suggested by the ABA in its original Model Rule 3.6. The structure of Rule 3.6(d) means that even if unusual circumstances operate so as to cause a statement listed in this section to actually cause material prejudice to a proceeding, the speaker could not be disciplined, for the Rule completely immunizes the statements so listed.

It was one of these provisions that the Supreme Court found constitutionally flawed in Gentile. The apparent safe harbor created by Oklahoma's Rule 3.6(d)(1) with respect to "unelaborated" statements regarding the "general nature of the claim or defense" involved in a case was described by a five-Justice majority of the Court as an unconstitutional "trap for the wary as well as the unwary." 103 The concepts of "elaboration" and "general nature" of claims and defenses do not have an established understanding in the law; consequently, the vagueness of these terms lends the rule to the possibility of arbitrary or discriminatory enforcement, as lawyers are left to guess just how far they may go in explaining their client's position to the press without unintentionally "elaborating" their position. What one lawyer might consider a basic, general description of a client's position in a case might be another lawyer's excessive elaboration of the facts of the case.

Obviously, the language found to be unconstitutionally vague in Gentile must be either eliminated or reworked. The ABA's 1994 amendment simply deletes the troublesome terms, "without elaboration" and "general nature of," leaving the remainder of the list of permissible statements unchanged. 104 In considering the wisdom of the changes recommended by the ABA in 1994, two options should be evaluated. The ABA's 1994 amendment could be incorporated into the black letter of Oklahoma's new Rule, or the statements approved in the ABA's renumbered Rule 3.6(b) could be relegated to the comment to Oklahoma's rule, making them presumptively, not conclusively, permissible.

Following the ABA's approach would meet the Supreme Court's specific objection to the original version of the ABA's Model Rule (and Oklahoma's current rule). If implemented in Oklahoma, the amended language of what was Oklahoma's Rule 3.6(d) would appear as Oklahoma Rule 3.6(b) with appropriate modification of subpart (1). The new rule would still operate as a complete license to speak; if adopted here, it would render Rule 3.6(a) inoperative with respect to statements described in Rule 3.6(b). The inclusion of this "license" to speak would conclusively presume that out-of-court descriptions of claims and defenses, including descriptions of the alleged facts of a case and the positions

103. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991) (Kennedy, J.); see also id. at 1082 (O'Connor, J. concurring) (arguing that the rule in question is void for vagueness).
104. See GILLERS & SIMON, supra note 11, at 229 (showing ABA's 1994 alterations to Model Rule 3.6(a)).
of litigants, are ordinarily not "substantially likely to materially prejudice an adjudicatory proceeding," nor are they likely to pose an "imminent and material threat to the fairness of the fact finding process" in such proceedings. However, where publicized positions turn out to be unsupported at trial, judicial sanctions under Federal Rule 11\textsuperscript{105} and its Oklahoma corollary,\textsuperscript{106} as well as disciplinary sanctions under Oklahoma's Rule 3.1,\textsuperscript{107} would be available.

The ABA's 1994 amendment explicitly extends the license of renumbered Rule 3.6(b) to all lawyers, regardless of whether they are involved in the investigation or litigation of a matter. The breadth of this license is another reason to limit the prohibition contained in Rule 3.6(a) to lawyers who are participating in the matter or who are associated with such lawyers. Should a non-participating lawyer engage in conduct involving publicity that prejudices an adjudicatory proceeding in which the lawyer is not directly involved, Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice) would provide an adequate basis for discipline.

Before deciding whether to retain the permissions included in Rule 3.6(b), the Committee should consider the observations of Professor Hazard and Hodes, who labeled the draftsmanship of the 1994 revision of Model Rule 3.6(b) "unfortunate":\textsuperscript{108}

> [I]t creates the possibility that a statement which would otherwise have been proscribed under subsection (a) will be permissible under subsection (b). Rule 3.6(b) is also subject to the practical criticism that it chooses the wrong statements for safe harboring. For example, the statement described in [new ABA Model] Rule 3.6(b)(1) might allow defense counsel to leak news of an impending insanity defense, while the statement described in [new ABA Model] Rule 3.6(b)(2) could become a license for the prosecutor to read from a detailed indictment at a news conference. Rule 3.6(b)(7) seems to permit the routine announcement of family details of a person who is merely accused of crime - including his address. Although this information will rarely prejudice a trial, which is the concern of Rule 3.6, permitting its dissemination does seem to represent a gratuitous invasion of privacy.\textsuperscript{109}

Despite this critique, Professors Hazard and Hodes conclude that the ABA's retention of this list of conclusively permissible statements "should work tolerably well in practice."\textsuperscript{110} This lukewarm endorsement by such careful commentators

\textsuperscript{105} FED. R. CIV. P. 11.
\textsuperscript{106} See 12 OKLA. STAT. § 2011 (Supp. 1997).
\textsuperscript{107} OKLA. RULES OF PROFESSIONAL CONDUCT Rule 3.1, 5 OKLA. STAT. ANN. ch. 1, app. 3-A (West 1996). Oklahoma's Rule 3.1, like ABA Model Rule 3.1, prohibits advocating frivolous positions.
\textsuperscript{108} HAZARD & HODES, supra note 43, at 675 (Supp. 1998).
\textsuperscript{109} Id.
\textsuperscript{110} Id.
should cause the states to think twice before following the ABA's lead on this section.

