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Gag Orders & (and) Attorney Discipline Rules: Why Not Base the Former upon the Latter

Douglas E. Mirell

GAG ORDERS & ATTORNEY DISCIPLINE RULES: WHY NOT BASE THE FORMER UPON THE LATTER?

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I. INTRODUCTION

With increasing frequency, judges throughout the United States are imposing (or threatening to impose) ever-more Draconian forms of prior restraints upon the out-of-court statements of attorneys and other trial participants. These constraints upon extrajudicial speech—commonly known as judicial gag orders—typically have the intent and effect of limiting what lawyers, parties and others (including, for example, the parties' expert witnesses and jury consultants) may say outside of the courtroom about the testimony and other evidence being adduced at trial, at least until those trial court proceedings are concluded.[1]

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1. Because judicial gag orders chill the utterance of all speech, they have properly been characterized as "prior restraints," the single most opprobrious form of First Amendment violation. *See Levine*, 764 F.2d at 595. In general, prior restraints are traditionally viewed as "the most serious and the least tolerable infringement on First Amendment rights," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976), because they produce an "irremediable loss" in the immediacy and impact of expression. *See* ALEXANDER BICKEL, THE MORALITY OF CONSENT 61 (1975) (cited with approval in *Nebraska Press*, 427 U.S. at 559 n.6); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970) (quoted with approval in *Nebraska Press*, 427 U.S. at 589–590 (Brennan, J., concurring)).

This Article proceeds from the assumption that such judicial gag orders, like all other forms of prior restraint, are presumptively unconstitutional,[2] and that such gag orders represent poor, ineffective, naïve, and short-sighted public policy.[3]

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2. *Nebraska Press*, 427 U.S. at 556–59; New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). *See also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311 (1997).

3. Though it is not the purpose of this Article to comprehensively catalogue the reasons why gag orders are inappropriate, some of the more frequently cited criticisms include:

- *Vagueness*. As discussed in more detail in the sections which follow, a primary vice of such gag orders—indeed, the fatal flaw identified by the U.S. Supreme Court in the only case to have yet considered the constitutionality of attorney gag orders—is their vagueness and ambiguity.
- *Underinclusiveness*. Gag orders on trial participants do not preclude others (including police sources, private investigators, jury consultants, journalists, and legal commentators) from conducting their own investigations and interviews, and/or offering their comments on what is occurring both inside and outside the courtroom.
- *Overinclusiveness*. Gag orders, by definition, constrain the speech of precisely those individuals who are the most knowledgeable about the proceedings taking place in court. Absent commentary from trial participants, the media—especially in high-profile cases—will not simply ignore the story. Instead, they will seek out less informed, less reliable and frequently anonymous sources who will offer their observations—whether those observations are accurate or inaccurate.
- *The Fallacy of Unconditional Acceptance of Lawyer Advocacy*. Gag orders are generally premised on the fallacious presumption that members of the public (and, more particularly, potential venirepersons or empaneled jurors) will be irremediably influenced by the extrajudicial comments of attorney advocates who are participating in an ongoing trial. There is absolutely no empirical support for such an assumption. Indeed, it flies in the face of human experience, demeans public intelligence and runs directly contrary to the design of our adversarial system of justice to suggest that it is the responsibility of trial lawyers to be impartial, rather than to act as zealous advocates for their clients. The public has long been exposed to attorneys (whether prosecutors, defense counsel or civil lawyers) assuming the role of advocates. It is ludicrous to assume (much less to predicate public policy on the assumption) that members of the public are incapable of critically assessing the source of information, and taking "with a grain of salt" everything that attorney advocates may say.
- *Availability of Less Speech-Restrictive Alternatives*. In the case of sequestered jurors, for example, gag orders are never justifiable. If sequestered jurors are learning information about out-of-court commentary or other developments notwithstanding their sequestration, the court has a much larger problem with juror integrity than it could possibly have from any disobeyed gag order. Where non-sequestered jurors are involved, the court's concerns should be alleviated by the promulgation and frequent repetition of appropriate juror admonitions. If even unsequestered jurors are incapable of abiding by the trial judge's instructions not to read, listen to or consider anything about an ongoing proceeding other than what they learn from the testimony and other evidence presented in court, how can they be expected to abide by the instructions given to them at the outset of their deliberations? Every hour of every court day, we expect our trial judges (when acting as triers of fact) to hear testimony or receive other evidence and to then refuse its admission and thereby ignore it entirely if objected to on relevance, hearsay, or other proper grounds. Why are we afraid to assume that jurors cannot

Some lawyers have recently suggested, however, that many, if not all, of the pernicious effects of gag orders can easily be ameliorated. Judges could simply impose a prior restraint identical to that of existing rules of professional conduct that seek to preclude and punish attorneys' extrajudicial comments. For example, at the outset of the trial of the civil wrongful death lawsuit against O.J. Simpson, a consortium of broadcast and print media outlets unsuccessfully urged Los Angeles Superior Court Judge Hiroshi Fujisaki, and later the California Court of Appeal, to modify the gag order initially imposed by Judge Fujisaki, by conforming its scope to that of recently adopted Rule 5-120 of the California Rules of Professional Conduct (CRPC).[4] However, such a suggestion is subject to criticism from two perspectives.

