CURTAILING POST-REPRESENTATION
EXTRAJUDICIAL SPEECH

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“There is certainly, without any exception, no
profession in which so many temptations beset the
path to swerve from the line of strict integrity, in
which so many delicate and difficult questions of duty
are continually arising. There are pitfalls and
mantraps at every step, and the mere youth, at the
very outset of his career, needs often the prudence
and self-denial as well as the moral courage, which
belong commonly to riper years. High moral
principle is the only safe guide, the only torch to light
his way amidst darkness and obstruction.”

In America, where the stability of courts and of all
departments of government rests upon the approval
of the people, it is peculiarly essential that the system
for establishing and dispensing justice be developed
to a high point of efficiency and so maintained that
the public shall have absolute confidence in the
integrity and impartiality of its administration. The
future of the republic, to a great extent, depends upon
our maintenance of justice pure and unsullied. It
cannot be so maintained unless the conduct and the
motives of the members of our profession are such as
to merit the approval of all just men.

I. INTRODUCTION

Lawyers frequently write books, appear on talk shows, and otherwise engage
in public discussion of their cases, their clients, and their roles in representing them.
A number of provisions of the ABA Model Rules\(^3\) and the ABA Model Code\(^4\)
address the ethical issues raised when lawyers make public statements about a
client’s case prior to the conclusion of their representation. But to what extent should
it be ethically permissible for lawyers to make such oral or written statements,
without the informed consent of the client, after the representation has concluded?
This Note argues that the United States Supreme Court’s holding in Gentile v. State Bar\(^5\)
must be expanded to the time period following representation; otherwise, traditional duties owed to a client are violated. Part II begins with a historical look
at how the courts and bar associations have previously dealt with extrajudicial speech. Part III provides an in-depth look at Gentile v. State Bar. Part IV
extrapolates upon the legal analysis of Gentile and applies this holding to the post-
representational period by examining the nature of the profession and the duties an
attorney owes the public and the client. The conclusion of this Note argues that

2. *Id.* at v-vi.
3. See *Model Rules of Professional Conduct* Rule 1.8(d) (1997); see also *id.* Rule 3.6
   (stating that a lawyer who is representing a client during a trial “shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication” if the lawyer believes there is a strong likelihood of prejudicing the trial).
without the client’s informed consent there is no ethically permissible level of extrajudicial speech after representation.

II. EXTRAJUDICIAL SPEECH TREATMENT PRIOR TO GENTILE V. STATE BAR

A. The Origins of Extrajudicial Speech Rules

Extrajudicial speech developed into an issue in the context of trial publicity. The issue first appeared in 1807 due to the heavy press coverage of Aaron Burr’s treason trial.6 There were concerns that Burr could not get a fair trial.7 Due to the press coverage, the public was well educated with the case by the time of the trial.8 Responding to the concerns regarding trial publicity, Chief Justice Marshall established the standard that continues today.9 Chief Justice Marshall ruled that Burr could still receive a fair trial even if jurors learned about the case from the media.10 Thirty-five years later, the problem of trial publicity arose again in a controversial trial concerning survivors of a shipwreck who threw other passengers off a life boat.11 Riding circuit in Philadelphia, the Supreme Court Justice presiding over the trial offered a deal to a reporter.12 “If the press delayed publication of details concerning the spectacular trial, the Justice would provide the scribes convenient access to the courtroom.”13

The first attempt to curb the growing problems surrounding extrajudicial speech occurred in 1887 when Alabama issued an official code of ethics.14 The code

7. Jonathan M. Moses, Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion, 95 Colum. L. Rev. 1811, 1816 (1995) (referencing United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g)); see also Gerald, supra note 6, at 70 (expressing Burr’s and District Attorney George Hay’s beliefs that Burr could not get a jury whose members had not read or heard about the charges against him and who had not, at least in part, made up their minds).
8. Moses, supra note 7, at 1816 (explaining that prior to the Vice President’s trial, newspapers had published the affidavits of two prosecution witnesses); see also Gerald, supra note 6, at 70 (noting that much information about the charges had been both printed and circulated).
11. Moses, supra note 7, at 1816 (citing Telford Taylor, Two Studies in Constitutional Interpretation 120-21 (1969)).
12. Id.
13. Id. The Justice was forced to this kind of negotiation because Congress had severely limited the power of judges to exercise their contempt power over reporters and other people involved in cases before them. Id.
14. The appearance of codes of ethics also corresponds with the rise of law as a “profession” in the modern sense. David Luban, Introduction to The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics 1, 4 (David Luban ed., 1984).
warned that discourse with newspapers regarding legal concerns may prohibit justice by prejudicing potential jurors. In 1908, the ABA followed Alabama by issuing the Canons of Professional Ethics. Canon 20 of this Code echoed the same warning to lawyers as did the Alabama Code.

