

**PUNISHING PUNDITS: *PEOPLE V. DYLESKI*
AND THE GAG ORDER AS PRIOR RESTRAINT
IN HIGH-PROFILE CASES**

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I. INTRODUCTION

A. *Constitutionality of Gag Orders*

This Article considers the constitutionality of gag orders that restrain all people who are associated, even peripherally, with a high-profile criminal trial from engaging in the public debate surrounding the case. In an effort to suppress the general level of media coverage, such orders may function as a type of prior restraint to those who may be seen as participants in the trial, and yet are not parties to it. This issue is considered in the context of *People v. Dyleski*, a high-profile murder case pending in Northern California.¹

In *Dyleski*, a superior court judge issued a gag order against Gloria Allred, a nationally known legal commentator, because she represents a potential witness in the proceedings. Ostensibly to ensure the fairness of the legal process, the order prevents Ms. Allred from discussing a variety of subjects concerning the case, many that

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1. *People v. Dyleski* is pending in the Superior Court of Contra Costa County. Felony Complaint, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. filed Oct. 21, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

have already been well-exposed in the media.²

This Article argues that courts cannot prevent commentators like Ms. Allred from expressing their views about pending cases, especially matters already in the public domain, that are unrelated to the protection of criminal defendants from the disclosure of prejudicial information.³ Such broad gag orders go beyond protecting a defendant's right to a fair trial. And although many lament the intensity of media coverage in certain high-profile criminal cases, in our open society with its open courts, the First Amendment must be able to prevent the government from unduly restricting media coverage. In the authors' view, First Amendment protection should bar courts from issuing gag orders that act as blanket restraints intended to reduce the overall media coverage given to a particular case.

For better or worse, the amount of attention the media pays to any particular case will be regulated by the marketplace of ideas and not by judicial fiat. Gag orders directed at those associated with a trial must therefore be narrowly tailored and specifically limited to prevent only the disclosure of particularly prejudicial evidence.⁴ Persons associated with a proceeding, especially those that are

2. The authors represent Ms. Allred in proceedings challenging the gag order. A petition for review was filed before the California Supreme Court. Petition for Review, Allred v. Superior Court, No. S140816 (Cal. Sup. Ct. Jan. 23, 2006). The petition was denied. Order Denying Petition for Review, Allred v. Superior Court, No. S140816 (Cal. Sup. Ct. Mar. 15, 2006). The United States Supreme Court denied Ms. Allred's Petition for Certiorari on October 2, 2006. Allred v. Superior Court, 127 S. Ct. 80 (2006).

3. By "prejudicial" we mean information that would likely cause jurors to pre-judge the case instead of making their decision based solely on evidence introduced at trial. This would include the release of inadmissible evidence—for example, the defendant's refusal to take a lie detector test, or the premature release of information adverse to the defense or the prosecution prior to its presentation at trial. However, the Sixth Amendment guarantees that criminal trials be open to the public. U.S. CONST. amend. VI. The courts, therefore, may not restrict the disclosure of evidence—even if it is harmful to a particular party—when it is presented as part of a criminal proceeding. Cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573–74 & n.9 (1980) (noting a "presumption of openness" and the importance of keeping the public informed in criminal trials). Consequently, gag orders usually affect only the timing of the public disclosure of admissible, prejudicial information.

4. See *Levine v. U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985).

peripherally associated, ought not to lose their right to participate in free discussion simply because of their connection to the case.

B. Competing Interests

Granted, the balance between freedom of speech and the right to a fair trial can be difficult to achieve. Ever since the United States Supreme Court reversed the murder conviction of Dr. Sam Sheppard in *Sheppard v. Maxwell*,⁵ courts have struggled to find appropriate means to protect criminal defendants from the prejudicial effects of pre-trial publicity while preserving the First Amendment's guarantee of freedom of speech.

In *Sheppard*, the Supreme Court recognized the authority of trial courts to proscribe:

extrajudicial statements by any lawyer, party, witness, or court official which divulge[s] prejudicial matters, such as the refusal of [the defendant] to submit to interrogation or take any lie detector tests; any statement made by [the defendant] to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.⁶

Thus, *Sheppard* established that, under appropriate circumstances, courts have the constitutional authority to impose gag orders on the parties, their counsel and witnesses (including police investigators) in order to protect the fairness of the proceedings.⁷ But it is equally settled that courts have only limited authority, constrained by the First Amendment, to proscribe public statements by the press or other persons not directly involved in the proceedings.⁸ Any court order that forbids reporting by the press about a pending legal proceeding constitutes a prior restraint.⁹ And prior restraints on

5. 384 U.S. 333 (1966).

6. *Id.* at 361.

7. *See, e.g.*, *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000), *cert denied*, 531 U.S. 1111 (2001); *see also* *Dow Jones & Co. v. Simon*, 842 F.2d 603 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987); *Levine v. Dist. Court*, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

8. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

9. *Id.* at 556.

speech and publication are considered “the most serious and the least tolerable infringement on First Amendment rights.”¹⁰

What is most notable, then, about Ms. Allred’s relation to the *Dyleski* case is that she occupies the no-man’s land somewhere between the role of journalist on one hand, and the role of advocate for one of the parties on the other. As she has done in numerous other cases, Ms. Allred represents a potential witness in the underlying criminal case and has acted on behalf of her client. But she also has regularly participated in the national media coverage of several high-profile criminal trials. Thus, the question posed by *Dyleski* is whether *Sheppard* and its progeny authorize trial judges to issue gag orders broad enough to prevent *all* those associated with a trial from taking part in the public debate about a pending case. This Article contends that the *Dyleski* court improperly issued a gag order to unconstitutionally restrain the general public debate and media coverage surrounding the case. Instead of functioning as a blanket reduction, gag orders should only protect a defendant from the prejudicial, premature disclosure of admissible evidence, or any disclosure of inadmissible evidence.