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similarly disregard what they are told to ignore? And if they cannot be trusted to disregard out-of-court statements by trial participants, how can they be relied upon to follow the judge's instructions to ignore testimony which is ordered stricken? In short, if sequestration and/or admonitions prove inadequate to remedy the "problem" of juror exposure to extrajudicial comments, then the entire jury system must be questioned.

- *Unenforceability.* If a trial participant is willing to deny her actions, gag orders are almost impossible to enforce. For example, if an attorney or any other trial participant wishes to violate a gag order, the individual can easily do so by speaking to a reputable journalist on "background," on a "not for attribution" basis, or otherwise "off the record." The journalist is then free to use this information as having come from an anonymous source and, by virtue of reporter's shield laws (such as those embodied in CAL. CONST., art. 1, § 2(b) (1974) and CAL. EVID. CODE § 1070 (West 1995)), cannot be compelled to disclose the identity of the attorneys or other trial participants with whom they spoke. The task of identifying and appropriately punishing individuals who violate these gag orders is thus rendered effectively impossible. Meanwhile, the very process of searching out the identity of the trial participant who violated the court's gag order is one which is inevitably frustrating, usually unavailing and, at minimum, highly diversionary. A prime example of this phenomenon was seen in the O.J. Simpson criminal case when Judge Ito spent valuable court time attempting unsuccessfully to uncover the sources for a KNBC-TV news story by reporter Tracie Savage and a *Penthouse* magazine article authored by Joseph Bosco concerning the results of DNA tests allegedly conducted on Simpson's bloody socks—this in a case where no gag order was ever imposed. M.L. Stein, *TV Reporter, Writer Invoke Shield Law at Simpson Trial; Next Move Is up to Trial Judge Lance Ito*, EDITOR & PUBLISHER MAG., Aug. 12, 1995, at 25. *See generally* Paul Hoffman, *The Gag Order in the O.J. Simpson Civil Action: Lessons to be Learned?*, 17 LOY. L.A. ENT. L.J. 333 (1997).

4. Before Judge Fujisaki, this suggestion was made by attorneys representing Cable News Network, Inc., *Los Angeles Times*, National Broadcasting Company, Inc., KNBC-TV, Associated Press, Copley News Service, Inc., *Santa Monica Outlook*, *Daily Breeze*, CBS Inc., and King World Productions, Inc. *See* Notice of Motion and Motion for an Order Vacating the Portion of the Court's August 13, 1996 Order Restricting Comment by Parties, Witnesses and Attorneys dated Aug. 16, 1996, at 14–15.

A virtually identical plea was made to the Court of Appeal by these same parties—now joined by E! Entertainment Television, Inc., American Broadcasting Companies, Inc., KABC-TV, and KCAL-TV. *See* Petition for Alternative and Peremptory Writs of Mandamus, Prohibition, and Review, and for Writ of Supersedeas or Other Appropriate Stay, dated Aug. 30, 1996, at 40–41.

For those who support the imposition of gag orders this suggestion is inadequate because it applies only to lawyers and does not address the so-called "problem." For example, when parties hold press conferences[5] or when prospective expert witnesses appear on talk shows,[6] attorney-focused gag orders can play no role in limiting statements by these non-attorney trial participants.

But for those who generally oppose constraints upon attorney speech, proposals to conform the scope of gag orders to those of gag rules like CRPC 5-120, even when made in the context of last-ditch efforts to modify an arguably more onerous form of prior restraint, pose several problems.

First, such proposals, at least implicitly, presume the constitutionality of a specific set of bar disciplinary rules constraining attorneys' extrajudicial comments. Second, whether or not such disciplinary rules are ultimately found constitutional, these arguments improperly lend status, credibility, and weight to such rules of professional conduct. Third, and perhaps most dangerous of all, these proposals remove such disciplinary rules from the context in which they were originally formulated. The proposals bring such disciplinary rules directly within the ambit of the judiciary's immediate power to both enforce and interpret such rules as contempt-precipitating gag order standards at a time when they may directly, adversely and irremediably impact the interests of the client. In order to fully appreciate the scope and seriousness of these problems, it is important to understand how these disciplinary rules are formulated and the precise types of extrajudicial lawyer

