OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DOMINIC P. GENTILE, Petitioner

v. STATE BAR OF NEVADA

CASE NO: 89-1836

PLACE: Washington, D.C.

DATE: April 15, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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DOMINIC P. GENTILE, :

Petitioner :

v. : No. 89-1836

STATE BAR OF NEVADA :

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Washington, D.C.

Monday, April 15, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

MICHAEL E. TIGAR, ESQ., Austin, Texas; on behalf of the Petitioner.

ROBERT H. KLONOFF, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1836, Dominic P. Gentile v. the State Bar of Nevada.

The spectators are admonished to refrain from talking until you get outside the courtroom. The Court remains in session.

Mr. Tigar, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL E. TIGAR

ON BEHALF OF THE PETITIONER

MR. TIGAR: Mr. Chief Justice, and may it please the Court:

This case involves a truthful statement to the media on a matter of public concern more than 6 months before a scheduled trial. For nearly a year before that statement, Las Vegas media portrayed Dominic Gentile's client, Grady Sanders, as a suspect. They said Sanders was a key target. The police fed these stories. The police said that their officers had passed drug and polygraph tests.

At joint appendix pages 43 through 45, Mr. Gentile tells us what he did. He kept silent until there was an indictment. He kept silent until, at the first

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court appearance, a trial date was set that he then knew would be more than 6 months in the future. The night before arraignment he went to the library and researched the law on what he could and could not say. Exhibit D in the hearing shows what he read, including, by the way, what was at that time the American Bar Association's inconsistent position, on the one hand the clear and present danger test, and on one hand the tendency test.

In his presentation which is video taped and available to the Court and is in the appendix to the petition for certiorari, he stressed on at least five separate occasions that he was discussing what the evidence would show. He made no further press conference thereafter until --

QUESTION: You say his presentation, Mr. Tigar -- you mean his presentation to the press?

MR. TIGAR: Yes, the conference, Chief Justice Rehnquist, that is videotaped. He thereafter remained silent until after the trial. Neither the prosecutor nor the trial judge raised a complaint or sought a protective order. And at trial some 70 pages of voir dire transcript show that not one juror remembered the press statement.

Mr. Gentile proved at trial what he said that he would, and Grady Sanders was acquitted. The bar's charges against him --

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QUESTION: Well, how much does a defense lawyer have to prove at trial in order for a defendant to be acquitted? It could simply be a failure of the prosecution's evidence, couldn't it?

MR. TIGAR: It could be.

QUESTION: The burden -- the burden is on the State.

MR. TIGAR: The burden rests on the State, Mr. Chief Justice. In this particular trial, the cross examination of Government witnesses is -- which of course defense counsel almost always does -- always does in my experience -- brought out the vital admission that these police officers were doing exactly what Mr. Gentile said they were. They were using narcotics. So it came out in that way in that case in addition to the defense evidence.

But it is important to stress that Mr. Gentile did not say anything at that conference which under any view of the trial would not be admissible in evidence, because what he was focusing on were the charges against his client and the fundamental defects in the Government's proof.

Now, at the hearing in this case based on these charges, they singled out six separate parts of the conference. The bar counsel essentially introduced the statement and then rested. The Nevada Supreme Court

affirming said, and I quote, "The evidence demonstrated that there was no actual prejudice in this case." We are here, if the Court please, because the respondent has conjured for the Court a collision between the First and the Sixth Amendments. A collision that this Court has expressly on two occasions and consistently wisely refused to find, saying in the Nebraska Press case that the framers intended no hierarchy between First and Sixth Amendment rights, and saying, in Bridges v. California where this line of authority begins, that the Court will not make a forced choice between the First and the Sixth Amendments.

The respondents conjure this collision by inviting the Court, we suggest, to ignore the working principles to which this Court referred at page 845 of its opinion in Landmark. The principles founded, as the Court made clear at page 843 of that opinion, rest upon the clear and present danger test but did not require a mechanical application of it.

Now we want to look at these working principles, because they are a touchstone. We submit that two ideas emerge. The first is the formulation of a rule. We submit that before trials, lawyers and judges can in good faith sit down and fashion orders -- not based upon imaginings, not at wholesale, but in light of concrete

circumstances -- orders that will restrain speech likely to have a clear and present danger to the trial process.

In analogous --

QUESTION: Well, Mr. Tigar, here we're dealing with, I suppose, Nevada Supreme Court rule 177.

MR. TIGAR: That's my understanding, Justice O'Connor.

QUESTION: And part 1 of that says that a lawyer shall not make an extra judicial statement if the lawyers knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Now, do you take the position that that provision is invalid as a matter of constitutional law?

MR. TIGAR: Yes, Justice O'Connor, we do. We take that position because we agree with the American Bar Association, which doesn't support the outcome here but supports the rule, that it doesn't embody the clear and present danger standard. And to that extent we say that violates what the Court said in Landmark.

QUESTION: And is this provision, part 1 of rule 177, rather typical of what many States have in their rules governing attorney conduct?

MR. TIGAR: Yes, Justice O'Connor, it is typical of what many States have done.

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QUESTION: So they're all invalid?

MR. TIGAR: Any rule that does not embody the clear and present danger standard would be invalid under our view, Justice O'Connor. And I think it is important to point out that this would not be the first time that the Court has had to say to the bar that the First Amendment doesn't stop short of its door.

Again, however, the problem, Justice O'Connor, is not simply a facial invalidity. It is not simply overbreadth but vagueness. As the materials that Mr. Gentile consulted the night before that are in that Exhibit D point out, there is judicial disagreement. There is disagreement among even the ABA standards. How do you know what to do? The invalidity also appears, Justice O'Connor, from a reading of subparagraphs two and three, which in an attempt to clarify matters only add to the difficulties.

QUESTION: Well, I think part 2, A and B, present a somewhat different question. And I was trying to explore with you initially part 1 which seems to be a more typical provision.

MR. TIGAR: Yes, Justice O'Connor, and our position on that is clear. We would suggest that if the Court will adopt for this kind of a case what it said in Landmark that it's not beyond the wit of Bar Association

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folks to sit down and draft a rule that would meet that standard. But we do find a problem with many of the rules that exist in the States under the standard that we think this Court has set out.

QUESTION: In -- in your view, Mr. Tigar, if the Court makes a ruling on a motion in limine that it's not to be brought out that a lie detector test has been given -- trial is ongoing, can an attorney go out in the corridor at recess time and tell the press that there was lie detector test that the witness had failed?

MR. TIGAR: Absolutely not, Justice Kennedy. That's the kind of a mid-trial order or a pretrial order that takes account of the concrete dangers to the jury process. That's the sort of order that the court --

QUESTION: Suppose the jury had been sequestered.

