

## Pre-Trial Publicity: Know the Rules

by Brad Bannon



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As criminal defense attorneys know, one of the great myths about media and the criminal justice system is that, while defense lawyers are running around out there, preening for the cameras on the courthouse steps and trying their high-profile cases in the media, prosecutors and their teams stand stoically and silently by, “muzzled,” as a Raleigh newspaper columnist wrote earlier this year, “by prosecutorial ethics.”<sup>1</sup> Of course, like so many other myths and legends, the reality is much different.

Prosecution teams—comprised of law enforcement officers and prosecutors—often do anything *but* stand silently by, especially in high-profile cases. Anyone who thinks they do should check the press release page of the U.S. Department of Justice Web site to see how many times this country’s top prosecutor, John Ashcroft, has held press conferences discussing the facts of criminal cases and declaring the guilt of any number of persons before the first piece of evidence has been presented in an adversarial proceeding. Ashcroft was even rebuked earlier this year by federal Judge Gerald Rosen for lauding the credibility of a prosecution witness in a criminal case *while the trial was proceeding*—maybe in violation of a gag order. In fact, Judge Rosen recently ordered Ashcroft to show cause why he should not be made to appear before the court in a hearing about the potential violation.<sup>2</sup>

Even if prosecution teams don’t hold regular press conferences, they speak loudly with every *action* they take in a case: from drafting affidavits in support of warrants; to shutting down businesses and descending on homes to execute those warrants; to seizing assets allegedly connected to a crime; to showing up at jobs to question suspects and witnesses; to crafting detailed indictments rendered by secret grand juries that only hear from people the prosecution

calls; and, as in the case of another high-profile case in Durham, to engage in very public pursuits of potentially damning (and potentially inadmissible) 404(b) evidence just weeks before jury selection.<sup>3</sup>

By contrast, criminal defense attorneys never get to “speak” by such authoritative and public actions. We are often left to respond to such actions or risk even more harm to our clients. And while many of us go most of our professional lives without having to deal with media inquiries about our cases, we can never predict when we might be retained by or appointed to represent a client whose case becomes a matter of public interest. When that happens, it’s only a matter of time before a reporter calls or we are questioned outside a court appearance. The words we utter (or do not utter) in the face of those inquiries are, in many respects, just as important as whatever we might say (or not say) to a judge or jury in open court. And those words may have as much of an impact on our professional careers as they will on our clients’ cases.

Let me be clear: I am not an expert in media relations in criminal cases, and this article is not a primer on how to deal with the media. For tips on that subject, you would do well to talk to someone like David Rudolf, Wade Smith, or Joe Cheshire. Rather than focusing on how to deal with the media in criminal cases, this article will focus on some of the rules and laws implicated by dealing with the media in criminal cases. A couple of summers ago, I had occasion to study those rules and laws, and I revisited them earlier this year when I appeared with Joe Cheshire and David Rudolf before the State Bar to support proposed amendments to Rule 3.6 of the North Carolina Rules of Professional Conduct (“Trial Publicity”).

Back in the summer of 2001, I was assisting Joe Cheshire and Keat Wiles in

preparing the defense of a highly respected state public health official. Her initiatives in the area of children's mental health treatment had earned her the scrutiny of the federal government, which was often, through various federal block grant and entitlement programs, called upon to reimburse significant portions of the costs related to those initiatives. In March 2001—after a six-year investigation that included some of the “speaking action” referenced earlier in this article—the Department of Justice finally secured an 18-count indictment against our client. Two

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months later, a superseding indictment added 26 more counts.

On both occasions, a reporter from the *Raleigh News & Observer* contacted Joe for comments about the indictments, which were the subjects of front-page articles in the paper. In response to the reporter's inquiries and negative editorial comments made in the paper about our client, Joe answered questions, issued a written statement, and wrote a letter to the editor of the N&O in which he sounded general themes about the presumption of innocence and made specific comments about our client's long-established dedication to children's mental health programs and the fact that the indictments against her exhibited a misunderstanding of the proper use of federal funds for reimbursement of state costs related to those programs.

On May 24, 2001, citing Joe's comments to the N&O, the Government filed a motion captioned “United States' Motion for Special Order Prohibiting All Extrajudicial Statements by Defense Counsel.” In its opening prayer for relief, the Government asked the Court “for an Order prohibiting all extrajudicial statements by defense counsel, Joseph Cheshire.” In short, the Government asked for a prior restraint of content-based speech by one person. The Government then extended its request to include all of “the parties” in the case, which would obviously include our client.