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5. At the conclusion of each day's deposition taken in the civil wrongful death suit against O.J. Simpson, the father and sister of murder victim Ronald Lyle Goldman, Fred and Kim Goldman, would frequently conduct press conferences outside their attorney's office to discuss that day's testimony. *See, e.g.*, Duke Helfand & Henry Weinstein, *Simpson Is Questioned for 4 Hours Under Oath*, L.A. TIMES, Jan. 23, 1996, at A1. These depositions and press conferences were held before Judge Fujisaki was assigned to handle the trial of the Simpson civil action, and before he imposed his *sua sponte* August 13, 1996 gag order. That initial gag order was subsequently modified following an August 23 hearing sought by various media organizations and others. *See* Rufo v. Simpson, 24 Med. L. Rptr. 2213, 2216, *available in* 1996 WL 511734, at *14 (L.A. Super. Ct., Aug. 23, 1996). *See* Hoffman, *supra* note 3. Judge Fujisaki's August 23 gag order was then modified by the California Court of Appeal on September 1, 1996, a modification accepted by the trial court. *See* Memorandum and Order, Cable News Network, Inc. v. Superior Court (Cal. Ct. App. 1996) (No. B104967). *See* Hoffman, *supra* note 3. Subsequently, Judge Fujisaki threatened Fred Goldman with contempt under this modified gag order for conducting an "impromptu news conference during a break in jury selection ... to defend a fund-raising letter that his family has sent nationwide." *See* Stephanie Simon, *Goldman's Comments Anger Judge*, L.A. TIMES, Sept. 28, 1996, at B3.

6. Following a November 11, 1996, appearance on CNBC's *Rivera Live* show by Dr. Michael Baden, a forensic pathologist hired by the Simpson defense team for the civil wrongful death lawsuit, Judge Fujisaki, invoking his own gag order, threatened to bar Dr. Baden's testimony if he made any further television appearances. *Tuesday's Simpson Developments*, Associated Press, Nov. 12, 1996, *available in* LEXIS, News Library, AP File.

speech they seek to punish. As there are a myriad of such publicity gag rules in place throughout the country,[7] this Article focuses on California's recently enacted Rule 5-120.

II. THE GENESIS OF CALIFORNIA'S ATTORNEY DISCIPLINE RULE[8]

Perhaps the most lasting legacy of the double murder trial of O.J. Simpson is the adoption of Rule 5-120. For the first time in California history, disciplinary sanctions can now be imposed against attorneys who offer extrajudicial comments about cases in which they are involved.[9]

In July 1994, an unprecedented event appeared on television screens around the world: a week-long, live broadcast of the preliminary hearing to determine whether former football star O.J. Simpson should be held to answer for the murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Lyle Goldman. On July 7, 1994, just one day before Los Angeles Municipal Court Judge Kathleen Kennedy-Powell found "ample evidence" to order Simpson to stand trial for these killings, California State Senator Quentin L. Kopp (I-San Francisco) amended his own Senate Bill 254.[10] That amendment would have added a new section 6103.7 to the California Business and Professions Code's State Bar Act embodying a

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7. Many states that have changed their ethics rules since the 1983 adoption of the American Bar Association's Model Rules of Professional Conduct (MRPC) (successor to the ABA's Model Code of Professional Responsibility, originally adopted in 1969) still follow the pre-1994 version of Model Rule 3.6, the provision governing extrajudicial commentary by attorneys. However, in addition to California, the following jurisdictions have adopted professional disciplinary rules which differ significantly from the pre-1994 version of MRPC 3.6: Colorado, Delaware, District of Columbia, Florida, Hawaii, Illinois, Louisiana, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, and Wisconsin. *Trial Publicity*, [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) No. 156, at 61:1005–1008 (July 26, 1995).

8. Portions of the discussion found in this section first appeared in the following articles: Douglas E. Mirell, *O.J. Fallout: A Misguided Attempt to Punish Attorney Speech*, (Nov. 30, 1994), *available in* 1994 WL 667135, TRIAL-COMMENT and OJ-COMMENT; and Douglas E. Mirell, *The Latest Threat to Free Speech: California's Proposed Bar Rules*, COMMUNICATIONS LAWYER, Summer 1995, at 13–16.

9. As one legal commentator trenchantly observed on the eve of Rule 5-120's effective date: "What the Rodney King case, the Reginald Denny case and the Menendez case couldn't accomplish, the Simpson case did—a rule that will limit lawyer speech about ongoing trials." Henry Weinstein, *State Justices Restrict Lawyers' Comments Out of Courtroom*, L.A. TIMES, Sept. 16, 1995, at A17 (quoting Loyola Law School Professor, now Associate Dean for Academic Affairs, Laurie L. Levenson).