MR. TIGAR: There might be less danger under such circumstances, but Justice Kennedy, I would submit that there a court could well find that the clear and present danger nonetheless exists, because we all --

QUESTION: Clear and present danger of what?

MR. TIGAR: The clear and present danger of a harm to the deliberative process that's then ongoing.

QUESTION: Because the jury is going to find out about it?

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MR. TIGAR: Justice Kennedy, I've tried some cases with sequestered juries, and unfortunately, despite the marshals' best efforts and sometimes even because the marshals are careless, matters are communicated to the jury. There is less risk under --

QUESTION: Well, is the -- is the only clear and present danger that you can envisage the fact that the jury will receive information that it ought not to have?

MR. TIGAR: No, there are other dangers to the trial process, although once you get away from impact on the jury's deliberations, they are considerably more attenuated. Judges, after all, are suppose to have thicker skins and suppose to be able to deal with the --

QUESTION: Well, what are the other dangers of the trial process if an attorney reveals the contents of matters that the judge in limine has instructed the attorney shall not mention in the courtroom?

MR. TIGAR: The Court's opinion in Alderman against United States referred to two of them; national security and the rights of third parties, suggesting that protective orders were necessary there. The Court in Seattle Times v. Rhinehart referred to protective orders in the civil discovery process which often implicates the privacy rights of strangers to the litigation in a way that oughtn't to be compromised for the sake of the

private interest of litigants.

QUESTION: So rights of third parties tested under the clear and present danger test?

MR. TIGAR: I think not, Justice Kennedy, because at least to the extent that they do not involve core speech on matters of public concern. The case before the Court presents such core speech on a matter of public concern. The Court has not suggested either in Alderman, certainly which is a routine run-of-the-mind protective order, or in Seattle Times that the clear and present danger test is appropriate. And we certainly would say that the Court need not adopt it in order to reach the result that we contend for with respect to the speech in issue.

QUESTION: Well, if -- if you say that the court can protect the rights of third parties by disciplining or ordering an attorney not to discuss certain matters, then I take it the attorney does have some special obligations to the court that others do not. Is that correct?

MR. TIGAR: That is absolutely correct, Justice Kennedy. The attorney has a special obligation -- an obligation to respect client confidences and an obligation of candor to the tribunal, among others. But this Court has always said that that special obligation does not include the forfeiture at wholesale of the rights of the

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attorney as public citizen. It said that, I think, in Keller against State Bar. It said that in the advertising cases and in the solicitation cases of Primus and Railway Trainmen.

More significantly, Justice --

QUESTION: Mr. Tigar, suppose -- is -- is there no interest in the dignity of the trial process that's separate and apart from injuring the jury? Suppose a prosecutor and defense counsel in a case that has drawn national attention decide to go off and enact the trial before it occurs in another jurisdiction, so it can't possibly infect the jury in the -- in the venue where the case is to be tried. Must the courts allow that simply because there's no problem of infecting the trial?

MR. TIGAR: Mr. Justice Scalia, if the reenactment has no risk of any danger to the ongoing trial process --

QUESTION: It's a preenactment, not a reenactment. A preenactment.

MR. TIGAR: If there is no --

QUESTION: For those interested this is what the trial is going to look like. It's a circus.

MR. TIGAR: If your -- if there is no risk of danger to the trial process, that sort of behavior, undignified as it may be -- and it wouldn't be the first

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time that lawyers have done something undignified -- would be protected by the First Amendment.

QUESTION: It would? My goodness.

QUESTION: Well, why would it be undignified?

MR. TIGAR: Excuse me?

QUESTION: Why would it be undignified?

MR. TIGAR: Justice Scalia's question assumed that it would be undignified. As I understood the question -- QUESTION: Do you agree that it would be undignified?

MR. TIGAR: Pardon me?

QUESTION: Do you agree that it would be undignified?

MR. TIGAR: It would not necessarily be undignified, Justice Kennedy. I think --

QUESTION: Depending upon -- upon the skill of the counsel making the presentation?

(Laughter.)

MR. TIGAR: Well, Justice Kennedy, I have never done a preenactment of a celebrated case. I've been involved in post-case reenactments, and my dignity has to be judged by others. I have a conflict of interest to argue it here. But I think --

(Laughter.)

QUESTION: I have -- one more question. Suppose

a court attache tells the reporter the conduct -- of the contents of a motion in limine ruling, and the jury has been sequestered. And there is no danger that the jury will hear it. Could the court attache be disciplined?

MR. TIGAR: Connick v. Meyers, Justice Kennedy -- the court attache can be disciplined.

QUESTION: Why?

MR. TIGAR: Different standards, sir.

QUESTION: Why? Does it affect the performance of the court?

MR. TIGAR: No, Justice Kennedy, because the rule which has to do with lawyer confidences, court attache duties, and the duties generally of employees as exemplified in nonlawyer cases such as Carpenter and Snepp have to do with the employer's responsibility and ability of consistent --

QUESTION: Well, suppose it's not a confidence. Suppose the court attache tells the press, you know, this police officer that testified here this morning, testified just the opposite in a case 3 weeks ago. Could the court discipline that court attache?

MR. TIGAR: Consistent with the First Amendment and absent an employment relationship that governs the speech, such as in Connick or Snepp, then that information on a matter of public concern would be subject to the same

standard for which we argue here. However, it's difficult in my experience to get the court attache out from under the Connick v. Meyers employee resolution.

What I wanted to do --

QUESTION: What -- what would the answer be if you had a sequestered jury and instead of a court attache making a statement, another judge of the same bench who wasn't presiding over the trial just decided to engage in commentary on it? He went to the press, and he said the guy is obviously guilty. The witnesses are lying. I sat in and I watched for a while. I've heard a lot of witnesses. I can tell. Same standard, clear and present danger standard?

MR. TIGAR: Yes, Justice Souter --

QUESTION: But there is no value whatsoever in the -- in effect in the public appearance of -- of a deliberative process of justice?

MR. TIGAR: I had a little more to my answer, Justice Souter --

QUESTION: Right.

MR. TIGAR: -- because I take your question extremely seriously. Judges, because of their special position, must know that their utterances pose special risks of danger to the deliberative process. Moreover, a judge -- and therefore, the -- the danger standard may be

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the same, but in practical application it's different. Moreover, a judge --

QUESTION: Why is a lawyer's effect on that appearance so much less? I will grant you it is less, but is it less to the point almost of insignificance, which was the impression that I was getting from your earlier answers?

MR. TIGAR: No, it is extremely significant, Justice Souter, and there is an additional reason. When a judge speaks out, the judge may very well trigger a motion to recuse the judge or his or her colleagues for bias.