Thus, after years of investigating our client and finally charging her in multiple indictments by way of secret Grand Jury proceedings, the Government further wanted to restrict her right to speak publicly in defense of herself against *unrestricted* negative publicity attending the publication of details of those indictments and other scrutinized conduct.

Finally, beyond simply requesting a restriction of extrajudicial speech about the case, the Government also expressly accused Joe of being in “direct violation” of the local rules of federal court and Rule 3.6

of the Rules of Professional Conduct in making his comments to the media. I volunteered to research and draft our response to the motion. The first thing I did was consult North Carolina's Rule 3.6, which has changed since then.<sup>4</sup> At the time, “old Rule 3.6” read:

- (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 there is a reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter.
- (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, or reputation 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, the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or
- (5) information 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.

- (c) Notwithstanding paragraphs (a) and (b)(1-5), 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 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 the investigat-

ing and arresting officers or agencies and the length of the investigation.

- (d) The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.
- (e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

The State Bar examined restrictions on a lawyer's public comments about a pending civil proceeding in 98 Formal Ethics Opinion 4. Noting that the proper standard under Rule 3.6 is to determine whether there is a reasonable likelihood that the public comments will materially prejudice an adjudicative proceeding, the State Bar listed several guiding principles in applying that standard, including the fact that an attorney should be permitted some leeway in making a necessary response to protect a client from the undue prejudicial effect of recent publicity not initiated by the attorney or his client.

I then consulted the allegedly violated local criminal trial publicity rules of federal court for the Eastern District of North Carolina: Rule 45.02 (prohibited public statements) and Rule 45.03 (acceptable public statements). I soon realized that those Local Rules were similar to North Carolina's old Rule 3.6, with one significant exception: while old Rule 3.6 prohibited public statements reasonably likely to materially prejudice a pending criminal matter and listed examples of such statements and a safe harbor, Rules 45.02 and 45.03 just listed examples of statements that could and could not be made, without tying such statements to any standard of likelihood of material prejudice to a pending criminal matter.

Finally, as we all know, the First Amendment guarantees freedom of speech and freedom of the press. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment," and "the dissemina-

tion of information relating to alleged governmental misconduct" is "'speech which has traditionally been recognized as lying at the core of the First Amendment.'"<sup>5</sup> Furthermore, "[p]ublic awareness and criticism have even greater importance where . . . 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."<sup>6</sup> Likewise, the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."<sup>7</sup> Accordingly, "any prior restraint on expression comes . . . with a 'heavy presumption' against its constitutional validity," and the party seeking to justify it "carries a heavy burden of showing justification for the imposition of such restraint."<sup>8</sup>

Of course, First Amendment rights are not the only rights guaranteed by the Constitution. The Sixth Amendment guarantees a criminal defendant the right to a fair trial by an impartial jury, a right "funda-

mental to the American scheme of justice."<sup>9</sup> "In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right. But when the case is a 'sensational' one, tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment."<sup>10</sup>

Seeking to address that tension, courts and state bars across the country have adopted and interpreted local rules of court and professional conduct regarding publicity in criminal matters. They have essentially adhered to the principle that, in particularly "sensational" criminal cases, the court must limit the adverse effect of pretrial publicity on a defendant's Sixth Amendment right to a fair trial by an impartial jury, and one such step may be to restrict the speech of participants—but only when that restriction is narrowly tailored to prohibit comments that are likely to prejudicially impact the pending adjudication.

The First Amendment case of *Procnier*

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*v. Martinez* discussed that principle as it relates to restrictions of lawyer speech. The Supreme Court held that content-based restrictions on attorney speech are permissible only when no greater than necessary to protect an accused's right to a fair trial or impartial jury.<sup>11</sup>

The Court later revisited that principle in the seminal case on lawyer speech, *Gentile v. State Bar of Nevada*.<sup>12</sup> In *Gentile*, petitioner Dominic Gentile, a Las Vegas attorney, held a press conference after his client's indictment, sketching his client's defense and accusing the government of indicting "an innocent man as a 'scapegoat'" and not being "honest enough to indict the people who did it; the police department, crooked cops."<sup>13</sup> He accused police and prosecutors of indicting his client to cover up their own wrongdoing, referred to "so-called victims" in the case as "known drug dealers and convicted money launderers," and criticized authorities for holding those victims out as "incredible . . . liars" until "they started going along with what detectives . . . wanted them to say."<sup>14</sup>

The Nevada State Bar disciplined Gentile for his conduct, holding that it violated Nevada Supreme Court Rule 177, which was, at the time, only slightly different from North Carolina's old Rule 3.6.<sup>15</sup> The Nevada Supreme Court affirmed the State Bar's discipline. However, the United States Supreme Court reversed the disciplinary action.

