FREE SPEECH V. FAIR TRIAL

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Reprinted from *Bench & Bar of Minnesota* (October 1991)

For over 25 years bar groups and various courts have attempted to balance the rights of free speech and fair trial. In the wake of recent criminal cases that have become media events, particularly that involving William Kennedy Smith, the issues have been debated again. Looking particularly at the conduct of defense counsel, the United States Supreme Court recently struggled to illuminate these issues.

Gentile v. State Bar of Nevada, decided June 27 by the U.S. Supreme Court, reversed a disciplinary reprimand given for prejudicial pretrial statements. However, the 5-4 reversal was on narrow grounds; and the justice who sided with four others on the decision joined with the other four judges on most of the legal principles involved. The Court was deeply divided on both the case before it and on the general approach it should take to questions of attorney free speech.

Before attorney Dominic Gentile's client Grady Sanders was indicted, there was a good deal of publicity in Las Vegas about how four kilograms of cocaine and $300,000 came to be missing from a vault used by police in undercover operations. Sanders owned the vault company. The sheriff publicly reporting the theft named police and vault company employees as suspects. At least 17 articles in the local papers followed, including a story that the police suspects had passed lie detector tests.

When Sanders was indicted, the prosecutor was quoted as saying that the indictment was legitimate. Gentile called a news conference. He read a prepared statement, including:

> When this case goes to trial, … you're going to see that the evidence will prove not only that Grady Sanders is an innocent person … but that the person that was in the most direct position to have stolen the drugs and money … is Detective Steve Scholl.
>
> I feel that Grady Sanders is being used as a scapegoat.
>
> With respect to these other charges … the so-called other victims … four of them are known drug dealers and convicted money launderers … .

Citing ethics restrictions, Gentile then answered only a few press questions. He did manage to say, "I know I represent an innocent man." Gentile also referred to a previous charge," … and I told you that the case would be dismissed and it was."

Six months later Sanders was acquitted by a jury. The State Bar of Nevada then alleged that Gentile had violated its discipline rule. The Nevada rule is almost identical to ABA Model Rule of Professional Conduct 3.6, and similar rules are used in most states. Gentile was privately reprimanded, with findings that several of his statements violated the Nevada/ABA rule by having "a substantial likelihood of materially prejudicing an adjudicative proceeding."Ftn 1 The offending statements were to the effect that:

- The evidence demonstrated the client's innocence;
- The likely thief was a police detective;
- The other alleged victims were not credible.

The Nevada Supreme Court affirmed the reprimand, but on a 5-4 vote the U.S. Supreme Court reversed.

The Court's opinion is a patchwork stitched together by Justice O'Connor's joining portions of the decisional opinion of Justice Kennedy and three others, and joining the opinion of Chief Justice Rehnquist and three others for general statements about lawyers and free speech. Left in limbo were the portions of the Kennedy opinion which O'Connor neither joined nor rejected.

The Kennedy portion of the majority opinion reversed the reprimand, on the grounds that a portion of the Nevada/ABA disciplinary rule is unconstitutionally void for vagueness. The unconstitutional provision was that "notwithstanding" the section of the rule that prohibited statements which were likely to prejudice a trial, "a lawyer involved in the matter may state without elaboration: (a) the general nature of the claim or defense;" [and certain other matters]. The majority held that this language "creates a trap for the wary as well as the unwary." The Court worried that such regulation of speech would risk discriminatory enforcement, particularly against "the criminal defense bar, which has the professional mission to challenge actions of the State."

Justice O'Connor joined the Rehnquist foursome in stating general principles of First Amendment law as applied to attorneys in legal proceedings. This majority concluded that:

> The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press . . . .

The Kennedy four argued that the majority too greatly restricted First Amendment liberties of attorneys, particularly of criminal defense attorneys. Since Gentile's reprimand was reversed on other grounds, and because Justice Kennedy believed Gentile's remarks clearly were not prejudicial, he concluded that "the outer limits under the Constitution of a court's ability to regulate an attorney's statements" should not be explored further in *Gentile*. Justice Kennedy also argued that *Gentile* was unlike the attorney advertising/free speech line of cases because "one central point must dominate the analysis: this case involved classic political speech … At issue here is the constitutionality of a ban on political speech critical of the government and its officials."

Were Gentile's comments apt to have prejudiced the proceeding against his client? Four justices said "yes," four said "no," and Justice O'Connor did not say. Those who found prejudice unlikely from Gentile's remarks emphasized the lengthy time before the scheduled trial, the population of the area, and a legitimate need to protect the client's business reputation. The justices who found prejudice emphasized deference to the Nevada findings and Gentile's admission that he called a press conference for the express purpose of influencing the venire. The Kennedy Four countered that influencing the venire was not illegitimate when the purpose was not to prejudice but only "to counter [pro-prosecution] publicity already deemed prejudicial."

The rule would have been found constitutional if — as in Minnesota — it had merely prohibited

public statements that would be apt to materially prejudice a proceeding.Ftn 2 The whole Court rejected the argument that a "clear and present danger" test was required, rather than a "substantial likelihood of material prejudice" standard, as embodied in Rule 3.6 of the ABA, Nevada (and Minnesota) Rules of Professional Conduct.

Minnesota has been more successful than the ABA and some other states in fitting its disciplinary rules and cases to the demands of the First Amendment. In a few recent Minnesota discipline cases, including First Amendment challenges and one case involving speech critical of government officials, the U.S. Supreme Court has declined review.

What may a criminal defense attorney say about a client's alleged innocence? The Nevada discipline guideline was that statements likely to materially prejudice a trial included "any opinion as to the guilt or innocence of a defendant . …" Former Minnesota DR 7-107(B)(6) made such a statement subject to discipline in Minnesota until 1985. The lineage of the rule traces at least to *Sheppard v. Maxwell,* 384 U.S. at 333 (1966), the case that first brought fair trial vs. free expression issues to a head. The Rehnquist dissent in *Gentile* indicated that this rule did not violate the First Amendment. The Kennedy opinion did not explicitly address the issue, but clearly enough hinted "that blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny." Justice O'Connor did not address the issue.

Gentile did not state clearly whether a defendant's attorney may proclaim the client's innocence to the media without acting unprofessionally. If the accused is presumed innocent, counsel should be able to proclaim that innocence. The maxim that cases should be tried in the courts and not in the press is a good general principle, but would not be a sufficient argument against freedom to declare to the public a client's innocence.

It may well be that *Gentile* did not discuss this issue more because it was not clearly before the Court. Gentile's reprimand was based in part on his stating his client's innocence; but the Nevada Supreme Court's affirmance of the reprimand made no mention of this rule violation. It may also be that Gentile's claiming, "I know" of the client's innocence was the statement of opinion that was seen as a rule violation. A Minnesota attorney who claimed of his "certain knowledge" of a judicial conspiracy against him, was also disciplined. *In re Graham,* 453 N.W.2d 313, 318 (Minn. 1990).

Gentile was debated in broad terms and decided on narrow grounds. The decision was made on what appears to have been a quirk in the disciplinary rule. The majority's statement of general principles suggests that under a more tightly drawn rule, discipline for prejudicial pretrial speech would be upheld in the future. The majority also clearly indicated that the free speech rights of attorneys participating in litigation may constitutionally be circumscribed somewhat more closely than those of the press and the public generally.

NOTES

1 *The rule is too long for reproduction here. In addition to the quoted general standard it lists six presumptively prejudicial statements and ten statements which would not be prejudicial.*

2 *The full text of M.R.P.C. 3.6 is: A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing a pending criminal jury trial.*