C. Roadmap

This Article first recounts the events leading up to the *Dyleski* gag order. It then discusses leading cases that lay out how far a court can go when it regulates speech in the interest of promoting fair criminal trials.

Next, the authors argue that gag orders aimed at curbing pre-trial publicity do little to promote the fairness of criminal trials, and yet place unwarranted restrictions on trial participants’ freedom of expression. Often, gag orders stifle legitimate criticisms of government actions, expression considered core political speech at the heart of the First Amendment. Moreover, gag orders fail to recognize that even parties’ attorneys may often have a duty to make extra-judicial statements to protect their clients’ best interests.

Finally, the authors conclude that gag orders in criminal cases

10. *Id.* at 559. In *Nebraska Press Ass’n*, the U.S. Supreme Court held that a gag order restricting public statements by the press about a pending case may only be entered where: (1) there is a clear or serious threat to the fairness of the trial; (2) less restrictive alternatives are not adequate to mitigate the harm; and (3) the order would effectively prevent the threatened danger. *See id.* at 562.

are often overly broad, vague, ineffective and unnecessary. In most instances, the integrity of criminal proceedings can be protected by alternative means, such as the court's use of probing voir dire, detailed jury instructions, and changes in venue. The integrity of the proceedings may be further safeguarded by adopting rules of professional conduct that bar attorneys from making statements prejudicial to the fairness of the proceedings.

II. THE GENESIS OF THE GAG ORDER IN *PEOPLE V. DYLESKI*

On October 15, 2005, Pamela Vitale, the wife of Daniel Horowitz, a prominent criminal defense attorney, was killed in her family home near the small town of Lafayette, California.¹¹ On October 21, 2005, the District Attorney for Contra Costa County (D.A.) filed a criminal complaint in superior court against 16 year old Scott Edward Dyleski for the murder.¹² Although he was only sixteen at the time of the alleged crime, Dyleski was charged as an adult.¹³

The criminal complaint did not allege a motive, but the media reported the murder occurred when Dyleski went to Ms. Vitale's home to retrieve marijuana growing equipment that he had ordered using a stolen credit card.¹⁴ According to the pleading, Dyleski used a bludgeon to kill the victim.¹⁵

The victim's husband, Daniel Horowitz, had himself frequently appeared as a television commentator on criminal matters.¹⁶ His prominence coupled with the circumstances of his wife's death ensured that the proceedings would be the subject of intense local and national media interest. The media, most notably cable television, widely reported the murder.¹⁷ The fact that Mr. Horowitz

11. *Police: Lawyer's Wife Beaten to Death*, CNN.COM, (Oct. 18, 2005), <http://www.cnn.com/2005/US/10/17/attorney.wifekilled/index.html>.

12. Felony Complaint, *supra* note 1, at 1.

13. Bruce Gerstman, *Mother of Murder Suspect Assisted After Fact*, *Police Say*, CONTRA COSTA TIMES, Oct. 28, 2005, at A1.

14. *Dyleski Mother Arrested As Accessory*, CONTRA COSTA TIMES, Oct. 27, 2005 at A1.

15. Felony Complaint, *supra* note 1, at 1.

16. *See Police: Lawyer's Wife Beaten to Death*, *supra* note 11.

17. *See People's Exhibit A*, submitted at Hearing, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Nov. 16, 2005; renumbered No. 05-060254-0,

was himself participating in another high-profile murder case at the time of his wife's death only increased the visibility of the *Dyleski* case.¹⁸

In late October 2005, Gloria Allred and her firm were retained by an unidentified potential witness in the *Dyleski* case¹⁹—the girlfriend of the defendant.²⁰ On October 24, 2005, Ms. Allred contacted the D.A.'s office on behalf of her client, a minor at the time, to alert the prosecution that her client was a potential witness in the case.²¹ Neither the police nor the D.A.'s office had previously contacted Ms. Allred's client.²² Ms. Allred and the prosecutor agreed to meet several days later, on October 27th, to discuss her client's potential testimony.²³

The next morning, however, on October 25, 2005, Ms. Allred was informed that her client's residence was being searched by the police, and that the D.A. had subpoenaed the young woman to appear before a grand jury later that day.²⁴ Ms. Allred contacted the D.A.'s office and requested that her client's grand jury testimony be postponed to the following day, October 26, 2005, to give Ms. Allred the opportunity to consult with her client and to be present outside the grand jury room.²⁵ The D.A. refused the request.²⁶

On October 26, 2005, defendant's counsel moved for a gag order to restrict public statements about actions taken by police and

Feb. 24, 2006).

18. *See Police: Lawyer's Wife Beaten to Death, supra* note 11.

19. On numerous occasions, Ms. Allred and her law firm have represented potential witnesses in criminal actions, including several high-profile homicide cases. *See* Opposition to Proposed Imposition of a Gag Order Upon Gloria Allred and Allred, Maroko & Goldberg, Memorandum of Points and Authorities, Declaration of Gloria Allred at 10:26–27, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Oct. 27, 2005; renumbered No. 05-060254-0, Feb. 24, 2006) [hereinafter Declaration of Gloria Allred]. For example, Ms. Allred represented Amber Frey, a witness in the Scott Peterson murder trial. *See id.* at 11:1, 8:13–14.

20. *Id.* at 8:14–16.

21. *Id.* at 8:7–10.

22. *Id.* at 10:4–6.

23. *See id.* at 8:22–23.

24. *Id.* at 8:24–27.

25. *Id.* at 8:27 to 9:1–2.