The proposal presented here, therefore, calls for dropping the essence of this section to the comment, where the list of statements would be identified as normally unlikely to materially prejudice a proceeding, even though circumstances could exist where such statements would still violate the general standard of Rule 3.6(a). Florida, Minnesota, and Oregon all have trial publicity rules that resist the temptation to codify lists of statements which are to be treated (either presumptively or conclusively) as permissible or impermissible.111

If a list of conclusively permissible statements is to be retained, it is recommended that the 1994 version of ABA Model Rule 3.6(b) be adopted verbatim. Besides curing the problem highlighted by Gentile, the ABA's 1994 amendments curtail the permission now included in Oklahoma's Rule 3.6(d)(3) for lawyers associated with investigations (most commonly, public prosecutors) to make detailed statements about them. Eliminated is the current license to state "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."112 When a matter has moved beyond the investigatory stage, proposed Rule 3.6(b)(1) will allow much of this information to be communicated, but during the investigatory phase of a criminal investigation, prosecutorial elaboration is fraught with danger. Another change would be the addition of clarifying language in what is now Rule 3.6(b)(7) to emphasize that the permission granted there is in addition to the authorized disclosures listed elsewhere in this same section of the Rule.

*Old Rule 3.6(e)*

This provision in Oklahoma's Rule, which encompasses a "right of reply" with respect to "charges of misconduct publicly made against a lawyer," is a unique Oklahoma invention.113 It was initially placed into our Rule 3.6 to carry forward similar language which had been found in the earlier trial publicity rules contained in DR 7-107(1) of the old Code of Professional Responsibility.114 That provision, in turn, found its origin in the ABA's Model Code. It is not clear why this provision was dropped from the ABA's Model Rules. Perhaps it was determined that Rule 3.6(a) should apply with respect even to cases in which the attorney is a party. Certainly, such cases are as vulnerable to material prejudice as any other, and attorneys should not enjoy the benefit of a double standard that allows them to make prejudicial statements about cases in which they are parties

111. See FlA. STAT. ANN., RULES REGULATING THE FLORIDA BAR ch. 4, RULES OF PROFESSIONAL CONDUCT Rule 4-3.6 (West 1996); 52 MINN. STAT. ANN., RULES OF PROFESSIONAL CONDUCT Rule 3.6 (West 1996); OREGON RULES OF COURT, CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (West 1997).
113. OKLA. RULES OF PROFESSIONAL CONDUCT Rule 3.6(e), 5 OKLA. STAT. ch. 1, app. 3-A (1991) (amended 1997).
114. See Maute, supra note 49, at 91 & n.231.
while they cannot make such statements when they represent someone else. Since the leeway provided by the rearticulated standard in proposed new Rule 3.6(a) and the proposed revised comment identifying presumptively permissible statements is ample for all litigants, there is no reason to retain this preferred position for attorneys. Nor is it necessary to include black letter language authorizing lawyers to participate in legislative, administrative, and other investigative bodies, for nothing retained elsewhere in Rule 3.6 could be construed to disallow this. The proposal therefore calls for the deletion of Oklahoma's present Rule 3.6(e).

New Rule 3.6(b)

When the ABA revised Model Rule 3.6 in 1994, it adopted two new sections that this proposal also supports. The first of these appears as proposed new Oklahoma Rule 3.6(b), which is derived from the 1994 version of ABA Rule 3.6(c). Professors Hazard and Hodes view the inclusion of this section as "necessary"115 to completely respond to the constitutional defect in the unamended rule identified in Justice Kennedy's majority opinion in Gentile. Professors Hazard and Hodes describe this subsection as permitting

lawyers to 'protect a client from recent publicity' with publicity of their own, so long as the original adverse publicity was not of the client's making, and so long as this right of reply is exercised no more extensively than necessary to cure the damage already done to the client's reputational or fair trial rights.116

Since this is essentially what the lawyer had done in Gentile, and since the Supreme Court said the First Amendment disallows the state to punish the lawyer for doing that, a provision is called for which will explicitly authorize attorneys to do what Mr. Gentile did without having to fear a possibly misguided effort to enforce Rule 3.6(a) against them.

New Rule 3.6(c)

Oklahoma's current Rule 3.6(a) does more than directly prohibit lawyers who are participating in a litigation from personally making the types of statements proscribed by the Rule's substantive standard; it also prohibits such lawyers from "participating" in making such statements and "counseling or assisting" others from making such statements.117 To the extent that it is the intent and effect of these broader prohibitions to prevent Rule 3.6(a) from being circumvented by lawyers who would simply have others say what they personally could not say, the additional verbiage is redundant and, hence, unnecessary. Rule 8.4(a) states, "It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do

116. Id. (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994)).
117. OKLA. RULES OF PROFESSIONAL CONDUCT Rule 3.6(a), 5 OKLA. STAT. ch. 1, app. 3-A (1991) (amended 1997).
so through the acts of another . . . ."118 Under this Rule, a lawyer participating in a litigated matter would face discipline if he or she affirmatively sought to use a lawyer with whom the lawyer was associated (or even a nonlawyer, e.g., a client or staff person) to make a statement which the participating lawyer was prohibited from making by operation of Rule 3.6(a). There is no reason to doubt that Rule 8.4(a) is sufficient to deter any such attempts to circumvent Rule 3.6(a). Existing Rule 3.8(e) goes even further with respect to prosecutors, imposing upon them a duty to restrain "leaks" by law enforcement authorities.119

Furthermore, the current breadth of Oklahoma's Rule 3.6(a) raises constitutional doubts because it threatens to disallow lawyers to assist nonlawyers (including clients) to make statements which the First Amendment permits nonlawyers to make. Recall that part of the rationale for regulating attorney speech, as articulated in Gentile, is that lawyers are "officers of the court," who enjoy less First Amendment protection than others.120 This status was found to justify the imposition of greater speech restraints on lawyers than the First Amendment would allow to be imposed on nonlawyers — especially the media. The present wording of Oklahoma's Rule 3.6(a) appears to prohibit lawyers from assisting nonlawyers, including the media, from making statements that the state cannot foreclose to nonlawyers. The constitutionality of this aspect of the present Oklahoma Rule is thus clouded.