B. John F. Kennedy's Assassination and Sheppard v. Maxwell

Two major events in the 1960s prompted bar associations to address the issues surrounding trial publicity. The first was Lee Harvey Oswald's murder in 1964 and the second was the Supreme Court's Sheppard v. Maxwell ruling in 1966. The Warren Commission issued a report critical of the trial publicity surrounding Lee Harvey Oswald's connection with President Kennedy's assassination. The Commission stated, "Because of the nature of the crime, the widespread attention which it necessarily received, and the intense public feelings which it aroused, it would have been a most difficult task to select an unprejudiced jury." The Commission concluded:

The burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne . . . by State and local governments, by the bar, and ultimately by the public. The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial.

16. Id.; CANONS OF PROFESSIONAL ETHICS OF THE ABA (1908), reprinted in GEO. W. WARVELLE, ESSAYS IN LEGAL ETHICS 216 (2d ed. 1920).
17. Canon 20, in its entirety, stated:
   Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement.

20. Id.
22. Id. at 238.
23. Id. at 242.
On the coat tails of this report by the Warren Commission, the ABA established the Advisory Committee on Fair Trial and Free Press to further consider the ethical rules in relation to trial publicity.\textsuperscript{24} Before this committee had a chance to draft a rule, however, the Supreme Court’s decision in \textit{Sheppard} came down.\textsuperscript{25}

In \textit{Sheppard}, the conviction of Dr. Sam Sheppard for the murder of his wife was overturned by the Supreme Court due to the media publicity surrounding the trial.\textsuperscript{26} The Court stated that “unfair and prejudicial news comment on pending trials has become increasingly prevalent” and that “[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences.”\textsuperscript{27} The Court supported greater regulation regarding trial publicity.\textsuperscript{28}

The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.\textsuperscript{29}

C. ABA Standard 1-1

Shortly following \textit{Sheppard}, the Advisory Committee on Fair Trial and Free Press responded to the Court by setting forth its proposal.\textsuperscript{30} The recommendation was adopted and became ABA Standard 1-1.\textsuperscript{31} This standard declares:

> It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is

\textsuperscript{24} Gregg, supra note 15, at 1333.
\textsuperscript{25} The \textit{Sheppard} case is a good example of the media circus that can accompany a high profile trial. After his pregnant wife was murdered, Dr. Sheppard became a suspect and was subjected to intense scrutiny by the media. \textit{Sheppard v. Maxwell}, 384 U.S. 333, 338-45 (1966). His inquest was held in a high school gymnasium in front of a mass of journalists and several hundred spectators. \textit{Id.} at 339. His lawyers were not allowed to participate and one was even expelled to cheers when he protested the injustice of the event. \textit{Id.} at 340. Dr. Sheppard was finally arrested after the local newspaper printed a front-page heading: “Why Isn’t Sam Sheppard in Jail?” \textit{Id.} at 341.
\textsuperscript{26} \textit{Id.} at 363.
\textsuperscript{27} \textit{Id.} at 362.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.} at 363.
\textsuperscript{30} Gregg, supra note 15, at 1334.
\textsuperscript{31} ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS Standard 1-1, at 1 (1968) [hereinafter ABA ADVISORY COMMITTEE].
associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.\textsuperscript{32}

\textbf{D. Disciplinary Rule 7-107}

Additionally, the Model Code of Professional Responsibility was adopted by the ABA in 1969.\textsuperscript{33} The Code included a trial publicity rule, Disciplinary Rule 7-107.\textsuperscript{34} In constructing Disciplinary Rule 7-107, the ABA wrestled with the core issue surrounding trial publicity rules: how to draft "an effective but constitutionally permissible standard for controlling lawyers' speech."\textsuperscript{35} Section D of Disciplinary Rule 7-107 reads:

During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.\textsuperscript{36}

Section D incorporated the "reasonable likelihood [of interfering] with a fair trial" language of ABA Standard 1-1.\textsuperscript{37} This language, however, is problematic because it attempts to impose sanctions upon attorneys for what they say, an issue which clearly falls under the First Amendment.\textsuperscript{38}

\textbf{E. Chicago City Council of Lawyers v. Bauer}\textsuperscript{39}

Following 1969, many lawsuits sprung up challenging the constitutionality of Disciplinary Rule 7-107. The majority of courts ruled the "reasonable likelihood" standard was constitutional.\textsuperscript{40} Some courts, on the other hand, found the standard

\begin{itemize}
  \item \textsuperscript{32} \textit{Id.}
  \item \textsuperscript{33} Gregg, supra note 15, at 1334.
  \item \textsuperscript{34} \textsc{Model Code of Professional Responsibility} DR 7-107 (1980).
  \item \textsuperscript{35} Gregg, supra note 15, at 1335.
  \item \textsuperscript{36} \textsc{Model Code of Professional Responsibility} DR 7-107.
  \item \textsuperscript{37} See ABA Advisory Committee, supra note 31, Standard 1-1, at 1.
  \item \textsuperscript{38} U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").
  \item \textsuperscript{39} Chicago City Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975).
  \item \textsuperscript{40} See Hirschkop v. Snead, 594 F.2d 356, 370 (4th Cir. 1979); United States v. Tijerina, 412 F.2d 661, 666-67 (10th Cir. 1969); Younger v. Smith, 106 Cal. Rptr. 225, 241-42 (Cal. App. 1973); Hughes v. State, 437 A.2d 559, 575 (Del. 1981); in re Hinds, 449 A.2d 483, 491-94 (N.J. 1982);
\end{itemize}
unconstitutional. In Chicago City Council of Lawyers v. Bauer, a major case of this era, the court held that the reasonable likelihood standard, as stated in Disciplinary Rule 7-107 and ABA Standard 1-1, could not control lawyers’ speech if it did not “specifically incorporate within each provision the serious and imminent threat standard.” Additionally, the court stated:

We do not believe that there can be a blanket prohibition on certain areas of comment—a per se proscription—without any consideration of whether the particular statement posed a serious and imminent threat of interference with a fair trial. Yet these rules establish such a blanket prohibition whereby even a trivial, totally innocuous statement could be a violation. The First Amendment does not allow this broad a sweep.

F. Rule 3.6 of the 1983 Model Rules of Professional Conduct

The Bauer opinion, critical of the “reasonable likelihood” standard, prompted the ABA to create a committee to revise Standard 1-1. Instead of revising the standard, the ABA drafted a new trial publicity rule, found in the Model Rules of Professional Conduct. Model Rule 3.6 reads:

(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 person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

The official comment to Rule 3.6 recognizes the inherent difficulty in striking a balance between the right to a fair trial and the expression of free speech. Rule


41. See, e.g., Chicago City Council of Lawyers v. Bauer, 522 F.2d at 249.
42. Id. at 251.
43. Id.
44. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1997).
45. Id.
46. Id. Rule 3.6 cmts. 1-7. The Official Comment also notes that the trial publicity issue has been the subject of considerable debate. Id.; see also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 663 (2d ed. 1990) (“The rules of professional conduct governing trial and pre-trial publicity—like the law of lawyer advertising—have become heavily infused with principles of constitutional law.”); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 631 (1986) (“The seemingly unresolved debate over fair-trial and free-expression involves the extent, if any, to which the interest of litigants, lawyers, the press, and
3.6 is different from Disciplinary Rule 7-107 in two major ways: (1) Rule 3.6 adopts the “substantial likelihood of materially prejudicing an adjudicative proceeding;” and (2) the rule makes clear that only lawyers who are or were involved in a court proceeding are subject to the rule.47

III. GENTILE V. STATE BAR

The Gentile opinion is important for many reasons. Most notably, Gentile spurred the ABA to refine Rule 3.6 which serves as a model for later rules governing trial publicity.48 Additionally, it is the only case upon which the Supreme Court has ruled regarding the constitutionality of trial publicity rules.49