But to come back to the issue which I think is embodied in your question and Justice Kennedy's, lawyers have a special status. Of course they do; but it is a special status that cuts it seems to me in petitioner's favor here. Because lawyers have always been not only representatives of private litigants and their interests, but also when they've been doing their professional job, people who have spoken out about matters of public concern. I find that when John Adams sat down on July 3rd, 1776, and wrote home to his wife about what was happening in Philadelphia, when he talked about what he and James Otis had done in 1761 in Boston, evoking it seems to me not only the arguments that they made in court in Sewell v. Hancock and the other writ of assistance

cases, but also the public debate in the Massachusetts file.

QUESTION: Could -- could I bring you back though to this question. You are -- you are agreeing that in fact there -- there is a value in the public provision of a deliberative process, and that that value in fact can be infringed by comments whether it be by lawyers or by judges so that our whole test is not simply going to be the effect on the jury. Now, assuming that to be the case, how do we -- how do we as a practical matter apply the clear and present danger test when a judge or a lawyer makes a statement which tends to suggest or cast doubt on the fairness and the deliberativeness of the process? How do we assess the clarity and the presence of the danger?

MR. TIGAR: As the Court did in Landmark, by looking not at legislative-type findings such as embodied in rule 177 and like the Nevada Supreme Court entertained. But by looking at real evidence of real prospects to harm. The clear and present --

QUESTION: Okay, but the point is doesn't the harm take place by destroying the public, if not general or universal perception, that there is a disciplined and rational and deliberative process that is going to go on in the courtroom? Doesn't the -- I guess what I'm getting at is if you concede that these values are appropriately

taken into consideration in the clear and present danger test, then don't you almost have to say as a practical matter that once these kind of inflammatory or conclusory statements are made in advance of trial, that the test really has been satisfied, because there has to that extent reasonably been -- I think reasonably perceived to be a -- a destruction of the public perception about the process.

MR. TIGAR: Justice Souter, the Court has resolutely refused to find the collision of First and Sixth Amendment rights the question suggests. And in this case there are 70 pages of voir dire which I respectfully urge the Court to read. There the jurors said what jurors always do; they may have heard something in the media they don't remember and it won't influence them. They were interrogated in great detail about that.

QUESTION: Yes, but our -- the -- maybe I misunderstand you. I thought we had agreed that the effect on jurors was not the sole -- the sole focus of a clear and present danger test once we assume there are some values even outside the -- the process of the 12 jurors that it would be served here.

MR. TIGAR: I would answer your question then, sir, in this way, and I'm sorry if you thought I had evaded it earlier. The public's business is done in more

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than one forum at a time. Granted the clear and present danger test and voir dire -- the elapse of time and these other things -- are there to preserve the trial process. But if the Las Vegas police, as the jury implicitly found in this case because it was argued to them, are taking cocaine from an investigation and traveler's checks and sniffing it and distributing it and stealing the money, that is a matter of the public's concern in the immediate future.

The fact that the public's business is at stake here, which may be done in more than one place at a time, is a part of every case that does the public's business. Indeed, there are times when prosecutors exercising the historic right of nolle prosequi recognized that they have made wrong decisions, particularly prosecutors who rely on being reelected to hold their offices. That's the problem.

QUESTION: So you're -- you're saying that the interest the Government may properly protect should be assessed in terms of countervailing interests?

MR. TIGAR: I am saying, Justice Souter, that lawyers are public citizens, that these are matters of public concerns, and that the Government -- if by that we mean the people's right to govern themselves -- is something we hold dear -- the First Amendment test for

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which we contend is essential to the proper operation of decision making processes that go well beyond the narrow interests of a particular trial.

QUESTION: And so you -- I take it, Mr. Tigar, then you -- you think that any lawyer can deliberately speak out before a trial begins and say things that he knows and intends to create a substantial likelihood of prejudicing a fair trial.

MR. TIGAR: That --

QUESTION: Lawyers are just free to do that. They have a constitutional right to attempt to subvert the -- the trial process. Is that what your position --

MR. TIGAR: If I am understood as saying that, Justice White, I have been a great deal less --

QUESTION: Well, the --

MR. TIGAR: -- coherent than I should.

QUESTION: -- the rule -- you say the rule -- this rule, paragraph one is unconstitutional in the States.

MR. TIGAR: Justice White --

QUESTION: Because it doesn't include the clear and present danger standard. That's what I understood.

MR. TIGAR: Justice White --

QUESTION: So a lawyer is free to make statements that he knows will have a substantial

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likelihood of materially prejudicing an adjudicative proceeding. Now, he's just free to do that?

MR. TIGAR: No, Justice White, he is not. If the ABA --

QUESTION: Well -- well, what can you do to him? I thought you said the First Amendment protects him.

MR. TIGAR: If the ABA would return to the standards for criminal justice that it once enacted before the model rules, the -- a rule can be fashioned which takes account of the clear and present danger standard. It can be embodied in orders of the kind that Justice Kennedy and I were speaking of.

QUESTION: Well, you're not answering my question. You're not answering my question at all. Is a lawyer protected by the First Amendment from -- protected by the First Amendment if he deliberately makes statements that he knows will have a substantial likelihood of materially prejudicing -- and I thought you said he -- that First Amendment protects him.

MR. TIGAR: Unless the State is willing to go further, Justice White.

QUESTION: Well, so I would say he is free -- that any lawyer is free to try to prejudice an adjudicative proceeding.

MR. TIGAR: Provided that the speech --

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QUESTION: The First Amendment gives him that right.

MR. TIGAR: Provided the speech only rises to the substantial likelihood test and not to the clear and present danger test, yes, that is our position. And the reason for our position, Justice White, is that the --

QUESTION: So I guess it's just how hard he's going to try to prejudice it.

MR. TIGAR: Justice White, I don't think that we have erected --

QUESTION: Well, if he tries real hard, he can probably create a clear and present danger.

MR. TIGAR: Justice --

QUESTION: But if he just goes out and says, well, I really want to -- I really want to prejudice this, but I'll only create a substantial likelihood of it.

MR. TIGAR: Justice White, you assume the cynical lawyer, and of course, sometimes rules are made for cynical people.

QUESTION: Well --

MR. TIGAR: On this record we see a lawyer --

QUESTION: I think -- I think this rule is aimed at cynical lawyers.

MR. TIGAR: On this --

QUESTION: Not lawyers who know that they

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are -- that likely are going to prejudice the proceeding.

MR. TIGAR: I wish -- I wish to start by noting that the Nevada Supreme Court did not require any such proof with respect to petitioner Gentile, and the American Bar Association hasn't said that he violated the rule for which they contend. So petitioner's case must be set apart. But the second --

QUESTION: What did the supreme court hold?