Nevertheless, Oklahoma's present rule presumes that a non-participating lawyer who is associated with a participating lawyer is in a position to make statements which would violate the standard of Rule 3.6(a). This is apparently because of such a lawyer's presumed access to information held by the participating lawyer and because of the presumed public perception that such an associated lawyer is in a position to have reliable information. If these presumptions are correct and an associated lawyer made a prejudicial statement, without having been induced to do so by the participating lawyer, the statement would fall in a gap between Rules 3.6(a) and 8.4(a). Under the structure of proposed Rule 3.6(a), that provision would apply only to lawyers who are participating or who have participated in a litigated matter. Rule 8.4(a) only reaches statements of associated lawyers and others which the participating lawyer elicits or induces. Therefore, assuming the validity of the assumptions regarding the potential for associated lawyers to make prejudicial statements, a separate provision is necessary to impose an independent duty on associated lawyers. Proposed Oklahoma Rule 3.6(e), modeled after the 1994 version of ABA Rule 3.6(d), accomplishes this.121 Creating a separate section addressed directly to those

118. OKLA. RULES OF PROFESSIONAL CONDUCT Rule 8.4(a) (1983).
119. Id. Rule 3.8(e). The rule provides: "The prosecutor in a criminal case shall exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6." Id.
121. Even if proposed Rule 3.6(e) is adopted, Rule 5.1 would impose additional obligations on supervisory lawyers participating in litigation as well as all partners in firms engaged in litigation. Rule
lawyers associated with lawyers who are directly participating in an investigation or litigation effectively fills the gap that exists between Rules 3.6(a) and 8.4(a) without raising the constitutional questions presented by Oklahoma's present rule.

**COMMENT**

The 1994 amendments to ABA Model Rule 3.6 substantially elaborated the comment to the rule by transferring to it the list of presumptively impermissible statements that had been included in original Model Rule 3.6(b). This repositioning in the comment could be interpreted as lessening somewhat the presumption that such statements are extremely likely to materially prejudice an adjudication. Still, the types of statements now listed in the comment to Rule 3.6 are clearly identified as suspect. Their inclusion there could chill the willingness of attorneys to make such statements, even though they doubt that making them would be prejudicial to the fact-finding process of a trial.

A few states have sought to avoid the potential chilling effect of including a list of disfavored, but not absolutely prohibited, statements in the comment by drastically reducing the comment or even eliminating it altogether. In other words, this trend toward abbreviated comments reflects a concession to the fact that, frustrating as it may be to "traditionalist" lawyers, the First Amendment considerably narrows the scope of permissible state regulation in this area. The California Supreme Court, directed by the state Legislature to create a trial publicity rule where none had previously existed, simply placed the text of the 1994 version of the ABA Model Rule 3.6(a) and (b) into California's Code of Professional Responsibility format, abandoning any effort to include a comment. Florida's new rule on trial publicity retains only the first paragraph of the original Model Rule comment. The chief contribution of that paragraph is to express ambivalence regarding the necessity and appropriateness of restricting

5.1(a) requires every partner in a law firm to make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Okla. Rules of Professional Conduct Rule 5.1. Rule 5.1(b) requires any supervisory lawyer to "make reasonable efforts to ensure that [any lawyer under her authority] conforms to the Rules of Professional Conduct." Id. Rule 5.1(b). Rule 5.1(c) makes any lawyer "responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or . . . ratifies it; or (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." Id. Rule 5.1(c).

122. See Gillers & Simon, supra note 11, at 228-33 (showing alterations to Model Rule 3.6 and its comment accomplished by the ABA's 1994 amendments).


trial publicity.\textsuperscript{126} While the current Illinois rule still contains lists of approved and disapproved statements, the lists are unaccompanied by a comment.\textsuperscript{127} Minnesota's rule on trial publicity has been reduced to three lines, unaccompanied by a comment.\textsuperscript{128} Washington's approach is similar: its rule is but three lines in length and it is published without a comment. It is, however, accompanied by "guidelines," whose chief contribution is to make a sharp division between criminal and civil proceedings and their susceptibility to prejudice on account of trial publicity.\textsuperscript{129} Oregon, which still employs the Code of Professional Responsibility format, is quite succinct, and there is no commentary to the black letter provisions in DR 7-107.\textsuperscript{130}

\textit{Paragraph 1}

The first paragraph of Oklahoma's current comment to Rule 3.6 is identical to the first paragraph of the comment that was contained in the original version of ABA Model Rule 3.6. When the ABA amended Rule 3.6 in 1994, it retained the entire text of that first paragraph. The proposal here is to modify that paragraph to reflect the thrust of the proposed Oklahoma amendments to the text of Rule 3.6(a), which limit the Rule's restrictions to statements judged to pose an obvious threat to the fact-finding process in trials that may result in incarceration or that employ lay fact-finders. Among such proceedings, the proposed comment treats criminal trials as being the most susceptible to prejudice due to publicity. With respect to criminal trials, statements that are most likely to cause material prejudice are those that are adverse to the accused. The text of the Rule still recognizes, however, that, besides the accused in a criminal trial, the state and the public have an interest in a trial that can fairly assess guilt or innocence in accordance with the full range of constitutional safeguards. Thus, this paragraph of the comment would recognize that it is possible that the substance and timing of public statements issued by or through criminal defense attorneys could be found to violate the proposed revised standard of Rule 3.6(a). But constitutional doctrines grounded in both due process and the First Amendment operate to make the prospect of material prejudice attributable to trial publicity most palpable when the publicity is adverse to the defendant in a criminal proceeding. The proposed revisions to the first paragraph of the comment are necessary to reflect this reality.

