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**1200 Ontario Street**
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# Court of Appeals

**MOTION Electronically Filed:**
**May 13, 2016 17:00**

By: RAYMOND VASVARI 0055538

Confirmation Nbr. 752120

CHRISTINA CRUZ, ET AL. CA 15 103714

vs.

**Judge:**

ENGLISH NANNY & GOVERNESS SCHOOL INC., ET AL.

**Pages Filed:** 39

IN THE CUYAHOGA COUNTY COURT OF APPEALS
EIGHTH APPELLATE JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

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| Christina Cruz, et al.,<br><br>Plaintiffs-Appellees / Cross Appellants,<br><br>– vs –<br><br>English Nanny & Governess School, et al.,<br><br>Defendants-Appellants / Cross Appellees. | Court of Appeals Case No. 15 103714<br><br>On Appeal from the Court of Common Pleas, Cuyahoga County, Ohio, Common Pleas Case No. CV-11-768767<br><br>Motion for Leave to File Instanter a Brief as Amici Curiae Supporting Plaintiffs-Appellees / Cross Appellants Christina Cruz and Heidi Kaiser Submitted on Behalf of Seven Media and Public Advocacy Organizations and Nine Members of the Ohio Bar. |

The moving parties seek leave to participate in the captioned matter by submitting a brief as amici curiae in support of a position taken by the Plaintiffs-Appellees / Cross-Appellants, Christina Cruz and Heidi Kaiser, in Cross-Assignment of Error III in their Merits Brief.

Cruz and Kaiser consent to the requested amicus brief being filed. The remaining parties to the appeal do not consent, and the putative amici accordingly hereby seek leave to filed their brief pursuant to OHIO R. APP. P. 17.

The issue upon which these putative amici seek leave to file has been addressed by Cruz and Kaiser in their Merit Brief: whether and when an attorney may be sanctioned, outside the framework of the Ohio Rules of Professional Conduct, for extra-judicial statements made to the press during pending litigation. Because this question is one of great public significance, and deals with a concern well within their experience, putative amici seek leave to provide additional briefing to the Court on the history and constitutional implications of restrictions on the pretrial speech of attorneys to the press.

Such supplementation should be beneficial to the Court, because the issue – though of general importance – is but one of several on appeal and may, as a result, suffer from a more abbreviated treatment in the briefs of the parties than its public importance merits.

The interests of each potential amicus, which are also stated in the proposed amicus brief being lodged for filing herewith, are as follows.

**The Ohio Association of Broadcasters** (OAB) is the not-for-profit trade association of radio and television stations in the state of Ohio. Founded in 1937, the OAB serves member stations through advocacy at the federal and state levels, and by providing regulatory compliance and training resources.

**The Ohio Newspaper Association** (ONA) is the not-for-profit trade association of local newspapers and their digital outlets throughout Ohio. Founded in 1933, the ONA engages in government relations and advocacy on First Amendment and business-related issues at the federal and state levels and also operates a legal hotline service for its members. Other activities include conferences, training and professional development programs in support of the newspaper industry and the profession of journalism.

**The Ohio Coalition for Open Government** (OCOG) is a nonprofit corporation whose members include Ohio newspapers, Ohio broadcasters, and other citizens who share a common interest in informing the public about, enforcing, and studying the laws of Ohio that obligate public offices to follow Ohio's "sunshine laws" related primarily to open records and open meetings. The coalition was formed in 1992 by the Ohio Newspapers Foundation, a nonprofit corporation affiliated with the Ohio Newspaper Association.

**ProgressOhio Education, Inc**. is Ohio's largest progressive, state-based 501(c)(3). It strives to promote progressive solutions, correct misinformation, advocate for open and transparent government and help make an Ohio that works for everyone.