MR. TIGAR: It found no prejudice but said that none was necessary --

QUESTION: Well --

MR. TIGAR: -- and cited its earlier case of In re Raggio.

QUESTION: Well, no actual prejudice but as it turns out, the lawyer wasn't successful in prejudicing the proceedings.

MR. TIGAR: The undisputed evidence, Justice White, is that the amount of study and concern he put in the night before illustrates a determination to try to follow the rules. And I think the record shines through with that. But coming to the next point; the process of speech about matters that are currently involved in litigation may very well mean that there are risks to the process of fair trial. The First Amendment standard that the Court has applied from Bridges v.

California on through Landmark and Butterworth has said that those risks --

QUESTION: Well, you've never -- had to deal with a press release and a labor lawyer. I mean a labor leader. None of these cases you've been talking about dealt with lawyers.

MR. TIGAR: Bridges was*pl[illegible]acipant, Justice White, with --

QUESTION: He wasn't a lawyer.

MR. TIGAR: That is correct. He was not a lawyer.

QUESTION: He wasn't a lawyer and what they did was try to -- they wanted to hold the -- the press and the labor leader in contempt. And there were no lawyers involved in that case.

MR. TIGAR: And for that, sir, we will have to rely, Mr. Justice White, on the cases such as Keller v. State Bar and the other cases in which the Court has said that the First Amendment doesn't stop at the bar's door.

QUESTION: And Landmark that you rely on carefully said we are not dealing here with a participant in the trial.

MR. TIGAR: Yes, Justice White, and the participants, which again is a term broader than lawyers, would invoke the Bridges and -- and Wood cases.

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QUESTION: Well, I'm still talking about a lawyer.

QUESTION: Mr. Tigar, do you read the ABA rules or -- or the rules at issue here as applying to anyone except the lawyer including his staff? I mean could -- could Perry Mason say to Della Street, you know, Della, put this out. Our client is getting clobbered in the press or -- or his investigator whoever it was, you know -- tell -- go public with what you've found?

MR. TIGAR: The rules --

QUESTION: Would that violate the ABA rules?

MR. TIGAR: There is a prosecutor rule that says that prosecutors have to try to control the police. Lawyers' staffs are probably covered by the intent of the rule, although the Solicitor General has taken the position that those other than the lawyer are entirely free to speak. That is a difficulty with the position that they have advocated here, and that of course supports the position that we've taken. The Solicitor General takes the odd view the defendant can hire someone to speak for them. So next case will be the Court regulating the ethics of public relations firms.

QUESTION: Mr. Tigar, if we adopt the position you wish us to adopt, my assumption is that in every bench trial in the country an attorney would be free to rehearse

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his case -- discuss his case on the courthouse steps 1 hour before the trial begins. Am I not correct?

MR. TIGAR: We would not take that position, Justice Kennedy. Certain -- the courthouse steps of course --

QUESTION: I -- I can't see any interest that you've identified or conceded here that would prohibit the bar from making -- that would permit the bar to make a rule that would stop that conduct.

MR. TIGAR: Cox v. Louisiana -- Cox, too, Justice Kennedy.

QUESTION: All right, then 100 yards away from the courthouse.

MR. TIGAR: 100 yards away from the courthouse we still have conduct brigaded with speech, which is a part of the burden of Cox, too.

QUESTION: That day or the day before?

MR. TIGAR: 100 yards away and the day before a reenactment of a potential bench trial such as a moot court argument to a group of law students before a Supreme Court argument might very well be the sort of exercise that the Court would find protected.

I would like to reserve if I may the balance --

QUESTION: You would like to have the Court find protected.

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MR. TIGAR: Excuse me, if I misspoke, Justice White.

QUESTION: No.

QUESTION: Thank you, Mr. Tigar.

Mr. Klonoff, we'll hear now from you.

ORAL ARGUMENT OF ROBERT H. KLONOFF

ON BEHALF OF THE RESPONDENT

MR. KLONOFF: Mr. Chief Justice, and may it please the Court:

We submit that the Nevada Supreme Court's private reprimand of petitioner is correct and should be affirmed. First, lawyers in pending cases are officers of the court and can be subject to certain restrictions that could not be imposed on the press. Second, Nevada rule 177, substantial likelihood of material prejudice standard, captures this simple premise that a lawyer should not be allowed to try his case on the press. Third, the rule was properly applied here because petitioner called the press conference for the precise purpose of prejudicing prospective jurors. And he argued extensively concerning the credibility and character of the Government's witnesses and on other matters.

Now petitioner takes the position --

QUESTION: Is it undisputed that he purpose was to prejudice jurors?

MR. KLONOFF: He own testimony makes that absolutely clear, Justice Stevens -- pages 41 to 42 of the joint appendix, 45 of the joint appendix, 50 of the joint appendix, and 56. Let me refer as one example to page 56. He states, "I really felt that the whole county from which a venire would be polled at least as of February 1988 had been poisoned, okay? And all I was trying to do was even it out." That's a clear admission that he was trying to prejudice the venire.

And by the way, that testimony also undercuts a major premise of petitioner, which is that you can't prejudice a venire 6 months prior to trial. His testimony reveals that he thought the police long before the 6-month period had already prejudiced the venire. So how can he then come in and say that his comments, later than the police comments, could not have prejudiced the proceedings. So, yes, it is absolutely clear from the record that his very purpose was to prejudice the proceeding.

QUESTION: He could have had his secretary do this though, right? Or he could have had the investigator, that he had had look into this, have a press conference?

MR. KLONOFF: Well, the -- actually, Justice Scalia --

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QUESTION: Would that have been all right under the rule?

MR. KLONOFF: Well, Nevada Supreme Court rule 203 provides that it's professional misconduct for a lawyer to violate any rule through the acts of another. Now --

QUESTION: Through the acts -- so he couldn't -- he couldn't have anybody do it?

MR. KLONOFF: Well, it would be extremely difficult, let me say as a practical matter, to prove a violation that a lawyer was somehow setting up a process --

QUESTION: Uh-huh.

MR. KLONOFF: -- whereby somebody else was violating the rule. I don't know of a single case in which a lawyer has ever been disciplined for prejudicial pretrial publicity from someone else, but it could happen. And indeed --

QUESTION: Do -- do the ABA rules contain the same -- proposals contain the same provision or is that of Nevada's own creation?

MR. KLONOFF: The ABA rule -- model rule 8.4(a) contains the same in substance provision. Let me also say that from the -- from the prosecutor's standpoint, rule 179.5 provides that the prosecutor must exercise

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reasonable care to prevent investigators, law enforcement personnel, employers, and other persons from making statements that would be prohibited by rule 177. That is incorporated in model rule 3.8.