\textsuperscript{126} See FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-3.6 (West 1994).
\textsuperscript{127} See ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1997).
\textsuperscript{128} See MINN. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1997).
\textsuperscript{129} Washington's guidelines do retain lists of presumptively permissible and impermissible statements with respect to a criminal proceeding, but civil proceedings are treated as being considerably less vulnerable to prejudice by way of publicity. The civil guidelines suggest statements with respect to such proceedings would violate the general standard of Rule 3.6 only if the statements were "designed to influence the jury or to detract from the impartiality of the proceedings." WASH. RULES OF PROFESSIONAL CONDUCT Rule 3.6, guideline II (1997). Subjective intent thus becomes an element of a Rule 3.6 violation sought to be made out in connection with a civil case. Id. Rule 3.6.
\textsuperscript{130} See ORE. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1986).
Paragraph 2

The second paragraph of Oklahoma's present comment was taken directly from the second paragraph of the original comment to the ABA's original Model Rule 3.6. When the ABA revised the Model Rule in 1994 to take account of the Supreme Court's opinion in Gentile, it eliminated this paragraph entirely, and Oklahoma should do the same. The first sentence of this paragraph is unhelpful, and the second sentence is no longer accurate.

Paragraph 3

This paragraph was likewise adopted directly from the original ABA Model Rule on trial publicity. The ABA's 1994 revision simply renumbered this paragraph as number 2, in light of the deletion of what had been Paragraph 2. Three alterations of this paragraph are recommended here. One change is to substitute "governs" for "requires" in the second sentence of this paragraph. This is a modification required to more accurately reflect the content of Rule 3.4(c), which the sentence cross-references. 131 That rule contains an exception for open challenges to the validity of a court rule or order. The applicability of that exception could become confused without the proposed change. Second, a new sentence is added to make clear that compliance with case-specific "gag" or "confidentiality" orders in high profile or especially sensitive cases is governed by Rule 3.4(c). To be constitutionally sustainable with respect to lawyers, any such special order would have to comply with the standard approved in Gentile: "substantial likelihood of material prejudice to an adjudicatory proceeding." 132 Even when a constitutionally valid special order has been entered in a case, until its validity has been tested, Rule 3.4(c) allows for an open challenge to it through disobedience. Should the challenge be unsuccessful, discipline could not be premised on Rule 3.4(c). However, if such an order's constitutionality is upheld and a lawyer is found to have violated it, not only could the lawyer be sanctioned by the court that entered it, but, if the lawyer's statement transgressed the standard of revised Rule 3.6(a), the lawyer could also be disciplined on the basis of that rule. The third change proposed in this paragraph, elaborating its second sentence, is intended to highlight and clarify the interrelationship between Rules 3.4(c) and 3.6.

New Paragraphs 3-7

When the ABA House of Delegates reworked Model Rule 3.6 in 1994, it added five new paragraphs to the rule's comment to provide guidance to the alterations


132. Gentile v. State Bar of Nev., 501 U.S. 1030, 1074 (1991) (Rehnquist, C.J.). Note that, as per Gentile, a special order could be more strict than the proposed new Rule 3.6 and still not transgress the First Amendment.
of the black letter rules found to be in order after the Supreme Court's decision in *Gentile.*  

Because of the deletion of the original paragraph 2, the ABA's proposed new paragraphs take numbers 3 through 7. This proposal recommends adoption of the ABA's new paragraphs in the comment, modified as described below. To facilitate comparison of these proposed new comments with the ABA's new 1994 comments, paragraphs 3-7 are presented as amendments of the ABA's version of them.

**New Paragraph 3**

It is recommended that the first sentence in ABA comment 3 not be adopted. It merely restates the black letter of Rule 3.6(a). If a restatement of the standard enunciated in Rule 3.6(a) is deemed advisable in the comment, then this sentence should be rewritten to reflect the Oklahoma version of that standard, which, if this proposal is adopted, will differ from the ABA's 1994 wording.

The second sentence in the ABA's paragraph 3 is helpful and should be adopted.

**New Paragraph 4**

The ABA's version of this paragraph seeks to explain language which the ABA retained in section 3.6(b) of the black letter rule, immunizing certain categories of statements, even though unique circumstances might justify treating them as violative of the general standard of revised Rule 3.6(a). In light of the skepticism expressed by Professors Hazard and Hodes regarding the draftsmanship and necessity of the ABA's new Rule 3.6(b), this proposal places the same list of presumptively permissible statements in this paragraph of the comment, and it treats the presumption regarding the lack of prejudice likely to be attributable to such statements as rebuttable. This paragraph of the comment also makes it explicit that the list of presumptively non-prejudicial statements is illustrative and not exhaustive. The inclusion of the explanatory language added by this proposal to the ABA's 1994 version of the comment's paragraph 4 is appropriate to emphasize that most statements in most circumstances are not likely to be prejudicial to the fact-finding process and they, therefore, should not be chilled by the threat of unreasonable disciplinary complaints or prosecutions.