**The Association of Alternative Newsmedia** (AAN) is a not-for-profit trade association for approximately 120 alternative newspapers in North America, including weekly papers like *The Village Voice*, *Washington City Paper* and the *Cleveland Scene*. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

**The National Lawyers Guild (Ohio Chapter)** is a civil rights and social justice organization headquartered in Cleveland, Ohio. The Ohio NLG is an affiliated chapter of the National Lawyers Guild, the oldest and most extensive network of public interest and human rights activists working within the American legal system. The Ohio NLG provides pro bono representation to individuals facing criminal charges for First Amendment activities, and engages in civil litigation concerning related civil rights violations.

**The Council on American-Islamic Relations (CAIR-Ohio)** is a community-service organization focused on promoting justice for all Americans while focusing on the needs and rights of the American-Muslim community. CAIR-Ohio is dedicated to protecting religious liberty through professional, transparent, fair-minded, and inclusive means.

**Jennifer L. Branch, Jeffrey Engerman, Gordon Friedman, Alphonse A Gerhardstein, Terry Gilbert, Jacqueline Greene, Jack Landskroner, Robert F. Linton, Jr., and Eric H. Zagrans** are all individual prominent practitioners of law who handle high-profile matters of public interest.

These putative amici, based on the importance of the question at issue, and their ability to provide insight, research and perspective on the constitutional dimensions of that question, respectfully move for leave to file, instanter, the amicus brief being submitted herewith.

Respectfully submitted,

/s/ Raymond V. Vasvari, Jr.

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**– CERTIFICATE OF SERVICE –**

The foregoing ***Motion for Leave to File Instanter a Brief as Amici Curiae Supporting Plaintiffs-Appellees / Cross Appellants Christina Cruz and Heidi Kaiser Submitted on Behalf of Seven Media and Public Advocacy Organizations and Nine Members of the Ohio Bar*** was filed today, May 13, 2016 via the Court Electronic Filing System. Copies will be served upon counsel of record by and may be obtained of that System.

Respectfully submitted,

/s/ Raymond V. Vasvari, Jr.

**RAYMOND V. VASVARI, JR.**
Ohio Bar. No. 0055538

One of the Attorneys for
Putative Amici

Attachment | Amicus Brief Tendered for Filing

**No. CA 15 103714**

**IN THE COURT OF APPEALS FOR OHIO**
**EIGHTH APPELLATE DISTRICT**

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**CHRISTINA CRUZ, ET AL.,**

**Plaintiffs / Appellees / Cross Appellants,**

**– vs–**

**THE ENGLISH NANNY & GOVERNESS SCHOOL, INC., ET AL.,**

**Defendants / Appellants / Cross Appellees.**

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On Appeal from the Court of Common Pleas,
Cuyahoga County, Ohio,
Common Pleas Case No. CV-11-768767

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# BRIEF OF AMICI CURIAE THE OHIO ASSOCIATION OF BROADCASTERS, THE OHIO NEWSPAPER ASSOCIATION, THE OHIO COALITION FOR OPEN GOVERNMENT, PROGRESSOHIO EDUCATION, INC., THE ASSOCIATION OF ALTERNATIVE NEWS MEDIA, THE OHIO CHAPTER OF THE NATIONAL LAWYERS GUILD, CAIR-OHIO, AND NINE MEMBERS OF THE OHIO BAR, ALL SUPPORTING PLAINTIFFS / APPELLEES / CROSS APPELLANTS

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## – STATEMENT OF INTEREST OF AMICI CURIAE –

Amici are organizations representing journalists and the media, advocates for open government, and practicing attorneys, all of whom have a deep professional interest in maintaining the transparency of the judicial process, and providing the public with the information it requires to understanding and assess the functioning of the civil justice system.

**Amicus the Ohio Association of Broadcasters** (OAB) is the not-for-profit trade association of radio and television stations in the state of Ohio. Founded in 1937, the OAB serves member stations through advocacy at the federal and state levels, and by providing regulatory compliance and training resources.