26. *Id.* at 9:2–4.

prosecution on October 25, 2005.²⁷ The D.A. promptly joined the defendant's motion and also specifically requested that the protective order apply not only to defense counsel, but to Ms. Allred and her law firm as well.²⁸ In papers filed in support of his request for a gag order, the D.A. expressed concern that Ms. Allred's presence in the case could "act as a lightning rod for the national broadcast media."²⁹ He noted that Ms. Allred was already scheduled to appear on a cable television program concerning the *Dyleski* case.³⁰

On October 27, 2005, the following day, the court issued a broad interim Protective Order.³¹ When it failed to specifically mention Ms. Allred, the D.A. sought to have it amended so that the gag order applied expressly to Ms. Allred and her firm.³² The D.A. objected to Ms. Allred's appearance on a cable television show in which Ms. Allred purportedly stated that her client was "doing the right thing,"

27. Notice of Motion for Protective Order, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Oct. 26, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

28. People's Request for a Protective Order, *People v. Dyleski*, No. 03-219113-8, (Cal. Super. Ct. Oct. 26, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

Prior to the *Dyleski* case, Ms. Allred has never been subjected to a gag order, despite the fact that she has represented prominent witnesses in many criminal proceedings. Declaration of Gloria Allred, *supra* note 19, at 11:4-7. Moreover, she has no record of any disciplinary action before the California State Bar. *Id.* at 11:18-21.

29. People's Request for a Protective Order, Declaration of Harold W. Jewett in Support of People's Request for a Protective Order at 1:27-28, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Oct. 26, 2005; renumbered No. 05-060254-0, Feb. 24, 2006) [hereinafter Declaration of Harold W. Jewett]. The Prosecution in the *Dyleski* case also expressed disdain for the widespread media coverage of criminal cases. "Media intentions, particularly national broadcast media, have transcended the public's right to know, and entered the sordid realm of morbid curiosity seekers." People's Supplemental Request for a Protective Order at 2:15-16, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Nov. 14, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

30. Declaration of Harold W. Jewett, *supra* note 29, at 2:5-7.

31. *See* Protective Order, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Oct. 27, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

32. People's Supplemental Request for a Protective Order, *supra* note 29, at 2:19-3:22.

and “telling the truth.”³³

On October 28, 2005, the court issued an Amended Protective Order that specifically included Ms. Allred and her firm as counsel for a potential witness.³⁴ Extremely broad in scope, the trial court’s Amended Protective Order prohibited Ms. Allred from making any statements whatsoever about the case.³⁵

The court subsequently invited all interested parties to submit briefs regarding whether the broad protective order should be modified or rescinded. In supplemental papers filed with the court, the D.A. argued that “the media has, and most certainly will, seek out Gloria Allred so long as she represents Defendant’s girlfriend.”³⁶ The D.A. rejected the notion that Ms. Allred had the right to participate in the general public debate surrounding the case.³⁷ Moreover, the D.A. argued that the court should prohibit general statements by Ms. Allred that attested to her client’s character and credibility.³⁸

On November 16, 2005, the trial court heard arguments regarding issuance of the Protective Order³⁹ from counsel for the

33. Declaration of Harold Jewett in Support of Application for Modification of a Protective Order at 2:18–28, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Oct. 28, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

34. Amended Protective Order at 2:2–10, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Oct. 28, 2005; renumbered No. 05-060254-0, Feb. 24, 2006). The Amended Protective Order provided that: [U]ntil further order of this Court . . . attorneys of persons that might be potential witnesses, or other representatives of such witnesses, shall refrain from discussing this case, the evidence expected to be used in the case, or the issues in the case, the merits of the case, or trial tactics or strategy, with the media or in an otherwise public fashion.

Id.

35. *Id.* Since the initial gag order was put in place, Ms. Allred has not issued any public statements regarding her client or the Dyleski case.

36. People’s Supplemental Request for a Protective Order, *supra* note 29, at 2:24–25.

37. *See id.* at 3:14–16.

38. *Id.* at 3:7–11.

39. At the time of the hearing, the D.A. filed numerous Internet news reports about the Dyleski case. Although some reports mentioned that Ms. Allred had been retained as counsel of a potential witness, none of the articles contained any quotations from Ms. Allred regarding the facts of the case. *See*

prosecution, the defense, the San Francisco Chronicle, and Ms. Allred.⁴⁰ Noting that Ms. Allred's counsel was "representing an attorney who represents a purported unidentified witness," the judge stated, "[I am] probably making judicial history here because I don't think anybody's had such an appearance in their court before."⁴¹

At the hearing, the D.A. argued for a broad protective order that specifically applied to Ms. Allred and her firm, to prohibit them from publicly discussing how their client had been treated by the police and the D.A. The prosecution stated: "[I]f Miss Allred wants to get on national television and talk about inflammatory things . . . about police officers putting guns to the head of people, that is, in fact, a comment on the evidence, and it's inflammatory."⁴²

On November 21, 2005, the trial court issued a revised Protective Order that expressly prohibited various persons, including Ms. Allred and members of her law firm, from making out of court statements on various topics.⁴³ The topics included "any opinion or public comments as to the weight, value or effect of any evidence as tending to establish either guilt or innocence."⁴⁴

The court also issued a Decision Granting In Part and Denying In Part Motions for Protective Order,⁴⁵ indicating that it did not want to give "an advisory opinion regarding . . . future communications."⁴⁶ Nonetheless, the trial court made it clear that Ms. Allred, as counsel for a potential witness, could not "preview evidence that might be provided by, or known to, the witness."⁴⁷

On November 29, 2005, Ms. Allred filed a Request for

People's Exhibit A, *supra* note 17.

40. Reporter's Transcript of Proceedings at 3:8–17, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Nov. 16, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

41. *Id.* at 25:23–26.

42. *Id.* at 33:27–34:2.

43. *See* Protective Order, *supra* note 31 at 1:21–2:7.

44. *Id.* at 2:6–7.

45. Decision Granting In Part and Denying In Part Motions for Protective Order, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Nov. 21, 2005; renumbered No. 05-060254-0, Feb. 24, 2006) [hereinafter Decision]. The text of the November 21, 2005 Protective Order and the accompanying Decision are set forth in the Appendix to this Article.

