Gagging Trial Participants

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This country has long struggled to reconcile freedom of the press with the fair trial rights of the accused and with the fair administration of justice in criminal and civil cases.[1] U.S. Supreme Court precedent has sharply curtailed direct regulation of the press, either through sanctions for what is published or restraints on publication.[2] Similarly, in curtailing trial court efforts to close judicial proceedings, the Court has fashioned a First Amendment right of public and press access.[3] But one method of trial court control on unwanted publicity has proven more successful and therefore is being used with greater frequency: gag orders on trial participants. Trial court judges imposing participant gag orders often cite the dicta of the Supreme Court in *Sheppard v. Maxwell*.[4] "The courts may take such steps by rule and regulation that will protect their processes from prejudicial outside influence. Neither prosecution, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be free to frustrate its function."[5]

However, the question remains: What justification is required before a court can impose gag orders on trial participants? Even if gag orders do not directly restrain the media, they restrict the free speech of trial participants and burden press gathering of the news for publication. Nevertheless, media lawyers seeking to challenge such judicial orders face significant uncertainties and difficulties, indicated in the turn-of-the-century decisions of the South Dakota Supreme Court in *Sioux Falls Argus Leader v. Miller*[6] and of the federal district court in *Dow Jones & Co. v. Kaye*,[7] both dealing with media challenges to participant gag orders. The Fifth Circuit's decision in *United States v. Brown*,[8] which rejected the constitutional challenge of a gagged criminal defendant, indicates how even the formidable protections of the First Amendment may provide little support.

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Thinly Veiled Prior Restraint

Many trial judges had read *Sheppard* as authorizing them to protect defendants from prejudicial publicity by imposing direct restraints on media publication. But in *Nebraska Press Ass'n v. Stuart*,[9] a unanimous U.S. Supreme Court rejected even a modified gag order in a factual context posing significant opportunities for prejudicial publicity.[10] The gag order on publication, the Court said, was a prior restraint, "one of the most extraordinary remedies known to our jurisprudence,"[11] and one of "the most serious and least tolerable infringements on First Amendment rights."[12] Such an order is presumptively unconstitutional and only a clear and present danger of prejudice could justify such a restraint.[13] Before issuing the restraining order, a trial judge must make specific findings, based on record evidence, justifying the restraint including (1) the nature and extent of pretrial news coverage; (2) the unavailability of other measures to mitigate the effects of publicity; and (3) the effectiveness of the proposed order in preventing prejudice.[14] The severity of this procedural and substantive burden, especially the demand that there be findings of less restrictive alternatives, has made *Nebraska Press* a near absolute rule of invalidity. Although trial courts do issue gag orders on media publication, they are, with rare exceptions, reversed on appeal.[15]

In form, a gag order on trial participants is a judicial injunction. In purpose, operation, and effect the order is as much a prior restraint as a gag order on media publication.[16] It is based on speculation that the content of what is said by the participants will produce harm justifying the suppression of speech. Because of the collateral bar doctrine, trial participants are not free to speak to the press and then challenge the order when a judge issues a show cause order.[17] The gag order is backed by the threat of real, concrete, particularized, and immediate sanctions. Offering a quick, effective way of curbing extrajudicial commentary, it is an inviting tool for the trial judge seeking to control potentially prejudicial publicity.[18] Accordingly, it would seem completely appropriate to apply the prior restraint doctrine. The content-based judicial order should be presumptively invalid; a heavy burden of justification should attach; and the procedural and substantive standards of *Nebraska Press* should apply. But these principles do not necessarily govern.