A. The Facts Surrounding Gentile

Dominic K. Gentile, a Nevada lawyer, was disciplined by the Nevada State Bar for statements made during a press conference addressing the publicity created by the arrest of his client, Grady Sanders.50 Sanders, in the business of renting safety deposit boxes,51 rented one to the local Las Vegas police to store cocaine and money that was used in certain sting operations.52 Four kilograms of cocaine and $300,000 in traveler’s checks were stolen from that very safety deposit box.53 Sanders became a suspect.54 Much publicity surrounded the theft and most of it implicated Sanders.55 When it became clear that Sanders was about to be charged with a crime, he retained Gentile as counsel.56 Gentile, believing the media was prejudicing his client, held his own press conference to present Sanders’s side of the story.57 Gentile, aware of Nevada Rule 177 governing a lawyer’s speech to the media, studied the rule and concluded his speech at the press conference was within its limits.58

47. Model Rules of Professional Conduct Rule 3.6(a).
49. Gregg, supra note 15, at 1339.
51. Id. at 1034-40.
52. Id.
53. Id. at 1039.
54. Id. at 1040-41.
55. Id.
56. Id.
57. Id. at 1042-43.
58. Id. at 1044.
At the press conference, Gentile asserted that the evidence would prove his client was innocent. Furthermore, Gentile argued that the person most likely to have taken the cocaine and the traveler’s checks was an undercover police officer named Detective Steve Scholl. Gentile concluded the entire situation was a conspiracy and Sanders was the scapegoat.

When the trial ensued, the court had little difficulty in selecting a jury that had not been exposed to the pretrial publicity. Gentile argued the same defense he had outlined in his press conference six months earlier and Sanders was acquitted. Four months later, however, Gentile was charged with violating Nevada Rule 177. Following a hearing, Gentile was disciplined for the statements made at the press conference. On appeal to the Nevada Supreme Court, the discipline prescribed by the Nevada State Bar Association was affirmed. Gentile then appealed to the

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59. Id. at 1045.
60. Id.
61. Id.
62. Id. at 1047.
63. Id.
64. Id. at 1033. In the factual findings charging Gentile, the Southern Nevada Disciplinary Board isolated six separate statements made by him during the press conference which allegedly violated Nevada Rule 177. These were:

(i) the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Traveler’s checks, is Detective Steve Scholl.

(ii) There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Traveler’s checks than any other living human being.

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

(iv) Now, up until the moment, of course, that [the other victims] started going along with what the detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.

(v) I think Grady Sanders was indicted because he . . . was a scapegoat that day they opened the [safe-deposit] box.

(vi) We’ve got some video tapes that if you take a look at them, I’ll tell you what, he [Detective Scholl] either had a hell of a cold or he should have seen a better doctor.

66. Id.
United States Supreme Court, challenging Nevada Rule 177 as unconstitutionally vague as applied and unconstitutionally overbroad on its face.67

B. The Decision

The decision in Gentile was complicated. Both Justice Kennedy68 and Chief Justice Rehnquist69 wrote four-vote opinions and Justice O’Connor wrote a concurrence agreeing with sections of the two main opinions.70 Justice O’Connor joined Justice Kennedy in sections III and VI of his opinion, holding Nevada Rule 177 void for vagueness, and she joined sections I and II of Chief Justice Rehnquist’s opinion, holding the “substantial likelihood of material prejudice” standard in Nevada Rule 177 and ABA Model Rule 3.6 constitutional.71

1. Justice Kennedy’s Majority Opinion

Section III of Justice Kennedy’s opinion held Nevada Rule 177 void for vagueness.72 Nevada Rule 177(3)(a) provides that a lawyer “may state without elaboration . . . the general nature of the . . . defense.”73 Speech under this provision is protected “[n]otwithstanding subsection 1 and 2(a-f).”74 From this language, it appears that a lawyer need not fear discipline for commenting on the “‘general nature of the . . . defense,’” even if the lawyer “‘knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”’75

Justice Kennedy argued that a lawyer attempting to adhere to this rule receives contradictory information. Section 2 prohibits speech that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding,”76 but section 3(a) allows for the lawyer to comment on the “general” nature of the defense “without elaboration.”77 Justice Kennedy concluded that Nevada Rule 177 provides “no principle for determining when [a lawyer’s] remarks pass from the safe harbor of the

67. Id. at 1077-78 (Rehnquist, C.J., dissenting).
68. Justices Marshall, Blackmun, and Stevens joined Justice Kennedy’s entire opinion. Id. at 1032.
69. Justices White, Scalia, and Souter joined Chief Justice Rehnquist’s entire opinion. Id. at 1062.
70. Id. at 1081.
71. Id. at 1082 (O’Connor, J., concurring).
72. Id. at 1048-51.
74. Id.
77. Id. R. 177(3).
general to the forbidden sea of the elaborated."\textsuperscript{78} Thus, Justice Kennedy argued that Nevada Rule 177 is void for vagueness.