46. *Id.* at 7:6.

47. *Id.* at 7:14–15.

Clarification of the Protective Order, in which she contended that the Protective Order and the Decision were ambiguous as to whether she was allowed to make certain public statements, including statements critical of government officials involved in the case.⁴⁸

The D.A. filed a response to Ms. Allred's request for clarification, stating that the gag order was not ambiguous.⁴⁹ In court, he argued that the terms of the Protective Order restrict members of Ms. Allred's firm from making out of court statements critical of the actions of the prosecution or the police, including assertions that actions of the police were harmful to their client and her family.⁵⁰ The trial court denied Ms. Allred's Request for Clarification on December 5, 2005.⁵¹

At first blush, the court's gag order imposed on Ms. Allred appears reasonable. It prevents her from publicly discussing her client's potential testimony, a restriction consistent with the First Amendment in these circumstances and reasonably necessary to protect the parties' right to a fair trial. In a criminal trial, a court should clearly be allowed to restrict the disclosure of prejudicial evidence before it becomes public.⁵² Indeed, certain evidence may be completely excluded as prejudicial.⁵³ Such orders will prevent

48. See Request for Clarification of Nov. 21, 2005 Protective Order by Attorney Gloria Allred at 3:18–22, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Nov. 29, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

49. *People's Response to Request for Clarification* at 2:7–11, *People v. Dyleski*, No. 03-219113-8, (Cal. Super. Ct. Dec. 7, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

50. Reporter's Transcript of Proceedings, *supra* note 40, at 33:27–34:2.

51. Unreported Minute Order, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Dec. 5, 2005; renumbered No. 05-060254-0, Feb. 24, 2006). On January 11, 2006, Ms. Allred filed a Petition with the California Court of Appeal to compel clarification. Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief, *Allred v. Superior Court*, No. A112615 (Cal. Ct. App. Jan. 11, 2006). On January 12, 2006, the Court of Appeal summarily denied the petition without explanation. Order Denying Petition for Writ of Mandate/Prohibition, *Allred v. Superior Court*, No. A112615 (Cal. Ct. App. Jan. 12, 2006). On January 23, 2006, Ms. Allred and her firm filed a Petition for Review with the California Supreme Court. Petition for Review, *supra* note 2. The Petition was denied. Order Denying Petition for Review, *supra* note 2.

52. See *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966).

53. See CAL. EVID. CODE § 352 (Deering 2006).

such evidence from ever becoming public and reaching jurors.

However, instead of merely preventing Ms. Allred from discussing her client's potential testimony (a demand to which she had already agreed), the gag order effectively prevented her from engaging in *any* public debate regarding the *Dyleski* case. For example, Ms. Allred was prohibited from offering opinions about the case that were unrelated to her client's potential testimony,⁵⁴ even though no other commentators had been subjected to this restriction.

It is particularly troubling that the order has silenced Ms. Allred and her firm from making any comments critical of the police or the D.A. The D.A. has taken the position that the gag order has expressly prohibited such statements, and the trial court denied Ms. Allred's request for a clarification on this issue. Therefore, Ms. Allred could face contempt proceedings if the court accepts the D.A.'s position, in spite of the compelling argument that the gag order allows her to criticize the actions of the government with respect to her client. Thus, the order impedes her ability to make public statements that she deems necessary to protect her client.

III. GAG ORDERS AND RESTRICTIONS ON SPEECH BY ATTORNEYS AND TRIAL PARTICIPANTS: AN OVERVIEW

A. *Sheppard v. Maxwell*

In *Sheppard*, the Supreme Court reversed the murder conviction of Dr. Sam Sheppard. The Court held that Sheppard had been denied the right to a fair trial as a result of extensive prejudicial publicity and the "carnival" atmosphere in which the trial was conducted.⁵⁵ *Sheppard* is often cited as the leading authority for courts to impose gag orders restricting trial participants' out of court statements. But the facts of the case reveal that the Supreme Court based its reversal on more than excessive pre-trial publicity.⁵⁶

True, the media bombarded jurors with prejudicial news reports about the case, including numerous inflammatory articles attacking

54. Protective Order, *supra* note 43, at 247.

55. *See Sheppard*, 384 U.S. at 358.

56. The Court considered the totality of the circumstances surrounding the trial. *Id.* at 352. For example, the Court noted that, despite the excessive publicity, the trial court denied Sheppard's request for a change of venue. *Id.* at 352-53.

Dr. Sheppard's character.⁵⁷ But the three major local newspapers also published the names and addresses of the members of the jury pool.⁵⁸ "As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors."⁵⁹ And, unlike most trials today, the press at the *Sheppard* trial had the run of the courtroom.

Approximately 20 representatives of newspapers and wire services were assigned seats . . . by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. . . . Representatives of the news media also used all the rooms on the courtroom floor. . . . Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.⁶⁰

Moreover, the media also dominated the scene outside the courtroom by photographing and televising trial participants, including jury members.⁶¹

[I]n front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights

57. *Id.* at 342.

58. *Id.*

59. *Id.*

60. *Id.* at 343.

61. *See id.* at 343–44.

and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and extensively photographed for the newspapers and television.⁶²

The trial participants felt the overwhelming presence of the media throughout the entire trial, which clearly interfered with the proceedings.⁶³

All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. . . . Their movement in and out of the courtroom often caused so much confusion that . . . it was difficult for the witnesses and counsel to be heard . . . [and] made confidential talk among Sheppard and his counsel almost impossible during the proceedings. . . . [W]hen counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom . . . [that] often these matters later appeared in newspapers accessible to the jury.⁶⁴

Moreover, contrary to the orders courts now give to jurors, the *Sheppard* trial judge did not instruct jurors to refrain from viewing press reports about the case or from discussing the case with others.⁶⁵ Rather, the judge abdicated his responsibility, merely suggesting that jurors disregard any newspaper, radio or television reports about the trial.⁶⁶

The Supreme Court was highly critical of the trial court's failure to take steps to ensure the fairness of the proceedings, including its

62. *Id.*

63. *See id.* at 344.