Media Challenges to Gag Orders

First, there is a question as to who is challenging the gag order. Although one of the gagged participants can challenge the restraint, more often it is the press that objects. When the press intervenes as a nonparty to challenge the order, courts are divided as to whether the prior restraint doctrine (and its rule of presumptive invalidity) applies. *Sioux Falls Argus Leader v. Miller*[19] involved such a media challenge to a pretrial gag order, issued with the consent of both the prosecution and the defense, after a hearing in which the media participated. The case involved two former employees at a state training school who were charged with manslaughter and felony child abuse of a fourteen-year-old girl. After distinguishing cases involving public access to judicial proceedings and gag orders on press publication, the court noted the split of judicial authority. The South Dakota Supreme Court adopted what appears to be the majority rule adopted by the Second, Fourth, Ninth, Tenth, and Eleventh Circuits and held that prior restraint doctrine did not apply.[20]

The *Miller* court followed the approach of the leading Second Circuit decision, *In re Application of Dow Jones & Co.*,[21] and asked only " '[w]hether there is a "reasonable likelihood" that pretrial publicity will prejudice a fair trial.' "[22] The South Dakota high court, however, required that the trial

court "explore whether other available remedies would effectively mitigate the prejudicial publicity."[23] Applying the lenient "reasonable likelihood" standard, the court found that the trial judge had properly taken notice of the extensive pretrial publicity that had already occurred and was justified in concluding that a reasonable likelihood of prejudice existed. Rejecting the need for specific factual findings, the court noted that the trial judge had concluded that alternate measures would be ineffective. Finally, the court held that the order was not overbroad since it "burdens no more speech than is necessary to protect the parties' Sixth Amendment right to a fair trial."[24]

In contrast, in *Dow Jones & Co. v. Kaye*,[25] an action brought by newspapers under 42 U.S.C. § 1983 and decided one month before *Miller,* the U.S. District Court for the Southern District of Florida issued a preliminary injunction enjoining the state court from enforcing a broad gag order against all parties and their agents in a high profile civil action for damages for diseases resulting from tobacco addiction. In that case, when the state trial judge learned that the tobacco companies planned a press conference that he believed could prejudice the fairness and impartiality of the trial, he called a hearing to determine whether to issue an order. The state judge and parties agreed upon a restraining order. The newspaper was not allowed to participate in the hearing. When some of the tobacco companies challenged the gag order during the compensatory damages phase of trial more than a year later, the state trial court denied the motion to vacate the order, the media was denied leave to intervene in the appeal, and a state appellate court sustained the gag order. The newspapers then adopted the somewhat unusual approach of filing a § 1983 claim based on the denial of federal constitutional rights. When the federal action in *Kaye* was filed, the compensatory damages phase of the state trial was almost completed, but a punitive damages phase was still possible.[26]

The federal district court noted the division of authority on the appropriate First Amendment standards when the media challenges a participant gag order and, although not entirely clear, the *Kaye* court, as in *Miller,* seemed to verbally adopt the more lenient "reasonable likelihood" of prejudice standard.[27] But here ends the similarity with *Miller, In re Dow Jones,* etc. The federal court found that the media was likely to prevail on the merits because the gag order was unconstitutionally overbroad and the state court made no findings of fact to support such a broad restraint on extrajudicial speech by the parties.[28] The state court order prohibited all speech regarding the trial and not just that "likely to affect the fairness of the trial."[29] Further, the federal court cited *Nebraska Press* and seemed to apply the more demanding First Amendment standards applicable to prior restraints: "The record fails to show that the gag order . . . was necessary to ensure a fair trial."[30] Although the state trial court had made general statements about the publicity the high-profile trial had generated, it had not set forth specifically the content of the coverage, its likely effect on the fairness of the trial, and why less restrictive measures would be ineffective.[31] Further, the gag order was unlimited in duration, adding to its overbreadth.[32]

The third-party standing rule is not a jurisdictional mandate; it is a prudential rule of judicial self-restraint that can be overridden by countervailing interests.

In short, although the federal district court in *Kaye* appeared to accept the more lenient "reasonable likelihood" standard, its analysis reflects the more demanding approach of those courts that apply *Nebraska Press* and prior restraint analysis to participant gag orders even when the media is the challenging party. Nevertheless, the rejection of the prior restraint doctrine and use of a lenient reasonable likelihood standard seems to be the approach accepted by most courts when the press challenges a gag order. One reason for this appears to be rooted in the doctrine of standing.

All of the modern participant cases accept that the media has Article III standing to challenge a gag order on trial participants. For example, in *Miller,* the court stated that "[m]edia has been injured because the order, though not directed at the [m]edia, restricts some of the sources to which it may turn or has turned for information about the underlying criminal action."[33] As long as there are potential participants who are otherwise willing to speak but are unwilling to do so because of the gag order, the media suffers injury in fact caused by the court order that is redressible if the courts grant relief.