2. **Chief Justice Rehnquist’s Majority Opinion**

In his opinion, Chief Justice Rehnquist found the “substantial likelihood of material prejudice” standard as stated in Nevada Rule 177 and ABA Model Rule 3.6 constitutional, even though it places a greater restriction on a lawyer’s speech than does the clear and present danger standard.\textsuperscript{79} Chief Justice Rehnquist contended that the “substantial likelihood of material prejudice” standard is a constitutional compromise between the defendant’s right to a fair trial and a lawyer’s freedom of speech.\textsuperscript{80}

Chief Justice Rehnquist advanced two theories in support of his decision to uphold the “substantial likelihood of material prejudice” standard. First, a lawyer’s unique position within the judicial process allows the lawyer access to a vast array of information that could be prejudicial to an adjudicative proceeding.\textsuperscript{81} Thus, the lawyer should be held to a stricter standard.\textsuperscript{82} Second, because lawyers are “officers of the court,” the Supreme Court has a long tradition of regulating their activities.\textsuperscript{83} For instance, if a lawyer were to make a prejudicial comment, the court would be forced to take measures to guard against the speech’s effect. Chief Justice Rehnquist argued:

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.\textsuperscript{84}

For these reasons, Chief Justice Rehnquist concluded the “substantial likelihood of material prejudice” standard in Nevada Rule 177 and ABA Model Rule 3.6 is constitutional.\textsuperscript{85}

\textsuperscript{78} Gentile v. State Bar, 501 U.S. at 1049.
\textsuperscript{79} Id. at 1068.
\textsuperscript{80} Id. at 1074.
\textsuperscript{81} Id. at 1073.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 1075.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 1076.
3. Justice O’Connor’s Concurrence

Justice O’Connor agreed with sections of both opinions. Regarding Chief Justice Rehnquist’s opinion, she wrote: “[A] State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press . . . and that] the ‘substantial likelihood of material prejudice’ standard . . . passes constitutional muster.”86 Justice O’Connor also sided with Justice Kennedy in that the “safe harbor” provision was vague and that “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.”87 Justice O’Connor’s concurrence allowed for two majority holdings in Gentile. First, Nevada Rule 177 is unconstitutionally vague. Second, the “substantial likelihood of material prejudice” standard is constitutional.

IV. THE “SUBSTANTIAL LIKELIHOOD OF MATERIAL PREJUDICE” STANDARD APPLIED TO THE POST-REPRESENTATIONAL PERIOD FROM THE PERSPECTIVE OF AN ATTORNEY’S DUTIES

Up until this point, the “substantial likelihood of material prejudice” standard has been applied to both litigation and pre-litigation time periods.88 This Note argues that the Gentile holding must extend to extrajudicial speech in the post-representational period.89 The reasoning behind this is simply that “the substantial likelihood of prejudicing an adjudicative proceeding” standard as applied after representation is consistent with the nature of the profession and the duties owed by an attorney to the client and the public.

86. Id. at 1081-82 (O’Connor, J., concurring).
87. Id. at 1082.
88. Compare Model Rules of Professional Conduct Rule 3.6 (1997) (prohibiting extrajudicial statements that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding”) (emphasis added), with Gentile v. State Bar, 501 U.S. at 1063 (1991) (disciplining Dominic Gentile for statements made prior to Grady Sanders’s trial). Gentile’s holding never suggested that this standard should be applied after trial. Additionally, Model Rule 3.6 does not apply this standard after litigation because once the trial is over, there no longer exists an adjudicative proceeding to prejudice.
A. Duties Owed to the Client