**New Paragraph 5**

The ABA added this paragraph to the comment of Rule 3.6 in 1994, taking language that previously appeared in the black letter text of Rule 3.6(b) and dropping it to the comment. This move was stimulated by *Gentile,* which the ABA apparently interpreted as casting doubt on the identification of presumptively prejudicial statements in the text of the Rule. While this may have been an overreaction to *Gentile,* on a policy basis it is sound to have this list of

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133. See GILLERS & SIMON, supra note 11, at 231-32 (showing new comments to ABA Model Rule 3.6).

134. See supra text accompanying notes 108-09.
presumptively prejudicial statements, along with the list of presumptively nonprejudicial statements contained in the proposed new Oklahoma paragraph 4, in the comment. Placement there emphasizes the difficulty of generalizations about the permissibility of attorney speech and forces attorneys and enforcement agencies to consider the potential effects of statements in light of the specific circumstances in play at the time. At the same time, the identification of presumptively permissible and impermissible statements in the nonbinding comments serves the salutary function intended to be performed by all the comments to the rules: to furnish guides to the interpretation of the black letter rules, upon which discipline may be premised. The Oklahoma proposal contains only two changes to the ABA's version of this comment. First, one word has been changed in the introductory sentence to slightly soften the presumption that the listed types of statements would violate the general standard adopted in Oklahoma's Rule 3.6(a). The second change, in category (5) in the list of presumptively impermissible statements, is necessary to reflect the general standard adopted in Oklahoma's Rule 3.6(a).

New Paragraph 6

The ABA's 1994 amendments to Rule 3.6's comment added a paragraph 6 in an effort to put lawyers and disciplinary agencies on notice that the prejudicial effect of a statement will be directly related to the nature of the proceeding, with criminal trials, civil jury trials, and all proceedings possibly resulting in incarceration being the most sensitive. These observations are so true that the proposed new text for Oklahoma's Rule 3.6(a) limits the applicability of the rule to such proceedings. The proposed Oklahoma changes to the ABA's new paragraph 6 are designed to emphasize the limited range of proceedings subject to the rule's disciplinary bite.

Another objective of the proposed Oklahoma changes to this comment is to articulate key factors which will be relevant to assessing when a statement with respect to one of the covered types of proceedings will cross the rule's threshold of imminent and material prejudice to the fact-finding process.

Finally, the proposal includes original, aspirational language regarding the speech of all lawyers with respect to all types of proceedings. While constitutional and policy arguments counsel against subjecting all such statements to the threat of professional discipline, this comment is an appropriate place in which to lodge aspirational caveats to serve as helpful reminders for thoughtful and conscientious lawyers. The establishment of a clear demarcation between mandatory and aspirational standards is one of the major objectives of this proposal.

New Paragraph 7

This new paragraph was added by the ABA in 1994 to explain the inclusion of the new "safe harbor" created by ABA Model Rule 3.6(c) and the identically-worded proposed new Oklahoma Rule 3.6(b). The proposed Oklahoma comment
adds only one word to the ABA version of the same comment, emphasizing that this safe harbor is limited by "reasonableness" considerations.

**PROPOSED AMENDMENT TO OKLAHOMA RULE 3.8**

When the ABA amended Rule 3.6 in 1994 to respond to *Gentile*, it also added a new section to Rule 3.8 to curtail abusive prosecutorial comment. The ABA inserted the provision as Rule 3.8(g). This proposal recommends that the substance of the ABA's new section be inserted into the Oklahoma Rule as Rule 3.8(f). The repositioning eases the integration of the new provision into the structure of the Oklahoma Rule, where the present Rule 3.8(f) differs from the ABA's version of original Model Rule 3.8(f). Oklahoma's current section (f) would simply be relettered as (g). The comment to proposed Oklahoma Rule 3.8(f) differs slightly from the comment to new ABA Rule 3.8(g), to reflect differences between the proposed new Oklahoma Rule 3.6 and the 1994 version of ABA Rule 3.6. Comparison of the Oklahoma and ABA comment can be made by placing the Oklahoma version next to the ABA version. The proposed new paragraph of the Oklahoma comment is depicted as an amendment of the 1994 ABA comment.

As indicated elsewhere in this memorandum, statements by prosecutors or law enforcement officials associated with prosecutors are among the statements most likely to be prejudicial to the fairness of an adjudicatory proceeding. Proposed new Oklahoma Rule 3.8(f) recognizes this fact and imposes specific limitations on the statements of prosecutors to reinforce the substance and policy of revised Rule 3.6. The Oklahoma proposal would simply incorporate the ABA's proposed new section 3.6(g) along with a modified version of the ABA's comment explaining that section in proposed new paragraph 5 under Rule 3.8. Because Oklahoma presently has one more paragraph in the comment to Rule 3.8 than does the ABA, the proposal requires renumbering the current paragraph [5] of the comment to the Oklahoma rule as paragraph [6]. This newly renumbered paragraph [6] has been changed to reflect preexisting differences between the ABA Model Rule and Oklahoma's rule regarding the issuance of lawyer subpoenas.