10. As originally introduced on February 10, 1993, Senate Bill 254 had a wholly different thrust. It would have amended section 14335 of the California Business and Professions Code to permit an injunction to be issued against the use of or infringement upon a trademarked "professional sports insignia" on or in connection with goods or services in order to enhance their commercial value "without prior consent of the owner of the mark." *Id.*

specific set of proposals that mirrored verbatim the then-current version of Model Rule 3.6 of the American Bar Association's Model Rules of Professional Conduct (MRPC).

One month later, in the midst of pretrial proceedings conducted by Los Angeles Superior Court Judge Lance A. Ito, Kopp again amended his SB 254. The bill became a directive requiring the State Bar of California to submit to the California Supreme Court for its approval "[n]o later than March 1, 1995," a rule of professional conduct "governing trial publicity and extrajudicial statements made by attorneys concerning adjudicative proceedings."[11] This amended bill also directed that "the State Bar shall, among other materials, review and consider the American Bar Association's Model Rule 3.6, as modified."[12] It was this version of SB 254 that California Governor Pete Wilson signed on September 26, 1994.[13]

At no time did Kopp conceal the purpose underlying SB 254. Claiming that the Simpson case "has made a mockery of the judicial process and the 6th Amendment guarantee of a fair trial," Kopp told the *Los Angeles Times* that the measure was inspired by what he characterized as "the staggering excesses of lawyers and witnesses in the O.J. Simpson criminal case."[14] Asserting that "[t]he best reason for this [legislation] is the squalid spectacle in the Simpson case," Kopp further observed that "[t]here is no gag order in that case and the lawyers are using every out-of-court way they can to get publicity."[15]

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11. *See* S. 254, § 1 (Cal. 1994) as amended in Assembly on Aug. 16. 1994.

12. The reference in the August 16 version of SB 254 to an "as modified" MRPC 3.6 referred to actions taken by the American Bar Association at its New Orleans convention on August 9–10, 1994, at which the ABA's governing body, its House of Delegates, adopted linguistic changes to the so-called "safe harbor" provision of MRPC 3.6(b)(1). That provision allowed a lawyer to state "without elaboration" the "general nature of the claim or defense." The August amendments eliminated the words "without elaboration" and "general" in response to vagueness concerns raised by Justice Kennedy's principal opinion and by Justice O'Connor's separate concurrence in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048–50 (1991); *id.* at 1082 (O'Connor, J., concurring). In addition to this change, the ABA's House of Delegates also agreed upon a so-called "right of reply" exception by adding a new Rule 3.6(c), which provides that a lawyer may make "a 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." *Trial Publicity, Certification Undergo Model Rule Changes*, 10 [Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) at 243–44 (Aug. 24, 1994).

13. *See* 1994 Cal. Stat. ch. 868.

14. Henry Weinstein, *Limits on Attorney Comments Loudly Opposed*, L.A. TIMES, Nov. 29, 1994, at A3.

15. Michael J. Hall, *Bar Proposing Limits on Talk by Attorneys*, L.A. DAILY J., Nov. 29, 1994, at 1. Kopp apparently failed to appreciate the irony in this last comment. In fact, it was precisely because Municipal Court Judge Kennedy-Powell and Superior Court Judge Ito refused to enter any gag order upon the attorneys in the Simpson criminal case that Kopp's professed concerns about the judicial process and Simpson's Sixth Amendment fair trial rights could be seen as election-year

The State Bar of California, fearing imposition of significant budgetary cuts and an even worse statute drafted by the Legislature, initially responded to the directive of SB 254 by promulgating a new Rule 5-120 of the CRPC. This Rule precluded both the direct and indirect making of any public extrajudicial statement by "[a] member who is participating or has participated in the investigation or litigation of a matter . . . if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." This draft Rule 5-120 specifically rejected the ABA's recently adopted "right-of-reply" rule found in MRPC 3.6(c).[16]

In October 1994, proposed Rule 5-120 was published for ninety days of public comment. Two public hearings were held in San Francisco and Los Angeles; fourteen groups submitted formal written comments. Among the opponents of draft Rule 5-120 were such mainstream pillars of the legal establishment as the Bar Association of San Francisco[17] and the Los Angeles County Bar Association.[18]

Following this public comment period, the State Bar went back to the drawing board and recrafted an alternative version of Rule 5-120 making four principal changes. First, the State Bar substituted an explicit "clear and present danger" standard[19] in place of the draft rule's initial "substantial likelihood" test—a benchmark which the United States Supreme Court has most charitably characterized as "not necessarily flawed."[20]

Second, it deleted the vague "adjudicative proceeding" language in the initial draft and substituted narrower and more comprehensible language applying Rule 5-120 only to a "criminal or civil jury trial." Third, it removed the initial draft's prohibition upon members who "directly or indirectly" make proscribed extrajudicial statements.[21] Fourth and finally, it

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pandering to an electorate that relishes nothing more than the sport of lawyer bashing. The import of Kopp's view, of course, is that attorneys should nevertheless be subjected to the threat of substantial disciplinary sanctions (including the potential loss of their licenses) even if the judges before whom those attorneys are contemporaneously appearing do not believe those lawyers have comported themselves in a manner warranting imposition of any form of judicial gag order.