QUESTION: Well, could Sanders have hired a public relations person who is not a lawyer to make all these statements?

MR. KLONOFF: Yes, I think he could have.

QUESTION: Could -- could this -- could the State prohibit that conduct?

MR. KLONOFF: It would be more difficult we would think. The -- as the questions of the Court to Mr. Tigar reflect, and as our position makes clear, there is something unique and special about the role of a lawyer as an officer of the court. And it would be much more difficult to try to deal with the conduct of outsiders or third parties. And certainly the bar would not try to --

QUESTION: Do you think that the public is influenced by a defense lawyer saying that his client is innocent?

MR. KLONOFF: Well, Justice Marshall, a -- much more than that was said at the press conference. In fact, the --

QUESTION: Well, would you answer the question?

MR. KLONOFF: I think that in some circumstances, depending on how it's said, it could have an effect. Now, here in fact he didn't just say my client --

QUESTION: What do you -- what do you expect -- do you expect the defense counsel to admit he is defending a guilty man?

MR. KLONOFF: No, but here -- here's the point --

QUESTION: Do you?

MR. KLONOFF: No, but here's the point, and it was established by this Court in the United States against Young. There's a difference in saying, my client -- you know, the evidence will show that my client is innocent versus actually vouching for innocence. Now, what Mr. Gentile did here is he went so far as to say, this is the first time I have ever held a press conference, and the reason I did so is because I believe in this case that my client is innocent.

QUESTION: Well, do you think that the average person is influenced --

MR. KLONOFF: I think that --

QUESTION: -- by any -- will you let me finish?

MR. KLONOFF: Sure. I'm sorry.

QUESTION: -- by anything a defense counsel say

in the press conference?

MR. KLONOFF: I do think so, yes, Your Honor.

QUESTION: You do?

MR. KLONOFF: This was the whole thrust of this Court's opinion in Sheppard. In -- in 1966, this Court in Sheppard against Maxwell identified pretrial publicity as being a problem of extraordinary magnitude and in essence instructed the bar to go out and do something to correct the problem. That ultimately led first to the disciplinary rule.

QUESTION: This is a case of the Bar Association doing it.

MR. KLONOFF: This is a Nevada --

QUESTION: Do you recognize that they are two different situations?

MR. KLONOFF: Well, these rules are Nevada Supreme Court rules; they were adopted by the court, Your Honor.

QUESTION: Couldn't the court have adopted the same thing in -- in Nevada, put on a gag rule?

MR. KLONOFF: The problem with the gag rule --

QUESTION: Couldn't that have been done?

MR. KLONOFF: There are several --

QUESTION: Yes or no?

MR. KLONOFF: In this case, no, because at the

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time the statements were made, there had not even been an appearance before the judge who was going to try the case. There -- there are enormous problems with the gag order if I could just go through those.

Number 1, if the gag order is required to comport with Mr. Tigar's --

QUESTION: This other one is much easier. You don't have to go through anything.

MR. KLONOFF: Well, the whole purpose, Your Honor, of professional standards is -- is to identify conduct that lawyers should hold themselves to. It's no different -- you could have a case-by-case determination of attorney-client privilege and you could say that it's okay to disclose client confidences unless in a particular case a judge orders you not to. That would be cumbersome and it really wouldn't make sense as a matter of procedure. The whole reason that you have disciplinary rules is because lawyers are to be held to certain standards. And these standards ought to apply, we submit, in every case.

But let me go on further with the problems of the gag order situation. One problem with the gag order is that you're not going to be dealing with all those other situations in which there's pretrial publicity. Even if a gag order is entered, you're going to have

myriad appeals, briefing. The Levine case which Mr. Tigar cites in his reply brief is a perfect example where you have a mandamus appeal -- extraordinary briefing on that case. And ultimately what the -- what the Ninth Circuit ended up doing was imposing a gag order that's virtually identical to model rule 3.6. So what you're going to end up having in -- in any event, probably from the gag order situation, is courts adopting rules very similar to 3.6.

QUESTION: Mr. Klonoff, I guess if every lawyer went around saying, I really believe -- honest, deep in my soul that my client is innocent, the public might be affected by the lawyer who can't say that.

MR. KLONOFF: Well --

QUESTION: You know, the press asks him, do you really believe deep down in your soul that your client is innocent? And he says, no comment.

(Laughter.)

QUESTION: That might be --

MR. KLONOFF: Well, that's true. Let --

QUESTION: It would be sort of hard to defend guilty people, wouldn't it?

MR. KLONOFF: Well, but there is -- the United States against Young has made clear in admonishing both the prosecutor and the defense lawyer in that case that it is misconduct to vouch for your client's innocence if

you're the defense lawyer or if you're the prosecutor to say you --

QUESTION: And that's the reason, isn't it? Because if -- if -- if you do that the lawyer who can't do it is prejudicing his client.

MR. KLONOFF: Absolutely. But -- and let me say one thing further with respect to all these comments about the vouching. The principal ground upon which the Nevada Supreme Court relied, and the ground that the bar thinks is the most egregious from the standpoint of this press conference is not the fact that Mr. Gentile said, I believe my client is innocent.

Rather it is the several pages of the press conference, starting on page 8a of the petitioner's appendix where he talks about the cover up --about the fact that one, two, four of the victims are drug dealers -- convicted money launderers -- known drug dealers. Didn't say a word about anything until they were approached by metro and after they were already in trouble trying to work themselves out of something.

On and on about the character, credibility, and reputation of the Government's witnesses. No one, I submit, who studied model rule 3.6 or rule 177 the night before could have believed reasonably that those kinds of comments were permitted under the rule. Mr. Tigar has

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made a big point out of the fact that his client studied the rule the night before. But I would submit that no reasonable lawyer could have concluded that those types of comments were proper.

QUESTION: Mr. Klonoff, is -- is the second part of rule 177 typical of State bar rules around the country?

MR. KLONOFF: It is, Your Honor. The bar rules that Nevada has is verbatim from model rule 3.6, which is the rule in the vast majority of jurisdictions with --

QUESTION: Which creates sort of a presumption that if the statement relates to credibility of a witness or a guilt or innocence of a defendant in a criminal case?

MR. KLONOFF: Let me say they're not presumptions in an evidentiary sense. What they are are guidelines. They are things that ordinarily would cause prejudice, and the reason --

QUESTION: Have they been -- have they been operated in Nevada as a sort of presumption do you think?