1. Competence

Rule 1.1 of the Model Rules of Professional Conduct requires lawyers to provide clients with "competent" representation. This requires use of "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The Model Code of Professional Responsibility simply states: "A Lawyer Should Represent a Client Competently." On the surface, Canon 6 protects the client from incompetent practitioners. But on a deeper level, Canon 6 recognizes the continuing obligation of the profession to take those actions fundamental to holding itself out as a profession. The Model Code does not define basic competence for lawyers, but Disciplinary Rule 6-101(A)(1) argues that a lawyer shall not "[h]andle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." Arguably, the duty of competent service relates to extrajudicial speech in two ways. First, when the representation concludes, if the lawyer makes extrajudicial statements, those statements would clearly be outside the scope of the attorney's employment and would not qualify as competent representation. Second, extrajudicial speech in the post-representational period may speak to the attorney's judgment. If the speech was damaging or the client never consented, the attorney's competence would surely be brought into question.

2. Confidentiality

One of the most fundamental obligations imposed on every lawyer is the preservation of a client's confidences and secrets. Confidentiality of attorney-client communications is essential. It allows the client to be completely open and candid with the attorney, giving the attorney all necessary information about the client's legal problem, without fearing that the information will be disclosed, thereby affecting the client adversely. The attorney needs all relevant information in order

90. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1.  
91. Id.  
92. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1980).  
93. Id.  
94. Id.  
to represent the client effectively and prepare the strongest possible case. The confidentiality requirement is crucial to the attorney-client relationship because it provides for the free flow of information. Furthermore, it is necessary to the proper functioning of the American legal system. Professor Monroe Freedman, one of the nation’s leading commentators on the American system of criminal justice, stated: "An essential element of that system is the right to counsel, a right that would be meaningless if the defendant were not able to communicate freely and fully with the attorney." Canon 4 of the ABA Code deals directly with attorney-client confidentiality. Disciplinary Rule 4-101 of the Code draws a distinction between the attorney's broad ethical obligation to preserve confidentiality and the more limited evidentiary privilege to refuse disclosure. It does so by differentiating between a confidence, defined as the information protected by the attorney-client privilege under applicable law, and a secret, referred to as other information the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client. The ethical obligation extends to all information divulged by the client without regard to the nature or source of information and, even though others may share that knowledge, the

98. See Model Code of Professional Responsibility EC 4-1.
99. Freedman, supra note 97, at 8. Professor Freedman more completely explains:
[T]he Constitution has committed us to an adversary system for the administration of criminal justice. The essentially humanitarian reason for such a system that it preserves the dignity of the individual, even though that may occasionally require significant frustration of the search for truth and the will of the state. An essential element of that system is the right to counsel, a right that would be meaningless if the defendant were not able to communicate freely and fully with the attorney.

In order to protect that communication—and ultimately, the adversary system itself—we impose upon attorneys what has been called the “sacred trust” of confidentiality.

Id. For example, courts have often articulated the justification for the confidentiality requirement. The United States Court of Appeals for the Ninth Circuit in Baird v. Koerner stated:
While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skill in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.

Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960).

100. Model Code of Professional Responsibility Canon 4.
101. Id. EC 4-6.
102. Id. DR 4-101(A).
103. Id.
104. Id. EC 4-2.
lawyer may not reveal this information under any circumstances.\textsuperscript{105} The attorney-client privilege, on the other hand, is a rule of evidence, applicable to the litigation process.\textsuperscript{106} The lawyer must safeguard this privilege by informing the client about it and asserting it whenever necessary.\textsuperscript{107}

The lawyer is obliged not to reveal the confidences and secrets of one client to another,\textsuperscript{108} and to maintain the confidentiality in social and business circumstances.\textsuperscript{109} A lawyer should never accept employment that might require disclosure of confidential material. The duty of maintaining confidences continues even after the termination of the attorney-client relationship.\textsuperscript{110}

The Code describes some limited exceptions to the requirement of confidentiality.\textsuperscript{111} A lawyer may reveal information of a confidential or secretive nature: (1) when the client consents, after a full explanation to the client of the need for disclosing that information;\textsuperscript{112} (2) when disclosing the information is necessary for effective representation of the client;\textsuperscript{113} (3) when the law requires the disclosure of the information;\textsuperscript{114} or (4) when the Code otherwise permits the disclosure.\textsuperscript{115} The attorney may, when necessary for effective representation, disclose the confidential information to other lawyers and non-lawyers in her firm, and to other persons or organizations providing special services to the client's legal matter, such as accountants, bankers, data processors, and printers.\textsuperscript{116} The attorney must be very discreet in selecting the recipients of such confidential information, and make sure that each truly needs it.\textsuperscript{117}

When the lawyer must disclose a client's confidential information to others, the lawyer has a strong obligation to ensure that the confidential information is not abused. The lawyer must clearly explain to the recipients the limited purpose for which the information is given, and must clearly warn them not to disclose it to others without first obtaining the client's permission.