But the reluctance to apply the prior restraint doctrine appears to stem from another standing problem, that of third-party standing. The media is not bound by the gag order and the participants are not parties to the action challenging the order. Because of this, the Ninth Circuit held in its 1986 decision in *Radio Television News Ass'n v. U.S. District Court,* that although the media had Article III standing "to raise freedom of the press concerns under the first amendment," it "lack[ed] standing to assert the free speech constitutional rights of the nonparty trial counsel in challenging this order."[34] Under that view, only the gagged participant could raise First Amendment claims.

However, the third-party standing rule is not a jurisdictional mandate; it is a prudential rule of judicial self-restraint that can be overridden by countervailing interests. There is ample reason to allow the media to raise the First Amendment rights of the gagged participants. The purpose and effect of the participant gag order is to restrain and censor speech. It is a restraint based on content; the court restrains speech based on what is being said, based on potential harm from the speech. The speech being curtailed generally concerns the operation of the legal system; it is speech in the public interest. In short, the critical values and concerns underlying the prior restraint doctrine and the First Amendment are implicated. And the participants, especially attorneys who must practice in the court that issues the order, may well be reluctant to demand that their own rights be protected.

There is an additional argument used by the courts to reject use of the prior restraint doctrine and stringent stan-

dards of review. The media challenge can be seen as an effort to protect the First Amendment rights of the public and the press, rather than speech rights of the gagged participants. Courts rejecting use of the prior restraint doctrine have summarily dismissed such a First Amendment interest. For example, the Ninth Circuit in *RTNA* labeled such a First Amendment claim as "tenuous"[35] since "the media's collateral interest in interviewing trial participants is outside the scope of protection offered by the first amendment."[36] The press remained free to gather the news; it was the participants who were restrained. Similarly, the Second Circuit in *Dow Jones* concluded there was no "censorship" of the press.[37] Since the press was not subject to sanctions if the participant gag order was violated, any burden on the press and public was indirect and incidental.[38]

But there is precedent for using the prior restraint doctrine even when the challenge is by the media. For the Sixth Circuit in *CBS, Inc. v. Young,*[39] a participant gag order "directly impaired or curtailed" the media's "constitutionally guaranteed right" to gather the news.[40] Only a showing that the gag order was "required to obviate serious and imminent threats to the fairness and integrity of a trial" would overcome the order's presumptive invalidity.[41] Similarly, the Tenth Circuit in *Journal Publishing Co. v. Mechem,*[42] in holding a post-trial gag order on jurors that was challenged by the press to be unconstitutionally overbroad, said that "any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint."[43] And the federal district court in *Connecticut Magazine v. Moraghan*[44] used the prior restraint doctrine and applied the mandate of *Nebraska Press* requiring specific record findings that alternatives were unavailable in enjoining enforcement of a participant gag order by a state court.[45]

The analysis in *CBS, Inc. v. Young* and its progeny is far more compatible with the underlying rationale of the prior restraint doctrine and the First Amendment protection of newsgathering. The prior restraint doctrine is designed to prevent government from deciding what speech enters the marketplace of ideas (i.e., censorship) and to promote citizen access to the information and ideas needed to perform their duty in a democratic society. A judicial gag order on trial participants has both the purpose and the effect of allowing government to curtail the flow of speech it determines to be harmful.[46] The speech in all of the above cases was of public interest and concern. Yet the participant gag order curtailed the speech of those with the most intimate knowledge of the legal proceedings, forcing the media to rely on less knowledgeable sources of information. And the restraint was a content-based regulation that should be presumptively unconstitutional and subject to strict scrutiny. As one judge aptly put it, "An indirect prior restraint, is, de facto, a prior restraint, nonetheless."[47]

Direct Challenges from Participants

It might be logically assumed that if the gagged trial participant challenges the order, the prior restraint doctrine and strict scrutiny or the clear and present danger doctrine (i.e., *Nebraska Press*) apply. Indeed most courts have adopted this approach. For example, the Second Circuit, in *United States v. Salameh,*[48] overturned an overbroad participant gag order issued in the World Trade Center bombing trial. The court required a narrow tailoring of such orders, consideration of less restrictive means, and an assessment of the order's likely effectiveness,[49] in other words, the demanding standards of *Nebraska Press.* The Sixth Circuit in *United States v. Ford*[50] and the Ninth Circuit in *Levine v. U.S. District Court*[51] similarly applied the prior restraint doctrine to participant gag orders challenged by a gagged participant.

