[NOTE: This opinion has been edited for use by students and teachers. For ease of reading, no indication has been made of deleted material and case citations. Any legal or scholarly use of this case should refer to the full opinion.]

GENTILE v. STATE BAR OF NEVADA
501 U.S. 1030 (1991)

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III and VI, and an opinion with respect to Parts I, II, IV, and V, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

Hours after his client was indicted on criminal charges, petitioner Gentile, who is a member of the Bar of the State of Nevada, held a press conference. He made a prepared statement, and then he responded to questions.

Some six months later, the criminal case was tried to a jury and the client was acquitted on all counts. The State Bar of Nevada then filed a complaint against petitioner, alleging a violation of Nevada Supreme Court Rule 177, a rule governing pretrial publicity almost identical to ABA Model Rule of Professional Conduct 3.6. Rule 177(1) prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 177(2) lists a number of statements that are "ordinarily . . . likely" to result in material prejudice. Rule 177(3) provides a safe harbor for the attorney, listing a number of statements that can be made without fear of discipline notwithstanding the other parts of the Rule.

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

I

This case involves classic political speech. The State Bar of Nevada reprimanded petitioner for his assertion, supported by a brief sketch of his client's defense, that the State sought the indictment and conviction of an innocent man as a "scapegoat" and had not "been honest enough to indict the people who did it; the police department, crooked cops." At issue here is the constitutionality of a ban on political speech critical of the government and its officials.

This case involves punishment of pure speech in the political forum. Petitioner engaged not in solicitation of clients or advertising for his practice, as in our precedents from which some of our colleagues would discern a standard of diminished First Amendment protection. His words were directed at public officials and their conduct in office.

There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct, which we described as "speech which has traditionally been recognized as lying at the core of the First Amendment."

Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption, or where, as is also the present circumstance, the criticism questions the judgment of an elected public prosecutor. Our system grants prosecutors vast discretion at all stages of the criminal process. The public has an interest in its responsible exercise.

We are not called upon to determine the constitutionality of the ABA Model Rule of Professional Conduct 3.6 (1981), but only Rule 177 as it has been interpreted and applied by the State of Nevada. Model Rule 3.6's requirement of substantial likelihood of material prejudice is not necessarily flawed. Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm. A rule governing speech, even speech entitled to full constitutional protection, need not use the words "clear and present danger" in order to pass constitutional muster.

The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test. See ABA Annotated Model Rules of Professional Conduct 243 (1984) ("formulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality."

The difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application. Under those principles, nothing inherent in Nevada's formulation fails First Amendment review; but as this case demonstrates, Rule 177 has not been interpreted in conformance with those principles by the Nevada Supreme Court.

II

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

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

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

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

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

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

Petitioner gave a second reason for holding the press conference, which demonstrates the additional value of his speech. Petitioner acted in part because the investigation had taken a serious toll on his client.

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

Petitioner's Investigation of Rule 177. Rule 177 is phrased in terms of what an attorney "knows or reasonably should know." On the evening before the press conference, petitioner and two colleagues spent several hours researching the extent of an attorney's obligations under Rule 177. He decided, as we have held that the timing of a statement was crucial in the assessment of possible prejudice and the Rule's application.

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

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

The Content of Petitioner's Statements. Petitioner was disciplined for statements to the effect that (1) the evidence demonstrated his client's innocence, (2) the likely thief was a police detective, Steve Scholl, and (3) the other victims were not credible, as most were drug dealers or convicted

money launderers, all but one of whom had only accused Sanders in response to police pressure, in the process of "trying to work themselves out of something." He also strongly implied that Steve Scholl could be observed in a videotape suffering from symptoms of cocaine use. Of course, only a small fraction of petitioner's remarks were disseminated to the public, in two newspaper stories and two television news broadcasts.

The stories mentioned not only Gentile's press conference but also a prosecution response and police press conference. The chief deputy district attorney was quoted as saying that this was a legitimate indictment, and that prosecutors cannot bring an indictment to court unless they can prove the charges in it beyond a reasonable doubt.

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

Events Following the Press Conference. Petitioner's judgment that no likelihood of material prejudice would result from his comments was vindicated by events at trial.

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

At trial, all material information disseminated during petitioner's press conference was admitted in evidence before the jury, including information questioning the motives and credibility of supposed victims who testified against Sanders, and Detective Scholl's ingestion of drugs in the course of undercover operations (in order, he testified, to gain the confidence of suspects). The jury acquitted petitioner's client. There is no support for the conclusion that petitioner's statements created a likelihood of material prejudice, or indeed of any harm of sufficient magnitude or imminence to support a punishment for speech.