MR. KLONOFF: Not as an evidentiary presumption. The way they have applied both in Nevada and the courts around the country is exactly what they are. They are guidance, but the burden is still on the bar in a particular case to show by clear and convincing evidence that there was a substantial likelihood of material prejudice, and that is the standard.

QUESTION: And you think that was done here notwithstanding the Nevada Supreme Court's finding that there was no actual prejudice?

MR. KLONOFF: Oh, absolutely. There's a clear difference between a substantial likelihood of prejudice and actual prejudice. If a court or a bar were to adopt an actual prejudice standard, it could largely nullify the rule. For example, take a situation in which there's a -- just a press conference that everyone would concede is just outrageous. It's dealing with all kinds of prejudicial information. And then for some reason the indictment is dismissed or a guilty plea is entered. You would have a situation there where the argument would be made there was no actual prejudice, because the indictment was dismissed or there was no trial or whatever.

You can't have a rule that focuses on actual prejudice. You have to look at the time the statement is made in order to assess whether or not there's a violation.

QUESTION: Do you think the case In re Primus speaks at all to the standard we should employ?

MR. KLONOFF: We think that that the standard, Your Honor, in terms of -- of the balancing test -- there -- there's really two parts to the question. Number 1, what is the balancing test that gets you to the

standard. And we'd submit that that's the Seattle Times/Procunier test that we set out on page 25 of the brief.

QUESTION: Well, I ask you though about In re Primus which I thought did concern discipline of an attorney. Did it not?

MR. KLONOFF: Yes, it did. And -- and the Primus standard is certainly relevant, as is the Ohralik standard. Let me note, petitioner in -- in his reply brief at page 4 agrees with the Nevada Bar in terms of the operative standard. They, too, recite the Procunier standard as -- as enunciated in Seattle Times.

If I can return, Justice O'Connor, to your question -- these guidelines that are set out in the rule are really one of the great virtues of the rule. Petitioner in his brief goes on at length trying to criticize these guidelines, but in fact this was an extraordinary effort of the bar over many years, guided in fact by this Court's decision in Sheppard against Maxwell, not only to set a substantial likelihood of prejudice standard but to do so in a way that lawyers will really understand what is permitted and what is not permitted.

And indeed, I would refer this Court to page 28 of our brief, footnote 28, where we quote at length this Court's Sheppard v. Maxwell decision. And the Court will

see that many of the guidelines set out in part 2 of the rule were taken almost verbatim from Sheppard. By the same token, the third part of the rule is designed to provide a safe harbor to let a lawyer know that in certain circumstances he doesn't have to fear any possibility of discipline so long as he doesn't go outside of those -- of those parameters.

Now let me return to the implications of the standard that's urged by petitioner. It's interesting. As the argument is made in his brief, it's a clear and present danger press standard. But as the argument has been made today, in response to virtually every difficult hypothetical that this Court could -- could propose such as judges, such as court employees, Mr. Tigar ran from that standard.

And we would submit as we said in our brief that if the clear and present danger Nebraska Press standard were held to apply to lawyers, you would ultimately have precisely what was indicated by that questioning and the answer. You'd have the dissolution of the Nebraska Press standard, because court would not want to hold officers of the court to the same standards that apply to the press.

The Nebraska Press standard, we submit, is entirely appropriate for the press. It is necessary for a free and vigorous press. But the standard, we would

submit, has no application whatsoever in the context of lawyers.

Just to give a few examples to further the examples that -- that Mr. Tigar has given, under the clear and present danger standard presumably, a defense lawyer could go out, call a press conference, and announce that he believes his client is guilty. As long as it's done before trial, he could do that and he could not be disciplined, cause all you'd need to do is conduct searching voir dire, have a change of venue or one of the other devices. Now, no one would reasonably submit that it would be permissible for a lawyer in a situation like that to go out and announce to the press that his client is guilty.

The same thing applies --

QUESTION: Mr. Klonoff, why -- I'm not saying that I disagree with part 2 of the rule, but I'm not sure why that part really refers to matters that are -- that are ordinarily likely to have the effect of a substantial likelihood of materially prejudicing an adjudicative proceeding. For example, why does it -- why does it -- why is it limited? It is ordinarily likely to have such an effect when it refers to a criminal -- a criminal matter and the statement relates to. Is there any limitation on what a lawyer can say with respect to civil

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proceedings?

MR. KLONOFF: Well, the limitation takes you back into -- into subsection 1. What -- again, what -- what I said with the bar's --

QUESTION: Well, but all section two covers is criminal matters, is that right?

MR. KLONOFF: No. It covers -- it covers civil --

QUESTION: Does it -- does it cover civil as well? I just have the excerpt of it here.

MR. KLONOFF: It's a statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or other -- any other proceeding that couldn't be dealt an incarceration. So --

QUESTION: I see. If it's a civil matter triable to a judge, it doesn't make any difference and lawyers can do --

MR. KLONOFF: We concede --

QUESTION: -- pretty much anything unless it's like -- likely to influence the judge which it shouldn't, right?

MR. KLONOFF: We -- we concede in our brief that it would be extraordinarily difficult to violate the rule in the context of a bench trial, because of all the

jurisprudence suggesting that judges are thick skinned and that they're different. It's not inconceivable however, and that's why there is that rule to deal with extraordinary situations. Cox v. Louisiana -- the court did in the context of that case recognize that even judges could in some circumstances be prejudiced. But the rule and the presumption -- the guidelines in part 2 are a reflection of that very common sense premise that ordinarily you would not be able to have that kind of prejudiced --

QUESTION: Well, let me go back to Justice Souter's hypothetical for a moment then. Assume a sequestered jury -- does the rule not apply to anything that might be said on television during a trial then?

MR. KLONOFF: Well, we heard that Mr. Tigar's rule does not apply.

QUESTION: No, I mean what is your view of this rule?

MR. KLONOFF: Our rule is that it very well could. That there could be --

QUESTION: And why? Because of the -- because of what State interest?

MR. KLONOFF: Because --

QUESTION: If the jury is -- is safe from hearing what's said.

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MR. KLONOFF: Studies have shown that in sequestration situations juries aren't always safe from hearing that sometimes they do get news. But sometimes --

QUESTION: But you would rely on the possibility that the information we get to the jury even in that situation?

MR. KLONOFF: That would be one theory. And Justice Souter has talked about the whole dignity of the court process.

QUESTION: That -- I really am -- that's what I'm really asking. Are you -- are you relying on that dignity there?

MR. KLONOFF: Well, that would be -- that would be one -- that would be one aspect of it. The Court in Levine -- the case --

QUESTION: But if that's the theory, why do you even need a substantial likelihood of prejudice to the trial?

MR. KLONOFF: Well, the dignity --

QUESTION: Why is it prejudiced to the dignity of the profession and so forth enough?