\textsuperscript{105} Id.
\textsuperscript{106} Gillers, supra note 95, at 21.
\textsuperscript{107} Id.
\textsuperscript{108} MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-5.
\textsuperscript{109} Id.
\textsuperscript{110} Id. EC 4-6.
\textsuperscript{111} Id. EC 4-2; see also id. DR 4-101(C)(1)-(4).
\textsuperscript{112} Id. EC 4-2.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} See id. EC 4-2, EC 4-3; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 & cmts. 6, 7 (1997) (addressing appropriate disclosures in the course of representation).
\textsuperscript{117} MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-2.
3. **Fiduciary Duty**

The lawyer also has a fiduciary relationship with the client.\textsuperscript{118} Lawyers occupy a "unique position of trust and confidence."\textsuperscript{119} This fiduciary relationship stems from clients seeking professional expertise on their behalf.\textsuperscript{120} This situation requires the "ultimate trust and confidence."\textsuperscript{121} The theoretical reasoning behind this duty is threefold: (1) the client almost blindly relies upon the attorney because the law is unfamiliar to the client; (2) the attorney, with superior knowledge of the law, holds potentially damaging information regarding the client; and (3) for a variety of reasons the client is unable to change attorneys.

When an attorney divulges information regarding a former client, the attorney undermines the fiduciary duty owed to that client. The information was only intended to be used within the scope of the client’s representation. Even if the information was not privileged or confidential, attorneys who speak publicly deter clients from speaking freely with their attorney. In turn, attorneys cannot represent clients effectively and eventually the foundations of the attorney-client relationship will erode. Thus, to ensure the integrity and effectiveness of the attorney-client relationship, the "substantial likelihood" standard must be extended to the post-representational period.

4. **Loyalty**

The duty of loyalty requires lawyers to be free of conflicting interests or responsibilities when representing a client.\textsuperscript{122} This enables the lawyer to freely pursue the client’s objectives without the burden of competing interests.\textsuperscript{123} Loyalty survives the termination of the attorney-client relationship, preventing the lawyer from acting adversely toward the previous client concerning substantially similar matters.\textsuperscript{124}

Canon 15 of the Canons of Professional Ethics states:

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning

\textsuperscript{118.} Papke, supra note 89, at 29.
\textsuperscript{119.} Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994).
\textsuperscript{120.} In re Cooperman, 633 N.E.2d 1069, 1071 (N.Y. 1994).
\textsuperscript{121.} Id.
\textsuperscript{122.} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7.
\textsuperscript{123.} Id.
\textsuperscript{124.} Id.
and ability," to the end that nothing be taken or be withheld from him, save by
the rules of law, legally applied.\footnote{125}

A profession, to be worthy of the name, must inculcate in its members a strong
sense of the special obligations that attach to their calling. One who undertakes the
practice of a profession cannot be content with the faithful discharge of duties
assigned by others. A professional's work must find its direction within a larger
frame. All that the professional does must evidence a dedication, not merely to a
specific assignment, but to the enduring ideals of the vocation. Only such dedication
will enable the professional to reconcile fidelity to those served with an equal fidelity
to an office that must at all time rise above the involvements of immediate interest.

B. \textit{Duties Owed to the Community}

A vital element of professional responsibility is what may be called the "public
responsibility" of the individual lawyer.\footnote{126} Lawyers have a duty to aid the profession
in the effort to provide legal services for all who need them; to maintain high
standards of competence and responsibility among practitioners; to see that the
principle of due process is preserved and extended; and to assist in improving the law
and our legal system.\footnote{127}