64. *Id.* at 344.

65. *Id.* at 353.

66. *Id.* ("I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress.").

failure to control the spread of prejudicial publicity.⁶⁷ The trial judge believed that because he could not restrict press reports about the case, he was also powerless to control the spread of prejudicial materials outside the courtroom.⁶⁸ The Supreme Court noted, however, that while it may be unconstitutional to place a prior restraint on press reports about the case, the court did have the power to control statements by persons directly involved, and thereby control the type of information that could be reported about the case.⁶⁹

[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.⁷⁰

At the core of the *Sheppard* case is the principle “that no one be punished for a crime without ‘a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power,’”⁷¹ and that “the jury’s verdict be based on evidence received in open court, not from outside sources.”⁷²

B. *The Expanding Effect of Sheppard*

Despite the unique circumstances surrounding the *Sheppard* trial, the case is often viewed as granting trial courts broad authority to control pre-trial publicity. For example, in *Nebraska Press Ass’n v. Stuart*,⁷³ the trial court took its concerns about pre-trial publicity and attempted to expand the scope of *Sheppard* to another level. Instead of merely restricting the ability of the parties, witnesses and

67. *Id.* at 358–59.

68. *Id.* at 357.

69. *See id.* at 350, 359.

70. *Id.* at 361. The Court did not, however, endorse placing any restrictions on “reporting events that transpire in the courtroom,” *id.* at 362–63, as such reports enjoy protection under the First Amendment.

71. *Id.* at 350 (quoting *Chambers v. Florida*, 309 U.S. 227, 236–37 (1940)).

72. *Id.* at 351.

73. 427 U.S. 539 (1976).

court personnel from making extra-judicial statements, the trial court issued an order that prevented the press from reporting any such statements.⁷⁴ Although the criminal trial had concluded by the time the case reached the U.S. Supreme Court,⁷⁵ the Court recognized that the issues raised in *Nebraska Press Ass'n* would likely be repeated,⁷⁶ and established constitutional parameters governing gag orders on criminal proceedings.⁷⁷

Using traditional First Amendment analysis, the Supreme Court determined that the gag order on the press was an unconstitutional prior restraint. Prior restraint, the Court emphasized, is “the most serious and the least tolerable infringement on First Amendment rights,”⁷⁸ and is presumed unconstitutional.⁷⁹

As the Supreme Court noted in *Nebraska Press Ass'n*, the imposition of a gag order involves the clash of two competing constitutional principles: the First Amendment’s guarantee of freedom of expression and the Sixth and Fourteenth Amendments’ due process guarantee of the right to a fair trial.⁸⁰

In *Nebraska Press Ass'n*, the Court determined that courts may only issue a gag order on the press restricting public statements about a pending case where: (1) there is a clear or serious threat to the fairness of the trial; (2) less restrictive alternatives would not mitigate the harm; and (3) the order would effectively prevent the threatened danger.⁸¹ Under this “clear and present danger” analysis, the court deemed the gag order on the press to be unconstitutional.⁸²

The gag order at issue in *Nebraska Press Ass'n* specifically applied to parties that were not participants in the trial.⁸³ Accordingly, the Court applied the constitutional analysis for prior restraint. But that analysis may not answer the question raised by the *Dyleski* case, which is whether a gag order aimed solely at trial

74. *Id.* at 541, 542.

75. *Id.* at 546.

76. *Id.* at 546–47.

77. *Id.* at 570.

78. *Id.* at 559.

79. *Id.* at 558.

80. *See id.* at 556, 561.

81. *See id.* at 562.

82. *See id.* at 570.

83. *Id.* at 541, 542.

participants should be subjected to the same constitutional analysis applied to prior restraint on the press.

On one hand, such gag orders do not constitute a prior restraint on members of the press or the public; they do not prohibit publication of news stories about a pending case. Rather, the gag order restricts press *access* to information about the case by barring trial participants from speaking to the media.⁸⁴

On the other hand, a gag order is a prior restraint on the freedom of expression of those persons who are subject to the order.⁸⁵ This raises the question of whether a gag order on trial participants, including attorneys, should be subject to the same “clear and present danger” analysis in determining its constitutionality. Or can gag orders on trial participants be justified under a lesser showing?

C. The “Substantial Likelihood” Standard

The Supreme Court answered this question in *Gentile v. State Bar of Nevada*,⁸⁶ when it addressed the constitutionality of speech restrictions placed on attorneys representing parties in criminal proceedings. In contrast to *Dyleski*, *Gentile* did not deal with a gag order imposed by a trial court. Instead, the case addressed the question of whether a criminal defense attorney should be subject to discipline by the Nevada State Bar for extra-judicial statements he made about a case he was trying.⁸⁷

After his client was indicted, Mr. Gentile, an attorney for a defendant in a criminal proceeding, gave a press conference in which he discussed aspects of the case.⁸⁸ In particular, Mr. Gentile vouched

84. See *Dow Jones & Co. v. Simon*, 842 F.2d 603, 608–09 (2d Cir. 1988) (holding that a gag order on trial participants is not a prior restraint with respect to the press).

85. See *Levine v. U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985) (holding that a gag order constitutes a “prior restraint” on the free speech rights of those subject to the order and is therefore subject to strict scrutiny to ensure its constitutionality); see also *CBS Inc. v. Young*, 522 F.2d 234, 239–41 (6th Cir. 1975) (holding that a broad protective order preventing parties and counsel from discussing civil litigation regarding the Kent State shooting was an unconstitutional prior restraint, even though the gag order was directed at the trial participants and not at the press itself).

86. 501 U.S. 1030 (1991).

87. *Id.* at 1033.