In doing so, the Court discussed the occasional tension between the First Amendment right to free speech and press and a criminal defendant's Sixth Amendment right to a fair trial before an impartial tribunal. The Court upheld Rule 177 to the extent that it restricted public speech of lawyers under a less demanding standard than the "clear and present danger" test traditionally applied to prior restraint of free speech and press. The Court recognized government's substantial interest in protecting the integrity and fairness of a pending adjudicative proceeding and found that Rule 177, on its face, constitutionally sought to achieve that interest by limiting *only that lawyer speech which carries a substantial likelihood of materially prejudicing that proceeding*.<sup>16</sup>

In fashioning that specific rule, the Court affirmed a general First Amendment rule:

when free speech is restrained to serve a legitimate objective, the restraint must be narrowly tailored to achieve the objective.<sup>17</sup> The Court held that restrictions on attorney speech are "narrowly tailored" when they: (1) apply only to speech that is substantially likely to have a materially prejudicial effect on an adjudicative proceeding; (2) are neutral as to points of view, applying equally to all attorneys participating in a pending case; and (3) merely postpone the attorneys' comments until after the proceeding.<sup>18</sup>

Despite upholding the constitutionality of Rule 177's lower standard of speech restriction, the Court found the rule itself void for vagueness, because its safe harbor provision—which permitted a lawyer to state "without elaboration" the "general" nature of the defense, "notwithstanding" the list of prohibited statements described elsewhere in the rule—failed to provide "fair notice" of the type of statements prohibited.<sup>19</sup>

Because *Gentile* is one of those classic Supreme Court cases where everyone seems to be concurring in part and dissenting in part, it is unclear whether the following excerpt from Justice Kennedy's opinion was one of those parts on which everyone agreed—but it should be, and it is very instructive about the dilemma faced by criminal defense attorneys in cases that gain public notoriety. After classifying Gentile's conduct as "classic political speech" and characterizing the disciplinary action against him as "punishment of pure speech in the political form," Justice Kennedy considered Gentile's motive in holding the press conference. Gentile had admitted he knew his client would be indicted based on leaks from the police department. He considered the negative impact of the extensive publicity that surrounded the yearlong investigation of his client, carefully considered Rule 177, and decided to conduct the press conference to counter publicity already deemed prejudicial:

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

Petitioner gave a second reason for holding the press conference, which demonstrates the additional value of his speech. Petitioner acted in part because the investigation had taken a serious toll on his client. [The client] was "not a man in good health," having suffered multiple open-heart surgeries prior to these events. And prior to indictment, the mere suspicion of wrongdoing had caused the closure of [his business] and the loss of [his] ground lease on an Atlantic City, New Jersey property.

**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 his client does not deserve to be tried.**<sup>20</sup>

After reading Rule 3.6, the local federal rules, and the First Amendment cases, I was even more convinced that my colleague's conduct in our case was protected. He answered a newspaper reporter's questions, issued a brief written press release, and wrote a letter to the editor *in response to* negative publicity attending the return of indictments that capped a six-year investigation against our client. By contrast, Gentile *called a press conference* immediately following his client's indictment, accused "crooked cops" of being the real culprits in the case, and charged the prosecution with wrongfully indicting his client so they could cover up their own illegal activities—and the Supreme Court afforded *him* First Amendment protection after analyzing an ethical rule practically indistinguishable from the North Carolina rule in effect at the time.

That left the allegedly violated local federal rules. As mentioned, the local rules

of North Carolina's three federal court districts list nearly the same examples of permissible and impermissible comments as North Carolina's old Rule 3.6, but do not tie them to any standard of "likelihood of material prejudice," whether "reasonable" or "substantial." They simply list the types of statements an attorney in a criminal matter may and may not make, without reference to *why*. Given the *Gentile* Court's reference to the "substantial likelihood" standard in Nevada's Rule 177 as necessary to support the conclusion that the rule was "narrowly tailored" (hence a constitutionally permissible restraint of free speech), it dawned on me that it is unclear whether North Carolina's local federal rules regarding trial publicity—or even North Carolina's old Rule 3.6, with its seemingly lower standard of "reasonable" likelihood of material prejudice—would survive the Supreme Court's First Amendment scrutiny under *Gentile*.