In a broad sense, lawyers have a duty to supply intelligent, unselfish leadership
to the forming of public opinion, and the determination of important issues. Our
system of democracy needs leaders, not those with the power to command, but those
who have the skill to persuade others to follow. Alexis de Tocqueville in \textit{Democracy
in America}\footnote{128} asserted that lawyers were "the most powerful existing security against
the excesses of democracy."\footnote{129} In an even broader sense, lawyers owe a fiduciary
duty to our society in general and to our governmental process in particular.
"Every[one] to whom much is given, of him will much be required; and of him to
whom men commit much they will demand the more."\footnote{130} Democracy must have
leaders.\footnote{131} If learned professionals fail to provide leadership, others will.\footnote{132} If the

\begin{footnotes}
125. \textit{Canons of Professional Ethics of the ABA Canon 15, reprinted in Warville, supra
note 16, at 222.}
126. See generally Gillers, supra note 95, at 8-11 (discussing professionalism).
131. See generally John W. Wade, \textit{Public Responsibilities of the Learned Professions}, 21
La. L. Rev. 130, 167 (1960).
132. \textit{Id.}
learned professionals fail at this, our system will fail. Many democracies have failed. The system is not foolproof.133

One of the most important aspects of a lawyer’s duty to the public is the responsibility of maintaining the integrity of the court system.134 This duty is not fulfilled if lawyers discuss cases after representation has concluded. In the vast majority of trials, judges provide the basis for the legal standards to be applied and the jury serves as the factfinders.135 We place faith in the judge to apply the correct rules of law.136 The judge’s rulings, however, can be reviewed at the appellate level.137 Yet, we still place faith that our judicial system will discover the truth. Inherent to our system is a set of rules of evidence.138 The rules set guidelines for what can and cannot be entered as evidence and the proper form of that evidence.139 Thus, at trial the evidence is limited by the rules and it must conform to certain guidelines for presentation.140 It is almost too obvious, but collecting evidence at trial is much different than collecting information outside the courtroom. When lawyers remove cases from the artificial setting of the courtroom and discuss them in a public forum, they threaten the integrity of the judiciary by opening it up to criticism by those who have the power to change it but lack understanding of the current structure.

V. CONCLUSION

The question addressed in this Note has been: To what extent should it be ethically permissible for lawyers to make extrajudicial statements, without the informed consent of the client, after representation has concluded? The first half of the Note provided a historical background to the treatment of extrajudicial speech. It concluded with a fairly close examination of Gentile v. State Bar where the Court’s holding that “the substantial likelihood of materially prejudicing an adjudicative


134. See generally Model Rules of Professional Conduct Rule 1.3 cmt. 1 (1997) (discussing the conflict in which the lawyer must remain an officer of the court while discharging the duty of zealous advocacy).


136. Id.

137. Id. at 5.


139. See id.

140. See id. at 6, 11.
proceeding” standard was constitutional. The second half argued that this holding should be extended to extrajudicial speech in the post-representational period. Simply put, professional and social responsibility do not condone lawyers engaging in public discussion of their cases, their clients, or their roles in representing them.

A lawyer’s duties to the client are inconsistent with such activities. The very first duty owed to the client is competent legal assistance. Clearly, discussion concerning another’s legal affairs in a public forum is outside of the scope of the duty of competence. A client approaches a lawyer for representation in a legal matter and the lawyer must competently represent that client. Once the matter has come to a conclusion, the lawyer no longer represents that individual. Representation includes public statements concerning the matter. But once the matter concludes, the client no longer needs representation. If the attorney continues, however, the attorney is violating the client’s wishes. Confidentiality is another duty owed to the client. When lawyers speak publicly about past cases and clients, they open up clients’ lives. The reason individuals seek attorneys is because they need help. For the attorney to help them, the attorney must know all the facts surrounding the situation. The attorney uses these facts on behalf of the client. But when the attorney uses these facts outside the scope of employment, the attorney violates a duty owed to the client.

The most pressing reason to extend the holding in Gentile to the post-representational period is to maintain the integrity of the courts. If the public is not satisfied with a particular verdict and extrajudicial statements are prevalent in the media, the public is likely to form an opinion that is not grounded in fact. Put another way, a comparison of apples and oranges is taking place. The apple is the way the case must be presented in court to conform with the procedural rules and the orange is usually a one-sided story presented by the attorney to the media. The public cannot judge the apple based on the orange.

In the end, the threat to the judiciary is great, whereas the right of attorneys to discuss a client’s situation regarding a concluded legal affair is minimal. Thus, to ensure the integrity of the judiciary and to remain consistent with the duties of a lawyer, the Gentile holding must be extended to include post-representation extrajudicial speech.

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