Then there is last year's *United States v. Brown,*[52] in which the Fifth Circuit upheld a broad participant gag order by using a seriously flawed constitutional analysis. James Harvey Brown, a prominent Louisiana politician and public official, was on trial in one of three criminal cases involving former Louisiana Governor Edwin W. Edwards. The district court sua sponte entered a gag order that, with exceptions for matters of public record and protestations of innocence, prohibited attorneys, parties, or witnesses from discussing anything about the case with the media "that could interfere with a fair trial," including statements "intended to influence public opinion regarding the merits of this case."[53] After efforts by Brown to vacate or modify the order were unsuccessful, he appealed.[54]

Logic dictates that an appellate court should be especially sensitive to a broad gag order that prevented a defendant from speaking out in his defense in an effort "to influence public opinion regarding the merits of this case." Such a sweeping order implicates not only the free speech rights of the defendant, the First Amendment rights of the public and press, but also the self-defense rights of a criminal defendant. Instead, the Fifth Circuit, while acknowledging that it was a "somewhat close call," affirmed the broad order.[55]

The appellate court acknowledged that the prior restraint doctrine was implicated[56] and that other circuits had applied some version of the clear and present danger test in reviewing participant gag orders when challenged by a party subject to the restraint.[57] But the court held "that the gag order is constitutionally permissible because it is based on a reasonably found substantial likelihood that comments from lawyers and parties might well taint the jury pool, either in the present case or one of the two related cases, is the least restrictive corrective measure available to ensure a fair trial, and is sufficiently narrowly drawn."[58]

The Fifth Circuit explained its adoption of this less demanding standard as follows: "We decline to adopt the more stringent tests advocated by the Sixth, Seventh, and Ninth Circuits because *Gentile* appears to have foreclosed applicability of those tests to the regulation of speech by trial participants."[59] However, *Gentile v. State Bar of Nevada*[60] involved a standing disciplinary rule, not a gag order subject to the prior restraint doctrine. Further, *Gentile* involved the First Amendment rights of lawyers to engage in extrajudicial commentary in cases in which they are participating. Chief Justice Rehnquist, writing for the majority in *Gentile,* stressed the special fiduciary duties of a lawyer as an "officer of the Court."[61]

The Fifth Circuit in *Brown* reasoned that the distinction between a lawyer and other trial participants was not critical. "The mischief that might have been visited upon the three related trials—primarily, jury tainting—would have been the same whether prejudicial comments had been uttered by the parties or their lawyers."[62] This suggests it was the harm threatened by publicity reflecting extrajudicial comments by trial participants that drove the appellate court to alter the standards of First Amend-

ment review. But the seriousness of the harm from speech goes to the application of the standard of review, not the selection of the standard to be used. Further, the dangers of prejudice and jury tainting were involved in all the precedents rejected by the Fifth Circuit. And a very serious claim of potential prejudice to the defendant's fair trial rights was involved in *Nebraska Press Association.* But the Supreme Court had still applied the prior restraint doctrine and the clear and present danger doctrine. The harm threatened by the defendant's speech in *Brown* is no greater than the harm threatened by the media speech in *Nebraska Press Association.*

The flawed analysis of the Fifth Circuit [in *Brown*] was not limited to its adoption of constitutional standards.