16. *See supra* text accompanying note 12.

17. Michael J. Hall, *BASF Opposes Lawyer-Gag Rule*, L.A. DAILY J., Nov. 23, 1994, at 1.

18. Dan Lee, *Attorney Free Speech Sparks Debate: Proposed Gag Rule Called an 'Overreaction' to Simpson Media Circus*, L.A. DAILY J., Dec. 2, 1994, at 2 (Attorney Stanley Lamport, representing the Los Angeles County Bar Association, stated that the proposed rule "would do more harm than good").

19. This standard is expressly incorporated in the trial publicity rules of Virginia and New Mexico.

20. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1036 (1991).

21. The rule's "Discussion" section was simultaneously amended to reflect that the rule would still apply to statements "made by or on behalf of the member."

elected to include an express right-of-reply exception permitting a lawyer to "make a 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."[22]

Yet, when this revised version of Rule 5-120 reached the State Bar's Board of Governors, that body came perilously close to spurning altogether SB 254's mandate that such a disciplinary rule be transmitted to the California Supreme Court. In January 1995, the Board initially voted 10-9 to ignore the Legislature's directive that it transmit such a rule to the state Supreme Court. However, after a recess and some reported arm-twisting, the Board ultimately agreed to send its revised version of Rule 5-120 to the Court. The Board nevertheless voted 13-6 to disapprove the very regulation whose transmittal it was authorizing due to concerns about the wisdom and enforceability of the rule.[23] In his formal letter to the California Supreme Court's clerk, then-State Bar President Donald R. Fischbach stated: "The majority of the Board believes that the rule is problematic, and may also be unnecessary, given the existing availability of gag orders."[24] The draft rule was finally transmitted to the Supreme Court in February 1995.

When the California Supreme Court received draft Rule 5-120 and Fischbach's explanatory letter, it promptly lobbed the political ball back into the Bar's court with a two-sentence letter requesting

> that the State Bar either propose a version of Rule 5-120 it recommends the court approve, or particularly explain the reasons

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22. Fortunately, the State Bar chose not to act upon an *ex cathedra* suggestion by Kopp to proscribe even statements by attorneys who were not "participating" in a specific investigation or litigation. *See* Michael J. Hall, *Bar Officials Seem Flexible on Comment Rule*, L.A. DAILY J., Nov. 30, 1994, at 3 ("State Sen. Quentin Kopp, however, may have stirred up new controversy, saying he wants a rule that would apply to all attorneys' statements about a particular case, and not just by those involved in the case."). Kopp attempted subsequently to clarify these comments. *See* Lee, *supra* note 18, at 2 ("Kopp said that any application of the rule 'would not foreclose commentary that is explanatory and informative' as long as it did not prejudice the proceedings."). However, that "clarification" actually clarified nothing. Kopp was still suggesting an extension of the State Bar's disciplinary sanctions proposal to non-record counsel—an expansion which would have been wholly unprecedented in the history of such constraints and which would have had palpably problematic consequences for the free speech of potential *amici curiae*, legal commentators and all other attorneys (whether active or inactive members of the State Bar).

23. *See* Michael J. Hall, *Bar Sends Lawyer-Gag Rule to High Court, with Reservations*, L.A. DAILY J., Jan. 24, 1995 at 3. Interestingly, the six members of the Board of Governors who did not disapprove of the regulation being sent to the Supreme Court were the six public members of the Board appointed by Governor Wilson and by the leaders of the State Assembly and Senate.

24. Letter from Donald R. Fischbach, Esq., to Robert F. Wandruff (Feb. 15, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*). It is ironic indeed, in light of the State Bar's presumptive view that attorney gag orders would prove a more effective deterrent against improper attorney comment that some should now use an attorney disciplinary rule as a template for crafting such gag orders.

> why it does not recommend approval of the rule already submitted. In either case, a complete evaluation and legal analysis of the State Bar's own concerns and those raised in public comment should be included, along with a discussion of reasons why such a rule may be necessary or appropriate.[25]

The Court's March 1995 challenge was answered on June 1, 1995 in a five-page letter from the State Bar asserting that while it "[did] not harbor concerns about the legality or constitutionality of the rule in the form submitted," it nevertheless opposed adoption of such a rule on at least six significant public policy grounds:[26]

1) "There is no evidence that attorney speech has had an adverse effect on the right to a fair trial;"[27]
2) There is no necessity for this rule in light of existing and more appropriate remedies to curb possible abuses;
3) The rule will be ineffective because it cannot regulate the conduct of non-lawyers who make out-of-court statements;
4) The rule will be extremely difficult to enforce;
5) The rule may become "a sword used by litigants seeking strategic advantage over one another;"[28] and
6) The rule will "impair attorneys'"[29] duty to represent their clients zealously.[30]

