
# GENTILE v. STATE BAR OF NEVADA

**SUPREME COURT OF THE UNITED STATES**
**501 U.S. 1030**
**June 27, 1991**

**OPINION:** Justice Kennedy...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...violated Rule 177 [and]...recommended a private reprimand. Petitioner appealed...[and] the Nevada Supreme Court...affirmed.

**Nevada's application of Rule 177 in this case violates the First Amendment.** Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws. Furthermore, the Rule's safe harbor provision...appears to permit the speech in question, and Nevada's decision to

discipline petitioner in spite of that provision raises concerns of **vagueness** and **selective enforcement**.

...The State Bar of Nevada reprimanded petitioner for his assertion...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...**

**[T]his case involves punishment of pure speech in the political forum...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 ...***Butterworth v. Smith (1990).*

...As we said in *Bridges v. California,*[1] limits upon public comment about pending cases are "likely to fall not only at a crucial time but upon the most important topics of discussion...No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." In *Sheppard v. Maxwell*,[2] we reminded that "the press...guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

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...

The record does not support the conclusion that petitioner knew or reasonably should have known his remarks created a substantial likelihood of 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...[T]his Court is "compelled to examine for itself the statements in issue and the circumstances under which they were made to see **whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect**." *Pennekamp v. Florida* (1946)...**An examination of the record reveals no basis for the Nevada court's conclusion that the speech presented a**

---

[1]Case 1A-S-7 on this website.

[2]Case 1A-P-2 on this website.

**substantial likelihood of material prejudice**...

*Pre-Indictment Publicity*. On January 31, 1987, undercover police officers with the Las Vegas Metropolitan Police Department (Metro) reported large amounts of cocaine...and travelers' checks (almost $300,000) missing from a safety deposit vault at Western Vault Corporation. The drugs and money had been used as part of an **undercover operation** conducted by Metro's Intelligence Bureau. **Petitioner's client, Grady Sanders, owned Western Vault**. John Moran, the Las Vegas sheriff, reported the theft at a press conference on February 2, 1987, **naming the police and Western Vault employees as suspects.**

Although two police officers, Detective Steve Scholl and Sargeant Ed Schaub, enjoyed free access to the deposit box throughout the period of the theft, and no log reported comings and goings at the vault, a series of press reports over the following year indicated that investigators did not consider these officers responsible. Instead, investigators focused upon Western Vault and its owner. Newspaper reports quoted the sheriff and other high police officials as saying that they had not lost confidence in the "elite" Intelligence Bureau. From the beginning, Sheriff Moran had "complete faith and trust" in his officers.

The media reported that, following announcement of the cocaine theft, others with deposit boxes at Western Vault had come forward to claim missing items. One man claimed the theft of his life savings of $90,000. Western Vault suffered heavy losses as customers terminated their box rentals, and the company soon went out of business. The police opened other boxes in search of the missing items, and it was reported they seized $264,900 in United States currency from a box listed as unrented.

Initial press reports stated that Sanders and Western Vault were being cooperative; but as time went on, the press noted that the police investigation had failed to identify the culprit and through a process of elimination was beginning to point toward Sanders. Reports quoted the affidavit of a detective that the theft was part of an effort to discredit the undercover operation and that business records suggested the existence of a business relation between Sanders and the targets of a Metro undercover probe. The deputy police chief announced the two detectives with access to the vault had been "cleared" as possible suspects. According to an unnamed "source close to the investigation," the police shifted from the idea that the thief had planned to discredit the undercover operation to the theory that the thief had unwittingly stolen from the police. The stories noted that Sanders "could not be reached for comment."

The story took a more sensational turn with reports that the two police suspects had been cleared by police investigators after passing lie detector tests. The tests were administered by one Ray Slaughter. But later, the FBI arrested Slaughter for distributing cocaine to an FBI informant, Belinda Antal. It was also reported that the $264,900 seized from the unrented safety deposit box at Western Vault had been stored there in a suit-case owned by one Tammy Sue Markham. Markham was "facing a number of federal drug-related charges" in Tucson, Arizona. Markham reported items missing from three boxes she rented at Western Vault, as did one Beatrice Connick, who, according

to press reports, was a Columbian national living in San Diego and "not facing any drug related charges." (As it turned out, petitioner impeached Connick's credibility at trial with the existence of a money laundering conviction.) Connick also was reported to have taken and passed a lie detector test to substantiate her charges. Finally, press reports indicated that Sanders had refused to take a police polygraph examination. The press suggested that the FBI suspected Metro officers were responsible for the theft, and reported that the theft had severely damaged relations between the FBI and Metro.

*The Press Conference*. Petitioner is a Las Vegas criminal defense attorney...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 theft and ensuing investigation. Petitioner determined, for the first time in his career, that he would call a formal press conference. He...acted with considerable deliberation.

*Petitioner's Motivation*...[Gentile's] primary motivation was the concern that, unless some of the weaknesses in the State's case were made public, a potential jury...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. Sanders 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 Western Vault and the loss of Sanders' ground lease on an Atlantic City, New Jersey, property...