88. *Id.*

for his client's innocence and stated that his client was being made a scapegoat by the police and the prosecution to cover up their own misconduct.⁸⁹

Several months later, after his client was acquitted, Mr. Gentile was disciplined by the Nevada Bar Association for violating the Bar's rules regulating speech by attorneys involved in pending matters.⁹⁰ In his defense, Mr. Gentile claimed that his public statements were necessary to protect his client against the prejudicial pre-trial publicity which resulted from leaks to the press by the police.⁹¹

The Supreme Court determined that the Nevada Bar rule, as applied, was an unconstitutional restriction on Mr. Gentile's free speech. The Court thus threw out the Nevada Bar's disciplinary charges against him.⁹² Nonetheless, the Court determined that speech by attorneys in pending cases can be regulated under a *lower standard* than the clear and present danger standard of *Nebraska Press Ass'n*.⁹³ Because lawyers representing clients in pending cases are key participants in the criminal justice system, the state may demand some adherence to the precepts of that system by regulating their speech as well as their conduct.⁹⁴

The test articulated in *Gentile* allows a court to curtail attorney speech that presents "a substantial likelihood of material prejudice" to the right to a fair trial.⁹⁵

89. *Id.* at 1059.

90. *See id.* at 1033.

91. *See id.* at 1064.

92. *See id.* at 1033. *Gentile* was decided by a divided court. In the part of the decision written by Justice Kennedy, who was joined by four other justices, the Court held that the Nevada rule as applied in the case was unconstitutionally vague in that it did not provide fair notice as to the type of speech that could be restricted. *Id.* at 1048, 1051–52. Nonetheless, a different majority determined that the speech of attorneys representing parties to a criminal proceeding can be regulated under the "substantial likelihood of material prejudice" standard, which is a lesser standard than that applied to restrictions on speech the press. *Id.* at 1074–75.

93. *Id.* at 1074.

94. *Id.*

95. *Id.* at 1075. "We agree . . . that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's

The “substantial likelihood” test . . . is constitutional . . . for it is designed to protect the integrity and fairness of a State’s judicial system, and it imposes only narrow and necessary limitations on lawyers’ speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by “impartial” jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.⁹⁶

Although *Gentile* did not involve a judicially imposed gag order on trial participants, subsequent lower court decisions have routinely applied the “substantial likelihood of material prejudice” standard in analyzing the constitutionality of gag orders on parties’ attorneys.⁹⁷

Nonetheless, *Gentile* dealt with a state bar rule as opposed to a gag order that constitutes a prior restraint on the speech of trial participants. Thus, where a state has adopted regulations on attorney speech that are based on the *Gentile* standard, it seems unnecessary for a court to impose a gag order on counsel.

IV. THE OVERUSE OF GAG ORDERS AIMED AT CURBING PRE-TRIAL PUBLICITY THREATENS THE FIRST AMENDMENT RIGHTS OF TRIAL PARTICIPANTS

Dyleski illustrates several dangers that gag orders pose to the

interest in fair trials.” *Id.*

96. *Id.*

97. See, e.g., *United States v. Scarfo*, 263 F.3d 80, 93–94 (3d Cir. 2001) (finding it reasonable to apply the substantial likelihood test to attorney’s speech where attorney was in the same position as the attorney referred to in *Gentile*); *United States v. Brown*, 218 F.3d 415, 428–29 (5th Cir. 2000) (concluding that the district court identified a substantial likelihood that extrajudicial comments of trial participants would prejudice its ability to conduct fair trials). *But see* *Hurvitz v. Hoefflin*, 101 Cal. Rptr. 2d 558, 565 (Ct. App. 2000) (requiring “a clear and present danger or serious and imminent threat” for prior restraint of speech by trial participants). In *Hurvitz*, the Court also noted that Article I, Section 2 of the California Constitution provides even broader protection for freedom of speech than the First Amendment. *Id.* at 565.

freedom of expression of those subject to the order.⁹⁸ First, gag orders are often issued to suppress media coverage in general rather than focusing on specific threats to the fairness of the proceedings. As a result, gag orders are not narrowly tailored to address the specific threats to a fair trial from extra-judicial statements.

Second, courts imposing gag orders often fail to appreciate that attorneys sometimes have to engage in conduct and speech outside the realm of formal judicial proceedings in order to protect the interests of their clients. Certainly, even trial participants have a right to participate in the public debate surrounding criminal proceedings, especially where there are allegations of government misconduct.

Third, the terms of gag orders can be vague, causing those subjected to the order to refrain from making any statements—even permissible ones—for fear of being punished for their speech.

In *Dyleski*, the trial court justified its imposition of a gag order as necessary to avoid tainting the pool of potential jurors:

The purpose of a protective order in the current environment is to assure a prospective jury panel, for jury selection, that has not been bombarded with either facts or concepts that make it reasonably unlikely that such can be “put aside” and the case determined solely on the trial evidence.⁹⁹

The trial court’s reasoning is consistent with a long line of cases that hold that the purpose of a gag order is to prevent the tainting of the jury pool with prejudicial information that could prevent the selection of an impartial jury.¹⁰⁰ The danger, however, with such a broadly stated rationale is that it may be applied to a broad range of comments that will not, in fact, taint the jury pool, but rather, will

98. The gag order imposed on attorney Gloria Allred is unprecedented. The authors are unaware of any reported cases in California in which a trial court has imposed a gag order on an attorney for a non-party potential witness.

99. Decision, *supra* note 45, at 5:12–16.

100. See, e.g., *Scarfo*, 263 F.3d at 93–94 (noting that gag order on former trial participant’s speech is appropriate when material prejudice could otherwise result); *Brown*, 218 F.3d at 428–29 (affirming district court’s gag order on trial participants as appropriate); *In re Russell*, 726 F.2d 1007, 1010–11 (4th Cir. 1984) (affirming gag order on witness as necessary to ensure a fair trial).

chill public discussions protected under the First Amendment.