In September 1995, the California Supreme Court adopted a revised version of Rule 5-120, which became effective on October 1 of that year. The amendments made by the Supreme Court included a retreat from the "clear and present danger"[31] standard and a return to the "substantial likelihood of material prejudice" standard embodied both in *Gentile* and in the State Bar's initial, pre-comment version of Rule 5-120. They also broadened the scope of the rule by replacing "criminal or civil jury trial"

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25. Letter from John C. Rossi to Diane C. Yu (Mar. 29, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*); *see* Michael J. Hall, *Court Returns Rule on Lawyer Comment*, L.A. DAILY J., Apr. 24, 1995, at 3.

26. Letter from Donald R. Fischbach, Esq., to Robert F. Wandruff (June 1, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*); *see* Michael J. Hall, *Bar Objects to a Gag Rule on Media Remarks*, L.A. DAILY J., June 5, 1995, at 3.

27. Hall, *supra* note 25, at 3.

28. *Id.*

29. *Id.*

30. In California, the duty of zealous representation is at least partly statutory. Under section 6068(h) of the Business and Professions Code, it is an attorney's duty "[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." CAL. BUS. & PROF. CODE, § 6068(h) (West 1990).

31. *See supra* note 20 and accompanying text.

with "adjudicative proceeding in the matter"—another return to the Bar's pre-comment draft language. As amended, Rule 5-120 is similar to MRPC 3.6, except that it fails to precisely define when and under what circumstances an attorney *may not* speak about a case in which he or she is involved.[32] By not specifically identifying the circumstances under which such a rule could apply and the scope of permissible attorney speech, Rule 5-120 fails to comport with classic vagueness and substantive due process requirements.[33]

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32. Though it is true that the current version of MRPC 3.6, unlike its predecessor, Disciplinary Rule 7-107(b) of the ABA's former Model Code of Professional Responsibility, does not explicitly identify particular problematic categories of speech, those six particulars are nevertheless incorporated into the commentary accompanying MRPC 3.6:

> Rule 3.6 omits the particulars in DR 7-107(b), transforming them instead into an illustrative compilation as part of the Rule's commentary that is intended to give fair notice of the kinds of statements that are generally thought to be more likely than other kinds of statements to pose unacceptable dangers to the fair administration of justice. Whether any statement will have a substantial likelihood of materially prejudicially [sic] an adjudicatory proceeding will depend upon the facts of each case.

ABA/BNA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Rule 3.6, Model Code Comparison.

The six problematic subject areas identified in former DR 7-107(b) and in the current Comment to MRPC 3.6 are:

1) "[T]he character, credibility, reputation or criminal record 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) "[I]n 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) "[T]he performance or results of any examination or test or 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) "[A]ny opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
5) "[I]nformation that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
6) "[T]he fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation that the defendant is presumed innocent until and unless proven guilty."

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1995).

California's Rule 5-120 contains no counterpart to this six-point "illustrative compilation" of potentially proscribable speech categories included as part of the MRPC 3.6 Comment. Its absence may present serious questions about the constitutionality and future enforceability of CRPC 5-120.

33. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048–51 (1991); Levine v. United States Dist. Court, 764 F.2d 590, 599 (9th Cir. 1985); *see generally* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Smith v. Goguen, 415 U.S. 566, 572–73 (1974); Grayned v. City of Rockford, 408 U.S. 104, 112 (1972); NAACP v. Button, 371 U.S. 415, 432–33 (1963).

"the . . . defense involved."[39] It is unclear at this time whether the elimination of this language is sufficient to alleviate the Court's vagueness concerns.

What exactly are the contours of the "defense involved" which counsel are permitted to discuss? Do they include defense counsel's strategy and tactics? If the defense wishes to attack the integrity of the underlying investigation, impugn the motives of the prosecution or challenge the character and credibility of various prosecution witnesses, are these not subjects appropriately embraced within the ambit of the "defense involved"? Unfortunately, these questions are currently unanswered. Consequently, a court's use of this language in formulating a judicial gag order intended to withstand constitutional scrutiny would be reckless. Moreover, while the California Supreme Court's adoption of Rule 5-120 signals that the current Court is unlikely to declare all or any portion of that disciplinary rule unconstitutional, the same certainly cannot be said for the U.S. Supreme Court.