MR. KLONOFF: Well, it doesn't say the trial. Actually the way that the rule is worded, it's -- it actually is broader so that it doesn't cover just the outcome of the trial.

QUESTION: The likelihood of --

MR. KLONOFF: The likelihood of materially prejudicing a proceeding -- of prejudicing the dignity of the proceeding. It doesn't say prejudice the outcome of the trial. And in fact, the Ninth Circuit in the Levine case -- with the case Mr. Tigar cited as adopting a Nebraska Press standard -- gagged the lawyers in the Richard Miller's case precisely because of that reason.

QUESTION: Let me just be sure I understand one of the -- does this rule only apply to lawyers who are representing parties to pending litigation? What about the lawyer who volunteers to go on the TV show and give a running commentary on the case?

MR. KLONOFF: The rule is, as applied in Nevada and as far as we know in all other jurisdictions, only applies to the lawyer involved in the case. And the reason we say that, number 1, that's the reference in part three of the rule. Number 2, the disciplinary rule that preceded it which was more restrictive of lawyers' speech than this rule -- the disciplinary rule, on its face, was clearly limited to lawyers involved in a proceeding. It would be very difficult, for example, to have this rule apply to commentary by Arthur Miller appearing on Good Morning America.

QUESTION: Right.

MR. KLONOFF: And the -- and the Nevada Bar and the Nevada Supreme Court are not trying to do that. They're trying to get at the lawyer whose an officer of the court in a pending proceeding. And that's what --

QUESTION: Well, on the question of the dignity of the court, suppose the defense counsel or trial counsel proves it to the jury, to its satisfaction, everything that he's said in the press conference. Doesn't that vindicate the dignity of the court?

MR. KLONOFF: That does not. And that in fact gets me back to a point --

QUESTION: Because this is very important -- I -- I assume you -- you would suggest that it's constitutional to have a rule saying that an officer of the court, an attorney in pending litigation cannot say anything which prejudices the dignity of the court.

MR. KLONOFF: Well, it would have to be a substantial likelihood of materially prejudicing.

QUESTION: Well, substantial likelihood of materially prejudicing the dignity of the court.

MR. KLONOFF: Yes. I must say, however --

QUESTION: And -- and would you -- and would you conclude that any statement that reveals the testimony that's going to be brought forth in the court offends the dignity of the court?

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MR. KLONOFF: No, I don't think so. You'd have to look at the facts.

QUESTION: Well, what -- what are the instances which you are trying to prohibit? Give me some examples of what would be prohibited by the dignity of the court rule?

MR. KLONOFF: Well, it would have to be in a very extreme situation. I know of only one case that has gone off on that ground, and that's the Levine case in the context of the gag order. It was a situation where the lawyers were just -- every day after court -- just bombarding the press with observations about the case, with harsh criticisms about the prosecutors, about the Government's witnesses, very extreme statements --

QUESTION: So, only in very extreme cases is it appropriate for a bar association to tell the attorney that it cannot comment on the case of the evidence?

MR. KLONOFF: No, only on -- you're referring to the dignity of the court. I'm saying that the dignity of the court --

QUESTION: Well, I want to know what your rule is. We've talked about the dignity of the court and I -- which I thought was an extremely broad standard. But then you said, well, but only in extreme cases would the dignity of the court ever be affronted by -- by comments

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made outside of the court. And I said, well, what other instances are there in which the bar would have an interest in promulgating a rule of this nature?

MR. KLONOFF: Well, the primary interest of the bar here, and as we stated in our brief, is affecting, number 1, the outcome of the trial, and number 2, prejudicing the jury venire and requiring sequestration.

QUESTION: But that sounds just like Mr. Tigar's clear and present danger standard.

MR. KLONOFF: Not at all. The second part of this standard, and this is very important, is materially different, because under Mr. Tigar's standard of Nebraska Press, as long as you can get 12 jurors who can decide the case, then there's no clear and present danger. So that means through a change of venue or whatever. Under our standard, the very need to sequester a jury or the very need for lengthy voir dire, the very need for a change of venue is itself material prejudiced to an adjudicative proceeding. So in other words, the very need to rely on one of the Nebraska Press less restrictive alternatives, we would submit, is a substantial likelihood of material prejudiced to an adjudicative proceeding.

QUESTION: Mr. Klonoff, I -- I'm not sure that the only basis for rules like this is -- is prejudicing the outcome, but I must say that I read your rule 177 to

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be addressed to that. It's an unusual word -- materially prejudicing. I mean prejudge.

MR. KLONOFF: Well --

QUESTION: But you're -- you're telling us that that language embraces something other than causing the -- causing the outcome to be prejudged?

MR. KLONOFF: Yes, it's very important to look at the -- the actual --

QUESTION: And it includes dignity considerations as well.

MR. KLONOFF: It could in some cases. But the primary evil is, number 1 --

QUESTION: Certainly didn't read it that way. Never mind the primary one. I'm --

MR. KLONOFF: Well, the wording is --

QUESTION: You say it goes beyond that.

MR. KLONOFF: But the wording of substantial likelihood of material prejudice to an adjudicative proceeding rather that substantial likelihood of prejudice to the outcome is, for example, the type of language that the court uses in its Brady v. Maryland test about whether or not there's been reversible error from a prosecutor's failure to disclose exculpatory evidence.

All one needs to do is read the adjoining rules to the Nevada rule to make absolutely clear that

prejudiced to the outcome is not the only kind of prejudice that the rule is dealing with. Rule 174.1, for example, prohibits lawyers from seeking to influence a prospective juror.

Now, under Mr. Tigar's standard that would not qualify under the Nebraska Press because if he talked to that prospective juror, all you'd have to do is find that out from voir dire, all you have to do is continue the trial, all you have to do is have a change of venue, and there's no actual prejudice to the outcome. And so there really is an important difference.

Rule 176.4 prohibits a lawyer or his employee as part of the trial from investigating prospective jurors by means calculated or likely to lead to communications with prospective jurors. Again, prejudiced to the proceeding, but under no Nebraska case that I know of --

QUESTION: Well, but he hasn't argued that this -- his standard applies to direct communication between the lawyer and individual jurors I don't think.

MR. KLONOFF: Jurors in the case, but prospective jurors --

QUESTION: Or even individual prospective jurors I don't think.