**VI. Minutes of Rules of Professional Conduct Committee Meetings**

*Showing Discussion of Proposed Amendments*

**OKLAHOMA BAR ASSOCIATION**

**RULES OF PROFESSIONAL CONDUCT COMMITTEE**

Minutes of Meeting of July 12, 1996

* * *

The discussion then turned to draft amended Rules 3.6 and 3.8 and their comments, prepared by Larry Hellman, copies of which, together with related discussion, analysis and background materials, had previously been furnished to the Committee. All complimented Larry for his comprehensive and scholarly analysis and presentation of relevant background materials.
Larry Hellman then proceeded to summarize the provisions of the proposals, in the process comparing them with the existing Oklahoma rules and those adopted by the ABA in 1994 following the Gentile decision. He discussed what the Gentile decision did and did not decide, and noted varying responses, including inaction, by other jurisdictions. In conclusion, he suggested that some time should be devoted to consideration of these issues, and that publication in the Bar Journal and an opportunity for public comment and discussion would appear to be indicated.

In response to a question from the Chair as to whether complaints relating to alleged violations of the pretrial comment rules had been a problem, General Counsel Murdock replied that there had been very few grievances filed in this area. Those submitted were for the most part informal and directed to public comments by prosecutors. He noted that "gag orders" imposed by judges in many high profile cases, which affect the parties as well as the lawyers, appeared to be fairly effective. He stated that the rules probably needed clarification in view of Gentile, and if a rule is not legally or practically enforceable, it shouldn't be there. He liked the idea of inviting public comment on proposed rules.

Chuck Watson noted that during his tenure on the PRC,[135] he did not recall that this area had been the subject of any formal complaints. It was certainly not a monumental problem in Oklahoma. He questioned whether a great deal of effort to "fix" the rules should be expended and suggested that abandoning the rule or changing it to a summary form, and instead relying on judicial "gag" orders on a case-by-case basis, should be considered.

The Chair commented that it would perhaps be better to restrict or eliminate a rule which would only apply to lawyers, and instead look to judicial "gag orders" which would restrict client statements, too.

In response to a question by the Chair, Larry Hellman stated that the constitutional validity of "gag" orders as applied to clients was not completely clear. However, such orders, where upheld, mean that based upon some sort of hearing, presumably in part evidentiary, a judge has found a "substantial likelihood" of prejudice that passes constitutional muster.

David Almond, drawing upon his recent experience in a "high-profile" case, described problems in client relations and managing the flow of information in a way which would avoid criticism and yet respond to public allegations by opposing parties. He expressed uncertainty as to whether a court could generally be persuaded to enter an order restricting client activity, or whether that would always be appropriate as a matter of policy. He also referred to problems in determining when matters subject to a confidentiality order are no longer confidential.

Mike Bigheart referred to the problem of high profile cases in small towns. He expressed support for the proposed rules.

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135. PRC denotes the Oklahoma Bar Association Professional Responsibility Commission, which administers the professional disciplinary system.
Pat Carr expressed the opinion that the present rule is a trap for both the "wary and unwary." It is usually employed as a threat in cases of "the big guy against the little guy," and lawyers should not be so muzzled.

Lou Ann Moudy liked the new draft proposals. She believes, however, that both the old and new "safe harbor" may be unclear. A lawyer should be protected against the possible selective enforcement of such a rule. Larry Hellman stated that the "conflict of interest" rule was the source of his "reasonable lawyer" proposal for the "safe harbor."

Tom Ruble expressed the opinion that there should be some rule to remind lawyers of their responsibility in the judicial system. He likes the proposed rules.

The Chair noted that, probably ideally, and perhaps such a situation may even have existed at some point in the 19th century English system, there should be no public comment by lawyers or parties on pending litigation, leaving the whole process to the courts and factfinders operating under the supervision of the courts. But that battle was lost almost from the inception of the United States, because since our founding and even before, in colonial times, legal proceedings have always been a matter of great public interest and therefore subject to broad-ranging public comment. It is now simply a question of trying to minimize potential harm to the rights of criminal defendants and litigants in general.

It was agreed that all would give further study to the proposals, conveying any specific questions or suggestions to Larry Hellman, and resume consideration at the September meeting.

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OKLAHOMA BAR ASSOCIATION
RULES OF PROFESSIONAL CONDUCT COMMITTEE
Minutes of Meeting of September 27, 1996

* * *

Discussion then turned to completion of the Committee's consideration of revised Rules 3.6, Trial Publicity, and 3.8, Special Responsibilities of a Prosecutor. Larry Hellman suggested three changes to address typographical or clarification matters, which were accepted. Discussion of the propriety of revealing personal information about an accused which might lead to harassment of innocent family members led to a recommendation that specific comment on that point be sought when (and if) the proposed rules are published.

It was also recommended that copies be specifically directed to the Prosecutors' and Defense Attorneys' associations requesting their comments.

Guy Clark noted, and thereby expressed the general consensus of the Committee, that the generality of the rule's language, together with ever-present "free speech" considerations, made it unlikely that many enforcement proceedings would occur. It was nevertheless important to make lawyers aware that the Bar as a whole disapproved of inappropriate public statements made with indifference to the possibility that the availability of a fair trial could thereby be impaired. Thereupon, the Committee unanimously approved draft revised Rules 3.6 and 3.8 for forwarding to the Board of Governors with the request that they be published in the Bar Journal for comment.