The flawed analysis of the Fifth Circuit was not limited to its adoption of constitutional standards. The appellate court showed the same insensitivity to First Amendment rights in its application of this less protective standard. A substantial likelihood of jury tainting was said to satisfy the requirement of harm even though the activities and criminal prosecution of Governor Edwards and his associates (including Brown) had already spawned a mass of publicity. Simply, the court speculated, with no apparent basis, that speech by trial participants would increase the publicity and add materially to the harm.[63] Nor did the breadth of the order move the court. "While the language of the order is somewhat broad, under the circumstances we do not find it to be so vague or overinclusive as to unjustifiably trammel on Brown's free speech rights."[64] The court noted that the order did not prohibit all extrajudicial commentary, provided for some exceptions, and the trial court had suspended the law to allow Brown to run for reelection.[65] However, this analysis ignores the fact that the orders prohibited all speech "that could interfere with a fair trial," which is a limitless standard. The order expressly was aimed at speech intended to influence public opinion: speech that is central to the values protected by the First Amendment.

The *Brown* court's articulated standard of review might appear to reflect the "less burdensome means" test characteristic of the demanding judicial review standard of strict scrutiny. However, the court's application of the requirement, which it characterized as "good judicial practice"[66] rather than constitutional command, provides a weak reflection of the doctrine that played such an important role in *Nebraska Press Association.* The district court's failure to make specific findings based on record evidence that there were no less restrictive means was simply discounted by the appellate court. The record, the Fifth Circuit said, was sufficient to justify the district court's "clearly implied conclusion" that other means would be "inappropriate or insufficient to adequately address the possible deleterious effects of enormous pretrial publicity in this case and the two related cases."[67]

Participant gag orders have become a favorite means by which courts seek to avoid excessive publicity. It is unlikely that this will change. Nevertheless, it should be expected that appellate courts will at least use standards for justifying such orders that reflect the important First Amendment interests at stake. *Brown* fails that test; the Fifth Circuit used a flawed constitutional standard and a deferential application inconsistent with First Amendment precedent on trial participant gag orders. One can only hope that it merely reflects the extremely political context of the cases that spawned it.

Endnotes

1. The background material for this article can be found in C. Thomas Dienes, Lee Levine and Robert Lind, Newsgathering and the Law (2d ed. 1999 and Supp. 2000), especially chapters 2 and 7, and C. Thomas Dienes, *Trial Participants in the Newsgathering Process,* 34 U. Rich. L. Rev. 1107 (2001).

2. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), limiting the use of restraining orders on press publication. Contempt sanctions for press publication are constitutional only if necessary to prevent a clear and present danger to the administration of justice. *See* Bridges v. California, 314 U.S. 252, 263 (1941); *see also* Wood v. Georgia, 370 U.S. 375, 384 (1962) *See generally* Dienes, Levine, and Lind, *supra* note 1, at 17–35. Content-based regulation of speech generally is presumptively unconstitutional and subject to strict scrutiny. *See* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803. 812 (2000) (cable); Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105, 115–16 (1991) (print).

3. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. (1986); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

4. 384 U.S. 333 (1966).

5. *Sheppard,* 384 U.S. at 363.

6. 610 N.W.2d 76 (S.D. 2000).

7. 90 F. Supp. 2d 1347 (S.D. Fla. 2000).

8. 218 F.3d 415 (5th Cir. 2000).

9. 427 U.S. 539 (1976).

10. The defendant was charged with walking into a neighbor's yard, sexually assaulting a ten-year-old girl and then murdering her and five members of her family in a small Nebraska town. *Nebraska Press,* 427 U.S. at 542.

11. *Id.* at 562.

12. *Id.* at 559.

13. *See id.* at 562. The Court invoked a form of the clear and present danger doctrine, set forth in *Dennis v. United States,* 341 U.S. 494 (1951), which asks whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

14. *See* 427 U.S. at 562.

15. *See* L. Tribe, American Constitutional Law 858–59 (2d ed. 1998); Dienes, Levine and Lind, *supra* note 1, at 32–35.

16. *See* Alexander v. United States, 509 U.S. 544, 550 (1993), stating that prior restraint describes "administrative and judicial orders forbidding certain communications in advance of the time that such communications are to occur."

17. *See In re* Providence Journal Co., 820 F.2d 1342, 1352 (1st Cir. 1986), *modified on reh'g en banc,* 820 F.2d 1354 (1st Cir. 1987) (holding that a publisher subject to a transparently invalid prior restraint must make a good faith effort to seek emergency relief before violating the judicial order).