III

As interpreted by the Nevada Supreme Court, the Rule is void for vagueness, in any event, for its safe harbor provision, Rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline. Rule 177(3)(a) provides that a lawyer "may state without elaboration . . . the general nature of the . . . defense." By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general nature of the . . . defense" "without elaboration" need fear no discipline, even if he comments on "the character, credibility, reputation or criminal record of a . . . witness," and even if he "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "'fair notice to those to whom [it] is directed.'" A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Petitioner testified he thought his statements were protected by Rule 177(3). A review of the press conference supports that claim. He gave only a brief opening statement, and on numerous occasions declined to answer reporters' questions seeking more detailed comments.

The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary.

The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

V

Only the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court. *Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial. All of these factors weigh in favor of affording an attorney's speech about ongoing proceedings our traditional First Amendment protections.

Still less justification exists for a lower standard of scrutiny here, as this speech involved not the prosecutor or police, but a criminal defense attorney. Respondent and its *amici* present not a single example where a defense attorney has managed by public statements to prejudice the prosecution of the State's case.

The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant, many of which are not within the scope of Rule 177 or any other regulation. By contrast, a defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel for the sole purpose of countering prosecution statements. These factors underscore my conclusion that blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny.

Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases. To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent.

VI

The judgment of the Supreme Court of Nevada is *Reversed*.

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

I

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

The Nevada Supreme Court affirmed the board's decision, finding by clear and convincing evidence that petitioner "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." The court noted that the case was "highly publicized"; that the press conference, held the day after the indictment and the same day as the arraignment, was "timed to have maximum impact"; and that petitioner's comments "related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses." The court concluded that the "absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice."

II

Gentile asserts that the same stringent standard applied in *Nebraska Press Assn.* v. *Stuart* to restraints on press publication during the pendency of a criminal trial should be applied to speech by a lawyer whose client is a defendant in a criminal proceeding. In that case, we held that in order to suppress press commentary on evidentiary matters, the State would have to show that "further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." Respondent, on the other hand, relies on statements in cases such as *Sheppard* v. *Maxwell*, which sharply distinguished between restraints on the press and restraints on lawyers whose clients are parties to the proceeding:

> "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

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

In the United States, the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards.

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

> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice."

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

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

The Advisory Committee developed the ABA Standards Relating to Fair Trial and Free Press, comprehensive guidelines relating to disclosure of information concerning criminal proceedings, which were relied upon by the ABA in 1968 in formulating Rule 3.6. The need for, and appropriateness of, such a rule had been identified by this Court two years earlier in *Sheppard* v. *Maxwell*. In 1966, the Judicial Conference of the United States authorized a "Special Subcommittee to Implement *Sheppard* v. *Maxwell*" to proceed with a study of the necessity of promulgating guidelines or taking other corrective action to shield federal juries from prejudicial publicity. Courts, responding to the recommendations in this report, proceeded to enact local rules incorporating these standards, and thus the "reasonable likelihood of prejudicing a fair trial" test was used by a majority of courts, state and federal, in the years following *Sheppard*. Ten years later, the ABA amended its guidelines, and the "reasonable likelihood" test was changed to a "clear and present danger" test.

When the Model Rules of Professional Conduct were drafted in the early 1980's, the drafters did not go as far as the revised fair trial-free press standards in giving precedence to the lawyer's right to make extrajudicial statements when fair trial rights are implicated, and instead adopted the "substantial likelihood of material prejudice" test. Currently, 31 States in addition to Nevada have adopted -- either verbatim or with insignificant variations -- Rule 3.6 of the ABA's Model Rules.

Eleven States have adopted Disciplinary Rule 7-107 of the ABA's Code of Professional Responsibility, which is less protective of lawyer speech than Model Rule 3.6, in that it applies a "reasonable likelihood of prejudice" standard. Only one State, Virginia, has explicitly adopted a clear and present danger standard, while four States and the District of Columbia have adopted standards that arguably approximate "clear and present danger."

Petitioner maintains, however, that the First Amendment to the United States Constitution requires a State, such as Nevada in this case, to demonstrate a "clear and present danger" of "actual prejudice or an imminent threat" before any discipline may be imposed on a lawyer who initiates a press conference such as occurred here.