They would, I learned, survive the Fourth Circuit's scrutiny—at least regarding the "reasonable" versus "substantial" likelihood distinction. After *Gentile*, and despite the fact that the "*substantial* likelihood" standard seemed to have figured critically in the Supreme Court's conclusion that the restriction on attorney speech in that case was narrowly tailored to satisfy the First Amendment, the Fourth Circuit re-affirmed its pre-*Gentile* decision that a "*reasonable* likelihood" of material prejudice standard would satisfy the First Amendment.<sup>21</sup>

Regardless of the conspicuous lack of a guiding standard in the local federal rules regarding trial publicity, I was convinced after reading all the rules and cases interpreting them that Joe had not violated them, even without reference to a standard. Furthermore, if for any reason his comments were somehow deemed in violation of the local rules, surely they would be afforded the First Amendment protection granted to *Gentile*.

In a comprehensive response to the gag order motion, I talked about many of the foregoing rules and case law and made an argument against the imposition of a gag order in the case, especially under the terms requested by the Government. We filed the response, but the issue basically died in an *in camera* meeting with the at-

torneys for both sides about other issues in the case.

The experience taught me much about the potential professional and ethical consequences of speaking publicly about my criminal cases. After all, in asking for an order to silence Joe Cheshire, the Government also accused him of violating ethical

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rules and local rules of court, either of which could subject him to discipline by the court or the State Bar—a consequence that might make some attorneys decide not to speak publicly about their criminal cases, no matter how justified or appropriate the speech.

But there are times when we must talk—not because of the mythical construct that we love the media spotlight and are anxious to take advantage of free advertising, but because *it's the right thing to do for our clients*. What Justice Kennedy said in *Gentile* is correct: we do have a duty to our clients outside the courtroom, and we cannot ignore the practical implications of a legal proceeding for the client. We should "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." While we can do great harm to our clients by speaking recklessly to the media, we can do similar harm by uttering "No comment" in the face of an onslaught of negative publicity. As Justice Kennedy wrote, "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 his client does not deserve to be tried."

Encouraging though *Gentile* was, it still left much unanswered—especially in North Carolina, where old Rule 3.6 was virtually identical to Nevada's Rule 177, which *Gentile* struck down for vagueness. Fortunately, our State Bar and Supreme Court gave us more clarity this year when they adopted changes to Rule 3.6, largely

as a result of the changes in ABA Model Rule 3.6 implemented after *Gentile*. The changes:

1. The standard of restricted public speech is now elevated from "reasonable" likelihood to "substantial" likelihood of material prejudice. Also, the test for

expectation of public dissemination is no longer what a "reasonable lawyer" would have expected, but what the actual lawyer who made the statement expected.

2. Gone from the Rule's text is the entire former Paragraph (b), which listed the things an attorney cannot say. It is now in a Comment.
3. Although shifted into new Paragraph (b), the provisions of former Paragraph (c), which listed the things an attorney can say, were left generally intact.
4. Notably, an entirely new paragraph (c) was added to the Rule that allows an attorney to make a public 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." Also added was the following Comment: "[E]xtrajudicial 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 respon-

sive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.”

In addition to conforming the Rule to the First Amendment analysis in *Gentile*, the State Bar’s recent revisions to Rule 3.6(c) make it more ethically sound to defend clients against negative public comments by the prosecution or any “third person.”

The revisions were opposed by the United States Department of Justice through its representatives here in North Carolina, the United States Attorneys. Thankfully, the State Bar rejected the complaints of the Department of Justice and adopted a rule that allows criminal defense attorneys in North Carolina to defend their clients—not just in the courtroom but, as Justice Kennedy noted in *Gentile*, in the court of public opinion. Prosecution teams have long enjoyed the upper hand in the ability to affect public opinion about a case; either directly, through press conferences, press releases, and leaks, or indirectly, by widespread publication of any number of public prosecutorial practices and tactics. With revised Rule 3.6, the State Bar has given North Carolina criminal defense attorneys the ability to defend their clients in the court of public opinion without fearing their conduct might subject them to discipline by the Bar or the courts of this State.