* * *
VII. June 23, 1997, Memorandum Summarizing Proposed Amendments for Oklahoma Supreme Court Memorandum

TO: SUPREME COURT OF OKLAHOMA
FROM: LAWRENCE K. HELLMAN
PROFESSOR OF LAW
OKLAHOMA CITY UNIVERSITY
RE: SUPPLEMENTAL MATERIAL ON PROPOSED AMENDMENTS TO RULES 3.6 AND 3.8
DATE: JUNE 23, 1997

Introduction

In light of some of the questions asked during my presentation on June 19 and the limited materials that had been previously submitted to the Court with respect to the proposed amendments to Rules 3.6 and 3.8, OBA Executive Director Marvin Emerson suggested that I prepare a brief memorandum that might facilitate the Court's consideration of the proposals. Enclosed with this memorandum is a "red-lined" version of the relevant rules clearly showing the textual changes that would be implemented by the Bar's proposal. I also have available a forty-page memo that I prepared last year for the OBA's Rules of Professional Conduct Committee. The longer memorandum more thoroughly explains the rationale for the proposed changes. I would be happy to supply a copy of the longer memorandum for any member of the Court or the research staff.

Reasons for Reconsidering Present Oklahoma Rules

The enforceability of our current rules was brought into question by Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). Since that case generated two somewhat conflicting 5-4 opinions, its actual holding is unclear. But it did prompt the ABA to amend its Model Rules 3.6 and 3.8 in 1994. Since most states (including Oklahoma) have based their rules on the ABA Model Rules, the ABA's action prompted a number of states to review their rules. The OBA Rules of Professional Conduct Committee has taken this occasion to thoroughly review our rules in this area. Thus, while it cannot be said that all of the changes recommended here are constitutionally required by Gentile, it is true that Gentile prompted the review that led to these proposals.

Objectives Sought by the Proposed Amendments

A. To simplify Rule 3.6 (to avoid over-deterrence and unjustified criticism of attorneys).
B. To more narrowly define the type of statement for which an attorney can be professionally disciplined (to yield a provision that provides clearer guidance and effective enforceability).
C. To add emphasis to aspirational considerations (to discourage irresponsible conduct that cannot be effectively disciplined).
Specific Changes That Would Be Implemented by Amendments

A. Change the disciplinary standard in Rule 3.6 from "substantial likelihood of material prejudice" to "will have an imminent and materially prejudicial effect on the fact-finding process." (Approximates "clear and present danger" test.)

B. Move lists of presumptively permissible and presumptively impermissible statements from text of Rule 3.6 to its comment. (Presumptions are not hard and fast rules that lend themselves to enforcement.)

C. Clarify and refine the "safe harbor" for attorney speech. (Deemed necessary to fully respond to Gentile.)

D. Limit the reach of Rule 3.6 to lawyers involved in a specific matter and other lawyers associated with them. (Current rule applies to all attorneys, even those not participating in a matter.)

E. Limit the applicability of Rule 3.6 to jury trials and all criminal proceedings. (Judges are presumed to be beyond influence by trial publicity.)

F. Add to Rule 3.8(f) a prohibition against extrajudicial prosecutorial comments that have a substantial likelihood of unnecessarily heightening public condemnation of an accused person. (Recommended by ABA as consistent with the special responsibilities of prosecutors.)

Background on the Proposed New Standard in Rule 3.6(a)

The Seventh Circuit opinion that Justice Opala inquired about was Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975). A similar Fourth Circuit opinion is Hirshkop v. Snead, 594 F.2d 356 (4th Cir. 1979). Bauer held that the disciplinary standard in the then-applicable Code of Professional Responsibility there challenged ("reasonably likely to interfere with a fair trial") did not meet constitutional standards. Bauer proposed a standard of "serious and imminent threat of interference with the fair administration of justice," Bauer at 249, adding that even this standard would not be "constitutionally sufficient" without specific rules to "furnish the context necessary to determine what may constitute a serious and imminent threat of interference with the fair administration of justice." Bauer at 249-50.

Bauer was cited favorably in Justice Kennedy's opinion in Gentile v. State Bar of Nevada, 501 U.S. 1030, 1056 (1991) (Kennedy, J.), but not with respect to the disciplinary standard. The portion of Justice Kennedy's opinion that cited Bauer was concurred in by only three other Justices. Chief Justice Rehnquist's opinion in Gentile, for himself and Justices Scalia, Souter, and White, did not expressly refer to Bauer; it did, however, uphold the constitutionality of the standard presently contained in Oklahoma's unamended Rule 3.6(a) ("substantial likelihood of materially prejudicing an adjudicative proceeding"). Gentile at 1075. Justice O'Connor provided a fifth vote for the constitutionality of this standard. Gentile at 1082 (O'Connor, J., concurring). The four other Justices (Kennedy, Stevens, Blackmun, and Marshall) believed the
"substantial likelihood" standard is "not necessarily flawed," at least so long as it is interpreted like a "clear and present danger" test. Gentile, at 1036-37 (Kennedy, J).

In light of the Supreme Court's acceptance of the "substantial likelihood of material prejudice" standard, the ABA's 1994 amendments to Model Rule 3.6(a) retained that standard. Therefore, as noted in my presentation to the Court on June 19, the OBA's proposed new standard ("imminent and materially prejudicial effect") is not constitutionality compelled, and not all of the states that have revised their rules since Gentile have abandoned the "substantial likelihood of material prejudice" standard. Indeed, a majority of states still hold to that standard. Nevertheless, a number of states — both prior to and since Gentile — have narrowed their standards in the same fashion as this OBA proposal:

- DC — "serious and imminent threat to the impartiality of the judge or jury"
- FL — "creation of an imminent and substantial detrimental effect on [a] proceeding"
- IL — "serious and imminent threat to the fairness of an adjudicative proceeding"
- MN — limits rule to pending criminal trials
- ND — "imminent threat of material prejudice"
- NM — "clear and present danger of prejudicing a criminal proceeding that may be tried to a jury"
- OR — "serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect"
- VA — "clear and present danger of interfering with the fairness of the trial by jury"

Note on Proposal to Limit Rule to Jury Trials

To my knowledge, no other state restricts the applicability of its trial publicity rule to proceedings "involving lay fact-finders." However, Minnesota, New Mexico, and Virginia limit the application of their rules to criminal jury trials. The proposed narrowing of our rule is recommended because judges are presumed to know the law of evidence and to be immune to the influence of trial publicity. There is thus significantly less justification for suppressing speech in connection with bench trials.