B. The Incorporation of Disciplinary Rule Standards into Judicial Gag Orders Improperly Lends Credibility to These Constitutionally Untested Rules

Whether or not California's new Rule 5-120 or the current version of the ABA's Model Rule 3.6 are ultimately found constitutional, both disciplinary rules today stand untested. While it is true that the most dire, potential, long-term consequences of violating an attorney discipline rule—*i.e.*, the loss of one's license to practice law—may be more severe than any short-term contempt sanction which may accompany the transgression of a judicial gag order, it is also true that a "contempt" finding in and of itself may ultimately give rise to the very same professional disciplinary consequences.[40]

Thus, the long-term consequences of violating a judicial gag order premised upon Rule 5-120 are the same as those arising from a State Bar disciplinary proceeding instituted in a case where there was only an alleged violation of Rule 5-120 and no gag order was imposed. Because of the severity of the sanction available to the State Bar under either of these

39. MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.6(b)(1) (1995); CAL. RULE OF PROF. CONDUCT 5-120(b)(1) (1995).

40. For example, section 6103 of the California Business and Professions Codes provides, in relevant part "[a] wilful disobedience or violation of *an order of the court* requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear . . . constitute causes for disbarment or suspension." CAL. BUS. & PROF. CODE § 6103 (West 1990) (emphasis added).

III. ATTORNEY DISCIPLINE RULES SHOULD NOT BECOME A TEMPLATE FOR DRAFTING JUDICIAL GAG ORDERS

There are at least three significant reasons why attorney discipline rules—be it California's newly-adopted Rule 5-120 or any other rule that imposes professional sanctions against attorneys who engage in extrajudicial speech—should not become a basis for crafting judicial gag orders.

A. Using Attorney Discipline Rules as a Basis for Drafting Judicial Gag Orders Improperly Presumes the Constitutionality of Such Rules

As we have already seen, the U.S. Supreme Court in *Gentile,* was quite chary in its discussion of the "substantial likelihood" test. The Court found that, at best, this standard (the same standard ultimately adopted by the California Supreme Court for this state's Rule 5-120) is "not necessarily flawed."[34] In dicta,[35] the *Gentile* Court noted that when "[i]nterpreted in a proper and narrow manner, . . . the phrase substantial likelihood of material prejudice *might* punish only speech that creates a danger of imminent and substantial harm."[36] Accordingly, the Supreme Court has yet to opine definitively upon the constitutionality of the "substantial likelihood" standard as employed in ABA Model Rule 3.6 or in Rule 5-120. The "substantial likelihood" test is the cornerstone of the ABA's "trial publicity" professional discipline rules. Its adoption by the California Supreme Court was the most important change made by that body to the State Bar's final version of Rule 5-120. Accordingly, it would be precipitous and foolish for the judiciary simply to incorporate this untested standard as the touchstone for imposing gag orders upon attorneys or other trial participants.

The second constitutional issue also arises from *Gentile.* There, the Court found Nevada's so-called "safe harbor" provision of Rule 177(3) to be "void for vagueness."[37] This ruling was predicated upon the fact that the rule's language permitting a lawyer to describe the "general nature of the . . . defense . . . 'without elaboration' failed to provide 'fair notice to those to whom [it] is directed.'"[38] Though the current version of the ABA's Model Rule 3.6 (and California's Rule 5-120) do not contain either the "general nature" or "without elaboration" language, they still permit lawyers to state

34. *Gentile,* 501 U.S. at 1036.

35. The Supreme Court's *Gentile* opinion makes clear that the constitutionality of ABA Model Rule of Professional Conduct 3.6 is not at issue. *Id.* at 1036.

36. *Id.* at 1036 (emphasis added).

37. *Id.* at 1048.

38. *Id.* (citations omitted).

scenarios, it does not behoove courts simply to adopt and incorporate Rule 5-120 (or other analogous disciplinary standards) into judicial gag orders. Yet, even if the transgression of contempt orders and attorney discipline rules did not similarly jeopardize an attorney's licensure, there is still no reason for importing the standards contained in those discipline rules into the form of a gag order. First, by virtue of the "blessing" given to these attorney discipline rules by other bodies (in the case of Rule 5-120, by the California Supreme Court), trial judges are likely to think of such rules as somehow pre-approved. In point of fact, however, they are and remain untested. Second, the mere existence of such attorney discipline rules presents a strong, and perhaps irresistible, temptation to impose gag orders in cases where no such orders are objectively necessary or appropriate. Third, even in those instances where gag orders are arguably needed or might prove useful, the incorporation of attorney discipline standards presents an overly simplistic alternative, potentially causing judges to avoid considering the reasons why they are even contemplating the imposition of any gag order. Finally, because attorney discipline rules are not and can not, by definition, be tailored narrowly or precisely to the circumstances of any given case, they present a template that is both too inviting and too undifferentiated to form a proper basis for a gag order whose immediate penalty is a contempt of court sanction.