18. *See* Montana *ex rel.* Missoulian v. Montana Twenty-First Judicial District Court, 933 P. 2d 829, 843–44 (1997) (Nelson, J., dissenting in part) ("Gag orders are simply too easy to impose"). See Laurie L. Levenson, Foreword to Symposium, *The Sound of Silence: Reflections on the Use of the Gag Order,* 17 Loy. L.A. Ent. L.J. 305, 306 (1997) ("For the trial court faced with a complicated trial surrounded by immense

and intense public and media interest, the temptation to rely on gag orders can be overwhelming.").

19. 610 N.W.2d 76 (S.D. 2000).
20. *See Miller*, 610 N.W.2d at 84–86.
21. 842 F2d. 603 (2d Cir. 1988).
22. 610 N.W.2d at 86 (quoting *Dow Jones*, 842 F.2d at 610).
23. 610 N.W.2d at 86.
24. *Id.* at 89.
25. 90 F. Supp. 2d 1347 (S.D. Fla. 2000).
26. *See id.* at 1350–51.
27. *See id.* at 1360 ("When a gag order is challenged by someone whose speech it does not directly prohibit, like the newspaper publishers in this case, it will be upheld if it prohibits speech that is *reasonably likely* to prejudice the fairness of trial.") (emphasis added).
28. *See id.* at 1360–61.
29. *Id.* at 1360.
30. *Id.*
31. *See id.*
32. *See id.* at 1360–61.
33. *Miller*, 610 N.W.2d at 81.
34. 781 F.2d 1443, 1445, 1448 (9th Cir. 1986).
35. *Id.* at 1445.
36. *Id.* at 1447.
37. 842 F.2d at 608.
38. *Id.* at 609.
39. 522 F2d. 234 (6th Cir. 1975).
40. *Id.* at 237–38.
41. *Id.* at 240.
42. 801 F.2d 1233 (10th Cir. 1986).
43. *Id.* at 1236.
44. 676 F. Supp. 38 (D. Conn. 1987).
45. *See id.* at 42–43.
46. In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000), the Court stated that "[w]hen the purpose and design of a statute is to regulate speech by reason of its content, special consideration is not accorded the Government merely because the law can somehow be described as a burden rather than an outright suppression."
47. Montana *ex rel.* Missoulian v. Montana Twenty-First Judicial District Court; 933 P.2d 829, 844 (Mont. 1997) (Nelson, J., dissenting). In his excellent dissent, Judge Nelson observed that "the distinction between a direct prior restraint (where the media is gagged) and an indirect prior restraint (where the media's sources are gagged) is one without a substantive difference." *Id.*
48. 992 F.2d 445 (2d Cir. 1993).
49. *See id.* at 447.
50. 830 F.2d 596 (6th Cir. 1987).
51. 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).
52. 218 F.3d 415 (5th Cir. 2000).
53. *Id.* at 418–19.
54. *See id.* at 420.
55. *Id.* at 423.
56. *Id.* 424–25.
57. *Id.* at 427.
58. *Id.* at 423. The court found support for the "reasonable likelihood" standard in *In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1984) and *United States v. Tijernia*, 412 F.3d 661, 666–67 (10th Cir. 1969). *See* DIENES, LEVINE AND LIND, *supra* note 1, at 306, 308.
59 218 F.3d at 427. The *Brown* court might have added that it was also rejecting precedent in civil cases that also used the prior restraint doctrine and demanding standards of review. *See* East Baton Rouge Parish School v. Capital City Press, 78 F.3d 920 (5th Cir. 1996); Bailey v. Systems Innovation, Inc., 852 F.2d 93 (3d Cir. 1988). *See also* Sherrill v. Amerada Hess Corp., 504 S.E.2d 802, 808 (N.C. App. Ct. 1998).
60 501 U.S. 1030 (1991).
61. *Id.* at 1074 (opinion of Rehnquist, C.J.); *See id.* at 1081–82 (O'Connor, J., concurring) ("Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech."). *See generally* Erwin Chemernisky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998), for a critical perspective.
62. 218 F.3d at 428.
63. *Id.* at 428–29.
64. *Id.* at 430.
65. *See id.* at 429–30.
66. *Id.* at 431.
67. *Id.*