Because the local federal court rules governing trial publicity have not been modified since I did most of my research on the subject in 2001, it appears that public comments in federal criminal cases are less protected than those in state criminal cases. However, given the interest of the U.S. Attorneys in attempting to block the recent revisions to Rule 3.6, it is reasonable to assume that those revisions (which, in turn, mirrored recent *Gentile*-motivated revisions to ABA Model Rule 3.6) would guide any court in determining whether public speech by a criminal defense attorney about a case was a violation of ethical rules. I am convinced that the new provision in Rule 3.6 allowing for necessary and limited public response by a criminal defense attorney to recent negative publicity about his client would have fairly disposed of the Government’s accusation in our case

that Joe committed unethical conduct.

Sometimes we must make comments to defend our clients in the court of public opinion. As long as we limit those comments to the types of things listed in Revised Rule 3.6(b) or to the scope of prejudice caused by recent negative publicity against our client, our conduct should be protected by the First Amendment and in accordance with the North Carolina Rules of Professional Conduct—no matter what the Government might say. ■

<sup>1</sup> See Ruth Sheehan, D.A. *Trips Peterson Defense*, RALEIGH NEWS & OBSERVER, May 1, 2003.

<sup>2</sup> See David Ashenfelter, *Judge Wants Ashcroft Out of Terror Trial*, DETROIT FREE PRESS, April 19, 2003, and *Judge Orders Ashcroft To Explain His Actions*, DETROIT FREE PRESS, September 4, 2003. The case is *United States v. Koubriti, et. al.*, 01-CR-80778, United States District Court for the Eastern District of Michigan.

<sup>3</sup> In *State of North Carolina v. Michael Peterson*, Durham County Indictment 01 CRS 24821, the defendant was charged in December 2001 with murdering his wife, Kathleen Peterson, after she was found dead at the bottom of the staircase in their home. In April 2003 (nearly a year-and-a-half after the defendant’s arrest and just weeks before jury selection was set to begin in his trial), the prosecution arranged for the exhumation of the body of Elizabeth Ratliff, a female friend of the defendant who had died as the result of a cerebral hemorrhage nearly 20 years earlier, and whose body had been found at the bottom of a staircase. After the Texas exhumation, Ms. Ratliff’s body was brought back to North Carolina for an autopsy, where the State Medical Examiner’s Office concluded—in the days preceding jury selection, and nearly 20 years after two contemporaneous death investigations found death by natural causes—that Ms. Ratliff was murdered in a manner similar to the prosecution’s homicidal theory of Mrs. Peterson’s death.

<sup>4</sup> In July 2002, after a 10-month review of the ABA’s Ethics 2000 Commission, the North Carolina State Bar recommended several revisions to the North Carolina Rules of Professional Conduct. Following a period of public comment, the State Bar adopted certain revisions, and the North Carolina Supreme Court approved them.

<sup>5</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-1035 (1991)(Kennedy, J.)(quoting *Butterworth v. Smith*, 494 U.S. 624 (1990)).

<sup>6</sup> *Id.* at 1035-1036 (citation omitted).

<sup>7</sup> *Id.* at 1035 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966)).

<sup>8</sup> *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 558 (1976).

<sup>9</sup> *Id.* at 551.

<sup>10</sup> *Id.*

<sup>11</sup> *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

<sup>12</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

<sup>13</sup> *Gentile*, 501 U.S. at 1034.

<sup>14</sup> *Id.* at 1059-1060.

<sup>15</sup> Nevada’s rule prohibited public statements that

carried a “substantial” likelihood of material prejudice, while North Carolina’s rule prohibited statements that carried a “reasonable” likelihood of material prejudice. All other parts, including the “safe harbor provision,” listing statements an attorney *can* make “notwithstanding” other language in the rule, were identical for purposes of legal analysis.

<sup>16</sup> *Gentile*, 501 U.S. at 1075-1076.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1048-1051.

<sup>20</sup> *Id.* at 1043 (citations omitted)(emphasis added).

<sup>21</sup> *In re Morrissey*, 168 F.3d 134 (4th Cir. 1999), cert. denied, 527 U.S. 1036 (1999). Given the Supreme Court’s denial of *certiorari* in *Morrissey*, we cannot know whether the Supreme Court would reach the same conclusion.

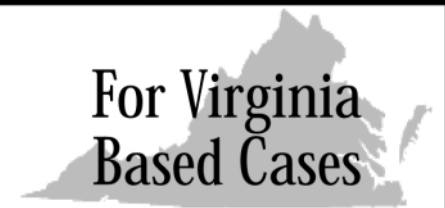
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