Note on Relationship of Rule 3.6 to Other Rules

Uniquely volatile cases can still be dealt with by case-specific orders by trial judges, which orders may go beyond the restrictions of Rule 3.6 — subject, of course, to constitutional limitations. Moreover, egregious conduct that may not be captured by amended Rule 3.6 will still be subject to scrutiny under other provisions in our rules, such as Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice), Rule 3.5 (condemning acts seeking to influence judge, juror, or potential juror by means prohibited by law, including ex parte communications and disruptive conduct), Rule 3.4(c) (prohibiting disobedience of the rules of a tribunal), and Rule 4.1(a) (prohibiting the making of false statements of material fact to third persons). Thus, the narrowing of Rule 3.6 through these amendments should not be perceived as giving a "green light" to reckless or irresponsible extra-judicial comments by attorneys.

136. The parentheticals included in this paragraph have been edited for clarity.
Conclusion

I hope this summary is helpful to the Court. Please let me know if I can be of further assistance.

VIII. Proposed "Oklahoma Modifications" Sections Explaining Differences Between Oklahoma's New Rules 3.6 and 3.8 and Current ABA Model Rules 3.6 and 3.8

OKLAHOMA MODIFICATIONS TO RULE 3.6

The Oklahoma Rule that went into effect on October 1, 1997, differs from ABA Model Rule 3.6 in effect on that date in the following respects:

The standard in the 1997 version of Rule 3.6(a), "will have an imminent and materially prejudicial effect on the fact-finding process," differs from the ABA Model Rules standard, "substantial likelihood of material prejudice," to emphasize that Oklahoma's standard approximates the "clear and present danger" test that is familiar to lawyers, and also to highlight the fact that the Rule is concerned with effects on the fact-finding processes of tribunals, rather than effects on public opinion.

The 1997 Oklahoma amendments restrict the applicability of Rule 3.6 to statements affecting adjudicatory proceedings "involving lay factfinders or the possibility of incarceration." This differs from the ABA Model Rule, which applies to statements concerning any adjudicative proceeding.

ABA Model Rule 3.6(b) contains a list of types of statements that lawyers are affirmatively allowed to make. A similar list of types of statements appears in the fourth paragraph of the Comment to Oklahoma's Rule 3.6, where the statements are described as "ordinarily" permissible. This emphasizes that the list establishes only a rebuttable presumption as to the permissibility of such statements. Unlike the ABA list of presumptively permissible statements, the Oklahoma Comment does not condone public statements about the residence and family status of a defendant in a criminal case.

The next to last paragraph of the Comment to Oklahoma's Rule 3.6 is somewhat more specific than is ABA Model Rule 3.6 in identifying some of the factors to be considered in determining whether a statement violates the standard of Rule 3.6(a). That same paragraph of the Comment also goes beyond the ABA Model Rule in encouraging lawyers to aspire to be responsible regarding their extrajudicial statements, even if they are not proscribed by Rule 3.6.

The fifth paragraph of the Comment to Oklahoma's Rule 3.6 contains a list of types of statements that are "more likely than others" to violate the standard of Rule 3.6(a). Like the Comment to ABA Rule 3.6, this list refers to a statement of "information that the lawyer knows or should know is likely to be inadmissible" at trial. The ABA Comment states that such a statement is presumed to be violative of Rule 3.6 when

137. At its meeting of March 27, 1998, the Oklahoma Bar Association Board of Governors approved these proposed "Oklahoma Modifications" sections and referred it to the Oklahoma Supreme Court for approval.
it poses a "substantial risk of prejudicing an impartial trial," while the Oklahoma Comment states that such a statement is presumed to be violative only when it poses an "imminent and material risk of prejudicing an impartial trial." This change is to conform to the different standard employed in Oklahoma's Rule 3.6(a) as compared with ABA Rule 3.6(a).

The last sentence of the last paragraph of the Comment to Rule 3.6 adds the word "reasonable" to the Comment explaining the "safe harbor" created by Rule 3.6(b) to emphasize that the right of reply is not unlimited.

**OKLAHOMA MODIFICATIONS TO RULE 3.8**

The Oklahoma Rule that was most recently amended effective October 1, 1997, differs from the ABA Rule in effect on that date in the following respects:

The word "care" in ABA Model Rule 3.8(c) was changed to "efforts" in Oklahoma Rule 3.8(e) to emphasize the prosecutor's duty to prevent extrajudicial statements.

Oklahoma added language to the Comment to the effect that Rule 3.8 applies to all government lawyers.

Oklahoma's Rule 3.8(f) is the same as ABA Rule 3.8(g).

Oklahoma's Rule 3.8(g) parallels ABA Rule 3.8(f), but, unlike its ABA counterpart, Oklahoma's Rule 3.8(g) prescribes a procedure by which a lawyer who is subpoenaed in a grand jury or other criminal proceeding may challenge the subpoena, and it imposes restrictions on prosecutors during the pendency of any such challenge.