C. The Consequences of Being Held in Contempt for Violating a Gag Order Are So Severe as to Require Great Care in Ordering Such a Prior Restraint upon Trial Participants

As noted at the outset of this Article, the ABA's and every other jurisdiction's bar discipline rules are crafted as vehicles for punishing errant attorney behavior. They have no immediate applicability to the conduct of non-attorney trial participants such as parties, expert witnesses and jury consultants. Assuming, however, that a court is prepared to overlook this glaring underinclusiveness and create a disciplinary rule-premised gag order that seeks only to silence attorneys, such a gag order nevertheless poses enormous problems for both the gagged attorneys and their clients.

Because there are no cases which have yet passed upon the constitutionality of either the ABA's Model Rule 3.6 or California's new Rule 5-120, the standards that these disciplinary provisions embody are wholly untested. Yet, once incorporated into a judicial gag order, these same untested standards become the measuring stick by which extrajudicial attorney comments may become the subject of mid-trial contempt proceedings. Absent anything remotely resembling legislative history, trial judges (and, more importantly, those who are potential contemnors) will be

forced to guess about whether particular extrajudicial statements fall within the ambit of a particular disciplinary rule-based gag order. Conversely, the interpretational decisions that a trial judge may make in the context of a contempt proceeding may be used later in bar disciplinary actions to define the very rule which the trial court first imported into its gag order. This kind of cross-pollination is helpful neither to the trial judge nor to the bar.

Mid-trial contempt proceedings and attorney disciplinary actions are not the same. Each serves a different and unique purpose. In particular, from a trial judge's perspective, contempt proceedings arising from the alleged violation of a gag order are meant to have a direct, immediate and powerful impact upon the conduct of trial participants in an ongoing proceeding. Any long-term impact of such proceedings upon an attorney's future career are presumably secondary and collateral. Blind application and interpretation of the same standards in these two different contexts is more confusing than it is helpful. The interpretational decisions of trial judges in contempt proceedings should not govern the standards used in bar disciplinary actions. The reverse is also true and, as a practical matter, it is in the context of contempt proceedings that great circumspection is vital because of the effect that such a finding can have upon an ongoing case and client.

There is no doubt that the immediate impact of a contempt citation resulting from the violation of a judicial gag order can have a devastating impact upon the cited party and upon the case being presented. Not only is there the distraction created by such ancillary proceedings (which frequently will require the retention of contempt-defense counsel) but also the very real problem that the client's position and interests in the underlying litigation will be adversely affected.

In California, for example, attorneys are duty-bound "[t]o abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, *unless required by the justice of the cause with which he or she is charged.*"[41] Moreover, California lawyers are also admonished "[t]o counsel or maintain such actions, proceedings, or defenses only as appear to [them] legal or just, *except the defense of a person charged with a public offense.*"[42] The existence of these two exceptional duties—exempting all lawyers from the usual rules where the cause is "just," and exempting all criminal defense lawyers under all circumstances—may be impossible to fulfill if blunderbuss, disciplinary rule-premised gag orders are imposed.

41. CAL. BUS. & PROF. CODE § 6068(f) (West 1990) (emphasis added).

42. *Id.* § 6068(c) (emphasis added).

As noted above, one of the six principal "policy concerns" identified by the State Bar of California in its letter to the California Supreme Court was the potential impairment of "attorneys' duty to represent their clients zealously." As the Bar's letter noted:

> [T]here are concerns that barring or restricting lawyer speech in this context will have a negative impact on the ability of lawyers to represent their clients zealously and effectively. A major component of the lawyer's role is to be the voice or spokesperson for the client in any forum in which the client's interests are affected, including the media. To infringe on access to that public forum limits the ability of lawyers to fully represent the interests of their clients.[43]

This fear is all the more real and immediate in the context of a gag order. Once cited for contempt, it is difficult to imagine that all but the most fearless or foolhardy attorneys will not feel constrained in the zealous representation of their clients.

IV. CONCLUSION

Given the increasing frequency with which courts are imposing or threatening to impose gag orders upon trial participants, there is a strong temptation simply to adopt the standards employed in attorney disciplinary rules that constrain extrajudicial comments as the basis for these judicially imposed prior restraints. However, such impulses ought to be curbed, not only because gag orders themselves are presumptively unconstitutional and constitute poor public policy, but because the disciplinary rules are meant to serve different purposes than contemporaneous gag orders.

So long as the constitutionality of any specific set of disciplinary rules constraining lawyers' extrajudicial comments remains unsettled, and the standards embodied within these rules are vague or ambiguous, gag orders predicated upon such rules will remain under a constitutional cloud. Meanwhile, more speech will be chilled than is absolutely necessary to remedy the "problem" that the trial court is seeking to solve through the imposition of a gag order in the first place.

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43. Letter From Donald R. Fischbach, Esq., to Robert F. Wandruff (June 1, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*) (opposing the adoption of any disciplinary rule regulating trial publicity).