Moreover, it appears that the *Dyleski* court went beyond what is reasonably necessary to ensure a fair trial for the parties. The court apparently believed that the best way to protect against prejudicial pre-trial publicity was to limit media coverage of the case in general. Such an approach is overbroad and unconstitutional, however, in that it restricts all types of public statements, regardless of whether they are likely to prejudice the fairness of the proceedings. As the Supreme Court noted in *Nebraska Press Ass'n v. Stuart*:

[P]re-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.¹⁰¹

Indeed, our courts have routinely recognized that high-profile cases are likely to attract widespread media attention and that there is little that can be done about this in a free and open society.

Media dissemination of the alleged facts of horrifying and threatening criminal activity . . . unfortunately is a fact of life in our society. The news reports may, and do, contain inadmissible hearsay, rank and unfounded opinions, incriminating statements, inaccurate sketches and more. But our criminal justice system is deemed to be hearty enough to withstand prejudicial publicity and still guarantee a given defendant the most basic right to receive a fair trial. In this regard, the cost to the criminal justice system to provide a fair trial is the price we pay for an open society, and a free press with access to criminal proceedings.¹⁰²

Therefore, absent extraordinary circumstances, issuing a broad

101. 427 U.S. 539, 565 (1976) (internal quotation omitted); *see also* *Columbia Broad. Sys., Inc. v. U.S. Dist. Court.*, 729 F.2d 1174, 1180 (9th Cir. 1983) (“[I]t is not enough that publicity might prejudice one directly exposed to it. If it is to be restrained, the publicity must threaten to prejudice the entire community so that twelve unbiased jurors can not be found.”).

102. *Tribune Newspapers West, Inc. v. Superior Court*, 218 Cal. Rptr. 505, 515 (Ct. App. 1985) (emphasis omitted).

gag order against an attorney-commentator such as Ms. Allred is unlikely to have any discernable effect on the press coverage of a particular case. Given this reality, all that a gag order will do is suppress some statements about a case, without having any overall effect on the amount of prejudicial information that could taint the jury pool.

In *Gentile*, the Supreme Court noted that the reason for allowing greater restraints on attorney speech is that attorneys “have special access to information through discovery and client communications, [and therefore] their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative.”¹⁰³ The strong counter argument, however, is that if knowledgeable attorneys, including prosecutors and defense counsel, are barred from commenting on pending matters, the vast majority of media coverage will come from disreputable sources that are only more likely to flood the media with prejudicial misinformation.

In any event, the aim of any gag order should not be to indiscriminately curtail pre-trial publicity in general. Rather, the aim should be to protect the fairness of the trial by taking reasonable measures to ensure that a fair and impartial jury decides the case based only upon the evidence admitted at trial.¹⁰⁴

It is well established under the First Amendment that

103. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (citing *In re Hinds*, 449 A.2d 483, 496 (N.J. 1982)); *In re Rachmiel*, 449 A.2d 505, 511 (N.J. 1982)).

104. The standard for showing that pre-trial publicity has jeopardized the right to a fair trial is extremely high. For example, in *Mu’Min v. Virginia*, 500 U.S. 415, 418 (1991), the community had been subjected to a barrage of publicity prior to the defendant’s capital murder trial. News stories appearing over a course of several months included details of the crime itself and numerous items of prejudicial information inadmissible at trial. *Id.* Eight of the twelve individuals seated on the jury admitted some exposure to pre-trial publicity. *Id.* at 421. Despite this, the U.S. Supreme Court held that the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity. *Id.* at 431–32.

The authors do not suggest that this standard should govern the issuance of gag orders. It does, however, suggest a large discrepancy between the definition of prejudice in terms of appellate review of criminal convictions and prejudice in terms of the issuance of gag orders.

governmental restrictions on speech, even when implemented for a legitimate purpose, “must be narrow and necessary, carefully aimed at comments likely to influence the trial or judicial determination.”¹⁰⁵ Governmental restrictions on speech that are overly broad and stifle speech beyond the legitimate purpose are unconstitutional.¹⁰⁶ Accordingly, before entering a gag order, the court must make specific findings to support its issuance.¹⁰⁷

Further, before a court imposes an order that unduly restricts the freedom of expression of those subject to its jurisdiction, it should consider alternative methods. These could include, for example, extensive and probing voir dire of jurors, and the “use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.”¹⁰⁸ A court’s implementation of these methods must be genuine, and if a broad gag order still appears necessary, the court should be required to explain why such alternative measures are inadequate.

Moreover, when imposing gag orders, courts must also be cognizant of the rights of all citizens, including trial participants, to engage in public debate about pending criminal matters. It “would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.”¹⁰⁹ It is therefore vital that courts allow free speech to play its part in revealing that process. “The knowledge that every criminal trial is subject to contemporaneous review in the

105. *United States v. Scarfo*, 263 F.3d 80, 93 (3d Cir. 2001). The gag order imposed by the trial court in *Scarfo* was purportedly aimed at preventing out of court statements from prejudicing the judge. *Id.* at 94. The Third Circuit held that such an order was unconstitutional as it was not narrowly tailored to address a specific harm:

[T]here was no risk of prejudice to the Judge because judges are experts at placing aside their personal biases and prejudices, however obtained, before making reasoned decisions. Judges are experts at closing their eyes and ears to extraneous or irrelevant matters and focusing only on the relevant in the proceedings before them. The District Court did not articulate any specific or general prejudice it would suffer, and we can see none.

Id.

106. *Shelton v. Tucker*, 346 U.S. 479, 488–90 (1960).

107. *See Levine v. U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985).

108. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 564 (1976).

109. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.”¹¹⁰

Also, a gag order that does not provide “fair notice to those to whom [it] is directed” is unconstitutionally vague.¹¹¹ In *Dyleski*, the D.A. contended that the gag order prohibited Ms. Allred from making public statements critical of the manner in which the government treated her client. When Ms. Allred disputed this position and requested a clarification from the trial court, the court denied her request.¹¹² Given the language of the gag order and the D.A.’s stated interpretation of it, the court thus placed Ms. Allred in the untenable position of having to guess whether certain statements would violate the order’s provisions. Ms. Allred was left with no clear idea as to what she could or could not say in public. If she guessed incorrectly, she could be subject to punishment by the court.¹¹³ This, then, illustrates how a vague gag order chills the freedom of expression of those under its authority.¹¹⁴ A proper gag order should be explicit as to which statements are allowed and which are proscribed.¹¹⁵

The *Dyleski* court recognized that it could not prevent other legal commentators from discussing the case.¹¹⁶ Instead of treating Ms. Allred like any other commentator, however, the trial court

110. *In re Oliver*, 333 U.S. 257, 270 (1948).

111. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)).

112. Unreported Minute Order, *supra* note 51.

113. *Cf. Gentile*, 501 U.S. at 1051 (“The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement . . . for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law”).

114. The D.A. has also taken the position that the gag order should prevent Ms. Allred from making general statements attesting to her client’s integrity. *See People’s Supplemental Request for a Protective Order*, *supra* note 29, at 3:8–10, 3:19–22. The authors fail to see how such general statements can present a substantial risk of materially prejudicing the fairness of the proceedings.

115. *See Gentile*, 501 U.S. at 1051.

116. *See Decision*, *supra* note 45, at 6:23–7:3.

determined that because of her status as counsel for a potential witness, she could be subjected to “the same constraints as any attorney representing a party.”¹¹⁷ But unlike the parties in *Dyleski*, Ms. Allred had no formal role in this case, nor did she have access to any inside information, other than information relating to her client. Further, the trial court failed to explain why Ms. Allred should be treated in the same manner as counsel for the parties, especially as she had already agreed not to comment on her client’s potential testimony. She did not have access to pre-trial discovery and had not seen the files of either counsel for the prosecution or the defense.¹¹⁸ Moreover, Ms. Allred had no standing to appear in court for her client, and could not proffer evidence or make arguments in court regarding the case. Thus, unlike the prosecution and defense counsel, Ms. Allred is not a participant in this trial.

One must therefore ask whether Ms. Allred should be lumped together with counsel for the prosecution and defense, or whether she belongs in a different category. The authors contend that a legal commentator like Ms. Allred, who also has a peripheral role in a pending criminal matter, should be subject only to the same restrictions that apply to the press generally, with one logical exception—that she be barred from making public statements concerning her client’s potential testimony or other matters that are not readily known to persons unaffiliated with the pending criminal matter. Such an approach is narrowly tailored to address the specific potential danger to a fair trial, while still protecting the rights of commentators such as Ms. Allred to participate in the public debate.

Dyleski illustrates the dangers of using general gag orders as to all trial participants. Such unfocused breadth potentially gives party opponents, especially prosecutors, the power to transform gag orders into blanket prior restraints. A person in Ms. Allred’s position could hardly risk engaging in public criticism of the D.A.’s conduct when she has been threatened with contempt proceedings in advance. A trial court may reasonably refuse to clarify its order, but without clarification an order may be transformed into a general prohibition

117. *Id.* at 7:9–10.

118. See Supplemental Declaration of Gloria Allred in Support of Her Request to Modify or Set Aside Protective Order at 2:10–11, *People v. Dyleski*, No. 03-219113-8 (Cal. Super. Ct. Nov. 8, 2005; renumbered No. 05-060254-0, Feb. 24, 2006).

on what should be protected speech.

V. GAG ORDERS ON COUNSEL ARE NOT NECESSARY
WHERE A STATE HAS ADOPTED RULES REGULATING
ATTORNEYS THAT ARE CONSISTENT WITH THE CONSTITUTION

Dyleski also raises the question of whether gag orders on counsel are necessary where a state, consistent with the Constitution, has promulgated regulations setting forth the obligations of any attorney with respect to extra-judicial statements.¹¹⁹

Rule 5-120 of the California Rules of Professional Conduct,¹²⁰ which governs trial publicity, was adopted in 1995 in response to the *Gentile* decision. The rule follows the *Gentile* standard by proscribing extrajudicial statements by lawyers participating in litigation which would have “a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”¹²¹ Moreover, the rule specifically allows attorneys to make certain statements reiterating matters contained in the public record, as well as statements necessary to protect clients from the prejudicial effects of pre-trial publicity.¹²²

The threat of state bar disciplinary proceedings for improper statements is likely enough to police the conduct of attorneys. Such procedures are based on a full record of past events, a body of precedents consistently elaborated and enforced, and heard by decision-makers not involved in the underlying proceedings. Thus, the risk of idiosyncratic enforcement is minimized. Reliance on state bar proceedings also minimizes the ability of a party to use gag orders to achieve broad prior restraints on speech, inconsistent with the First Amendment.

VI. CONCLUSION

Intense media coverage of high-profile criminal trials is a reality of twenty-first century America. It is impossible to suppress such coverage and, for the most part, such coverage is beneficial in a free

119. Clearly, rules regulating attorneys would not apply to non-attorney trial participants.

120. CAL. R. PROF'L CONDUCT 5-120(A) (2006). The text of Rule 5-120, as well as the official discussion, is set forth in the appendix.

121. *Id.*

122. R. 5-120(C).

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society.

The *Dyleski* gag order exemplifies the danger to First Amendment values posed by judicial actions to control the media. Media coverage of high-profile criminal cases is a reality and cannot be suppressed by judicial action consistent with the First Amendment and our societal commitment to open trial proceedings.

Trial judges are no doubt confronted with extraordinarily difficult choices in such circumstances. It is essential, however, that restrictions on the use of gag orders remain in place so that they do not become an automatic response to the careful balancing that must be undertaken to ensure that both First Amendment and Sixth Amendment rights are protected.