The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

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

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

In *Sheppard* v. *Maxwell*, we expressly contemplated that the speech of *those participating before the courts* could be limited. This distinction between participants in the litigation and strangers to it is brought into sharp relief by our holding in *Seattle Times Co.* v. *Rhinehart*. There, we unanimously held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery.

Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses.

The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press. Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements

are likely to be received as especially authoritative. We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.

The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

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

JUSTICE O'CONNOR, concurring.

I agree with much of THE CHIEF JUSTICE's opinion. In particular, I agree that a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech.

For the reasons set out in Part III of JUSTICE KENNEDY's opinion, however, I believe that Nevada's Rule is void for vagueness. Section (3) of Rule 177 is a "safe harbor" provision. It states that "notwithstanding" the prohibitory language located elsewhere in the Rule, "a lawyer involved in the investigation or litigation may state without elaboration . . . the general nature of the claim or defense." Gentile made a conscious effort to stay within the boundaries of this "safe harbor." In his brief press conference, Gentile gave only a rough sketch of the defense that he intended to present at trial -- *i. e.*, that Detective Scholl, not Grady Sanders, stole the cocaine and traveler's checks. When asked to provide more details, he declined, stating explicitly that the ethical rules compelled him to do so. Nevertheless, the disciplinary board sanctioned Gentile because, in its view, his remarks went beyond the scope of what was permitted by the Rule. Both Gentile and the disciplinary board have valid arguments on their side, but this serves to support the view that the Rule provides insufficient guidance. As JUSTICE KENNEDY correctly points out, a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement.

CHIEF JUSTICE REHNQUIST delivered a dissenting opinion with respect to Part III.

To assist a lawyer in deciding whether an extrajudicial statement is problematic, Rule 177 sets out statements that are likely to cause material prejudice. Contrary to petitioner's contention, these are not improper evidentiary presumptions. Model Rule 3.6, from which Rule 177 was derived, was specifically designed to avoid the categorical prohibitions of attorney speech contained in ABA Model Code of Professional Responsibility Disciplinary Rule 7-107 (1981).

Gentile claims that Rule 177 is overbroad, and thus unconstitutional on its face, because it applies to more speech than is necessary to serve the State's goals. The "overbreadth" doctrine applies if an enactment "prohibits constitutionally protected conduct." To be unconstitutional, overbreadth must be "substantial." Rule 177 is no broader than necessary to protect the State's interests. It applies only to lawyers involved in the pending case at issue, and even those lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding.

Gentile also argues that Rule 177 is void for vagueness because it did not provide adequate notice that his comments were subject to discipline. The void-for-vagueness doctrine is concerned with a defendant's right to fair notice and adequate warning that his conduct runs afoul of the law. Rule 177 was drafted with the intent to provide "an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice." The Rule provides sufficient notice of the nature of the prohibited conduct. Under the circumstances of his case, petitioner cannot complain about lack of notice, as he has admitted that his primary objective in holding the press conference was the violation of Rule 177's core prohibition -- to prejudice the upcoming trial by influencing potential jurors. Petitioner was clearly given notice that such conduct was forbidden, and the list of conduct likely to cause prejudice, while only advisory, certainly gave notice that the statements made would violate the Rule if they had the intended effect.

The majority agrees with petitioner that he was the victim of unconstitutional vagueness in the regulations because of the relationship between § 3 and §§ 1 and 2 of Rule 177. Section 3, as an exception to the provisions of §§ 1 and 2, must be read in the light of the prohibitions and examples contained in the first two sections. It was obviously not intended to negate the prohibitions or the examples wholesale, but simply intended to provide a "safe harbor" where there might be doubt as to whether one of the examples covered proposed conduct.

Petitioner's strongest arguments are that the statements were made well in advance of trial, and that the statements did not in fact taint the jury panel. But the Supreme Court of Nevada pointed out that petitioner's statements were not only highly inflammatory -- they portrayed prospective government witnesses as drug users and dealers, and as money launderers -- but the statements were timed to have maximum impact, when public interest in the case was at its height immediately after Sanders was indicted. Reviewing independently the entire record, we are convinced that petitioner's statements were "substantially likely to cause material prejudice" to the proceedings.

The board and the Nevada Supreme Court did not apply the list of statements likely to cause material prejudice as presumptions, but specifically found that petitioner had intended to prejudice the trial, and that based upon the nature of the statements and their timing, they were in fact substantially likely to cause material prejudice. We cannot, upon our review of the record, conclude that they were mistaken.

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