MR. KLONOFF: Well, if he's saying that, I would submit, Your Honor --

QUESTION: Well, that's --

MR. KLONOFF: -- he's deluding the Nebraska Press standard, and that's ultimately the fear that we're concerned about. The Nebraska Press --

QUESTION: May I ask you this question about your influence on the proceeding by requiring a more lengthy voir dire than you would otherwise have to have for example. Supposing it were rather clear that the prosecutor had sufficient press contact to stimulate interest that would require an extraordinarily long voir dire in any event. Would you then say that the defense statement had to have even more extensive voir dire or would he then be immunized from that particular charge? I mean, is it sort of a -- when does the -- when is the defense counsel responsible for this additional voir dire?

MR. KLONOFF: Well, you're -- you're assuming that the prosecutor and the defense are talking about precisely the same thing which --

QUESTION: Well, they did in this case. They were --

MR. KLONOFF: They did not. In fact this is an important point. What Mr. Tigar is complaining that the police were talking about primarily or the lie detector results of the police officers. What Mr. Gentile was talking about was something totally different. For

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example, the credibility of the other victims, the other people who had had items stolen from the --

QUESTION: Yes, but the voir dire didn't go into that much detail, did it? Didn't it just ask some -- what you'd read about the case and what you'd heard about the case?

MR. KLONOFF: This particular voir dire -- and we would concede there were -- there were I believe 10 juror who had heard about the case. There were three who -- who were aware that the police at one time --

QUESTION: Let me reframe the question. In this particular case, is there any reason to believe that voir dire was any more extensive than it would have been just based on what the police had already said to the press?

MR. KLONOFF: In this voir dire, it was not. And we don't quarrel with the Nevada Supreme Court's finding of no actual prejudice.

QUESTION: I see.

MR. KLONOFF: But the rule is a substantial likelihood of material prejudice. And again, you have to look at it --

QUESTION: And if you go back to your earlier answer to one of my questions about the -- his motive is shown by the fact he was trying to counteract the already widespread information about the case, which would seem to

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indicate that he wasn't requiring any more knowledge in the general community than there already was.

MR. KLONOFF: Well, his very admission that he was trying to counteract is not an exception. I don't know where he gets that from as an exception to the rule. It is not an exception because you believe one side has violated the rule that you're allowed to do so.

QUESTION: No, it isn't that. It's -- your argument is that his conference made it necessary to have a more extensive or -- the danger was you might have a more extensive voir dire than otherwise.

MR. KLONOFF: That was the danger --

QUESTION: And if you already needed that extensive voir dire because of what the prosecutor and the police had said, isn't that a response to the concern?

MR. KLONOFF: Well, that's not a response here. For example, jurors may have -- may have seen or recalled the particular press conference.

And in fact, I should note for the Court that the press conference was alluded to as early as 1 month before the trial, on July 6th, 1988. This is in the record, Exhibit A, to the disciplinary hearing, the Las Vegas Review Journal. The substance, if not the actual contents of the press conference, was referred to as much as a month before trial.

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Now, I could imagine a voir dire going along these lines, which would be prejudice. Do any of you recognize Mr. Gentile? Yes, I do. How do you recognize him? And then going into a lengthy discussion with individual jurors about what they remember about his press conference. So, yes, there could be prejudice -- new prejudice that has nothing to do with what the prosecutor had said before. But --

QUESTION: Would it -- would it have violated the rule if you had -- say it was a murder case, and the defense lawyer got up to counteract the publicity -- highly publicized murder case and said, our defense is going to be alibi. We have six witnesses -- I'll name them -- who will testify that he was in London at the time of the alleged incident. Would that violate the rule?

MR. KLONOFF: No, they -- if that's all they said, that would -- that would clearly be --

QUESTION: It wouldn't have to have the same prejudicial effect we've talked about.

MR. KLONOFF: Well, the -- number 1, I -- we don't think that just that kind of a conclusory statement would have the same prejudicial effect. Number 3 -- number 2, the rule says notwithstanding subsection 1, so they recognize that there could be prejudice. The rule provides a safe harbor. And so there -- there may be

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situations that fall within category 3 in which in a particular case there could be prejudice. But the court made a balancing determination -- for example, items in the public record -- made a balancing determination guided by the First Amendment that certain types of speech should be given approval and should be allowed.

Let me say in closing that in 1966 this Court in Sheppard against Maxwell went to great lengths to get the bar in the process of coming to where we are today to adopt rules. At the time of Sheppard against Maxwell, you had canon 20 in a number of States but it had really no teeth to it in substance.

This Court told the bars that told the States to get serious. The rule in effect here is now in effect. Either this rule or a rule more restrictive of speech is in effect in well over 40 States as we've detailed in our brief responsive to the concerns that this Court has raised.

These rules have worked well. They've been in place for close to two decades throughout the country. There has not been serious problem with administering these rules. That's why it's taken two decades before a case has reached this Court governing those rules. And we urge the Court not to turn back the clock. Not to go back to the time of Sheppard against Maxwell, and not to once

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again have a situation where lawyers are free to try their case in the press.

Thank you.

QUESTION: Thank you, Mr. Klonoff.

Mr. Tigar, you have rebuttal? You have 2 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL E. TIGAR

ON BEHALF OF THE PETITIONER

MR. TIGAR: In 1981, the ABA drafts group, as pointed out at footnote 19 of our reply brief, did say that the standard in this rule is equivalent to clear and present danger. I want to make that clear. We disagree with that, but the Court we think should know it.

We are gratified that at last it's been identified that one object of this rule is to protect the dignity of courts, language that in our respectful submission evokes the seditious libel cases of the 18th century. And were there any doubt about that, the case of In re Raggio decided by the Nevada Supreme Court and relied on in the -- affirming here, deals with a prosecutor who, although he was counsel in the pending case, was disciplined because he helped to erode confidence in our system of justice. That it seems to us is the danger of overbreadth here. That was a press conference about a decision of the Nevada Supreme Court

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that followed the Witherspoon case.

It is important we believe to note that the first -- the Levine gag order referred to here did use a clear and present danger test. That shows the workability of this. Mr. Gentile did limit himself to what he thought could be proved at the trial. He was caught between the language of 2a, can't comment on character, reputation, et cetera, and 3a -- you can state the general nature of the claim or defense. These victim identifies, after all, were in the various counts of the indictment to which he was responding. Hard to know how he could get more specific than alluding to the victims as real -- as really the wrong doers without falling afoul of 2a.

In sum, I stood at the bar for 25 years, and I care about the bar's professionalism. I think everybody in this room does. I think that the respondent's position we submit is based on fear. Fear that the contrariety of views in the marketplace of ideas won't resolve these problems to which the Court points. Fear that lawyers and judges can't draft effective protective orders. Fear that the wonder-working power of voir dire and of -- can't do it.

Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Tigar, the case is submitted.

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(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

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DOMINIC P. GENTILE, Petitioner v. STATE BAR OF NEVADA

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Maryann Hartel

(REPORTER)