**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.

A statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process...As turned out to be the case here, exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date. 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 innocuous content of petitioner's statements reinforces my conclusion.

This case was correctly decided, but I don't think Justice Kennedy is being candid. First, Attorney Gentile must have thought that what he had to say was going to make an impact; otherwise, no need for a press conference. So must have the Nevada Bar Association; otherwise, no need to bring the complaint against Gentile. And, to suggest that the likely thief was a police detective surely cannot be thought of as "innocuous."

*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. Deputy Police Chief Sullivan stated for the police department: "We in Metro are very satisfied our officers (Scholl and Sgt. Ed Schaub) had nothing to do with this theft or any other. They are both above reproach. Both are veteran police officers who are dedicated to honest law enforcement." In the context of general public awareness, these police and prosecution statements were no more likely to result in prejudice than were petitioner's statements, but given the repetitive publicity from the police investigation, it is difficult to come to any conclusion but that the balance remained in favor of the prosecution...

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. While it is true that Rule 177's standard for controlling pretrial publicity must be judged at the time a statement is made, *ex post* evidence can have probative value in some cases. Here, where the Rule purports to demand, and the Constitution requires, consideration of the character of the harm and its heightened likelihood of occurrence, the record is altogether devoid of facts one would expect to follow upon any statement that created a real likelihood of material prejudice to a criminal jury 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, and, as petitioner explained before the disciplinary board, "when the trial was over with and the man was acquitted the next week the foreman of the jury phoned me and said to me that if they would have had a verdict form before them with respect to the guilt of Steve Scholl they would have found the man proven guilty beyond a reasonable doubt." **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.**

**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." Statements under this provision are protected "notwithstanding subsection 1 and 2 (a-f)." 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."

...**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. One illustrative exchange shows petitioner's attempt to obey the rule:

> "QUESTION FROM THE FLOOR: Dominick, you mention you question the credibility of some of the witnesses, some of the people named as victims in the government indictment.
>
> "Can we go through it and elaborate on their backgrounds, interests –
>
> "MR. GENTILE: I can't because ethics prohibit me from doing so.
>
> "Last night before I decided I was going to make a statement, I took a good close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?
>
> "I can't name which of the people have the drug backgrounds. I'm sure you guys can find that by doing just a little bit of investigative work."

Nevertheless, the disciplinary board said only that petitioner's comments "went beyond the scope of the statements permitted by SCR 177(3)" and the Nevada Supreme Court's rejection of petitioner's defense based on Rule 177(3) was just as terse. 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.

The analysis to this point resolves the case, and in the usual order of things the discussion should end here. Five Members of the Court, however, endorse an extended discussion which concludes that Nevada may interpret its requirement of substantial likelihood of material prejudice under a standard more deferential than is the usual rule where speech is concerned. It appears necessary, therefore, to set forth my objections to that conclusion and to the reasoning which underlies it.

**Respondent argues that speech by an attorney is subject to greater regulation than speech by others, and restrictions on an attorney's speech should be assessed under a balancing test that weighs the State's interest in the regulation of a specialized profession against the lawyer's First Amendment interest in the kind of speech that was at issue.** The cases cited by our colleagues to support this balancing...involved either commercial speech by attorneys or restrictions upon release of information that the attorney could gain only by use of the court's discovery process. Neither of those categories, nor the underlying interests which justified their creation, were implicated here. Petitioner was disciplined because he proclaimed to the community what he thought to be a misuse of the prosecutorial and police powers. Wideopen balancing of interests is not appropriate in this context...


At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.

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. Our

colleagues' historical survey notwithstanding, respondent has not demonstrated any sufficient state interest in restricting the speech of attorneys to justify a lower standard of First Amendment scrutiny.

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. "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." 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.**

One may concede the proposition that an attorney's speech about pending cases may present dangers that could not arise from statements by a nonparticipant, and that an attorney's duty to cooperate in the judicial process may prevent him or her from taking actions with an intent to frustrate that process. The role of attorneys in the criminal justice system subjects them to fiduciary obligations to the court and the parties. An attorney's position may result in some added ability to obstruct the proceedings through well-timed statements to the press, though one can debate the extent of an attorney's ability to do so without violating other established duties. A court can require an attorney's cooperation to an extent not possible of nonparticipants. A proper weighing of dangers might consider the harm that occurs when speech about ongoing proceedings forces the court to take burdensome steps such as sequestration, continuance, or change of venue.

If as a regular matter speech by an attorney about pending cases raised real dangers of this kind, then a substantial governmental interest might support additional regulation of speech. But this case involves the sanction of speech so innocuous, and an application of Rule 177(3)'s safe harbor provision so begrudging, that it is difficult to determine the force these arguments would carry in a

different setting. The instant case is a poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statements about ongoing adjudicative proceedings. At the very least, however, we can say that the Rule which punished petitioner's statements represents a limitation of First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood. The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though cost and delays undermine it in all too many cases, the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases. And in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts. It cannot be said that petitioner's conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment. The judgment of the Supreme Court of Nevada is *Reversed*...