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**Amicus the Ohio Coalition for Open Government** (OCOG) is a nonprofit corporation whose members include Ohio newspapers, Ohio broadcasters, and other citizens who share a common interest in informing the public about, enforcing, and studying the laws of Ohio that obligate public offices to follow Ohio's "sunshine laws" related primarily to open records and open meetings. The coalition was formed in 1992 by the Ohio Newspapers Foundation, a nonprofit corporation affiliated with the Ohio Newspaper Association.

**Amicus ProgressOhio Education, Inc**. is Ohio's largest progressive, state-based 501(c)(3). It strives to promote progressive solutions, correct misinformation, advocate for open and transparent government and help make an Ohio that works for everyone.

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**Amicus the National Lawyers Guild (Ohio Chapter)** is a civil rights and social justice organization headquartered in Cleveland, Ohio. The Ohio NLG is an affiliated chapter of the National Lawyers Guild, the oldest and most extensive network of public interest and human rights activists working within the American legal system. The Guild engages in a broad range of advocacy efforts related to protecting civil rights, and in particular, First Amendment rights, including the National Lawyers Guild Legal Observer® Program, where third-party observers document violations of First and Fourth Amendment rights during demonstrations and protests. The Ohio NLG provides pro bono representation to individuals facing criminal charges for First Amendment activities, and engages in civil litigation concerning related civil rights violations.

**Amicus the Council on American-Islamic Relations (CAIR-Ohio)** is a community-service organization focused on promoting justice for all Americans while focusing on the needs and rights of the American-Muslim community. CAIR-Ohio is dedicated to protecting religious liberty through professional, transparent, fair-minded, and inclusive means.

**Amici Jennifer L. Branch, Jeffrey Engerman, Gordon Friedman, Alphonse A Gerhardstein, Terry Gilbert, Jacqueline Greene, Jack Landskroner, Robert F. Linton, Jr., and Eric H. Zagrans** are all individual prominent practitioners of law who handle high-profile matters of public interest.

## – STATEMENT OF ASSIGNMENT OF ERRORS –

Amici adopt by reference the Assignments of Error presented in the Merit Brief of Plaintiffs-Appellees / Cross-Appellants Christina Cruz and Heidi Kaiser (the "Cruz-Kaiser Brief"). This brief relates to Cross-Assignment of Error III in the Cruz-Kaiser Brief.

## – STATEMENT OF THE ISSUE PRESENTED FOR REVIEW –

Amici write to provide additional briefing on a question that is but one of the matters presented on appeal, but is of great importance to members of the press and the bar:

> Whether, consistent with the First Amendment, a trial court may sanction an attorney for frivolous conduct, based upon his having provided to a member of the press (a) public record and (b) scheduling information about a pending civil case, when providing such information is a form of communication in which lawyers are expressly permitted to engage under the Ohio Rules of Professional Conduct.

## – STATEMENT OF THE CASE –

Amici adopt the statement of the Case adopted in the Cruz-Kaiser brief.

## – STATEMENT OF FACTS –

The facts surrounding the imposition of sanction below are few. Peter Pattakos, counsel for Cruz and Kaiser, was and is a friend of Vincent Grzegorek, then and now the editor-in-chief of *Scene* magazine. *Scene* is a weekly publication that covers news, social events and goings-on in Greater Cleveland. It is published both in print and online.[1]

Cruz and Kaiser, respectively, were a student in and a career placement worker at a school for "English nannies," which the Defendants operate in Chagrin Falls. The Complaint, filed in November 2011, alleged that during a trial placement as a care provider in his home, Cruz witnessed a wealthy Philadelphia businessman sexually molest his young daughter.

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[1]Ruling on Motion for Sanctions, October 6, 2015, at 1-2.

Both Cruz and Kaiser, to whom Cruz had turned for guidance, alleged that the school pressured them to remain silent about the incident, to preserve the reputation of the school, and its graduates, for discretion. When they refused, the school retaliated against both Cruz and Kaiser in various ways. [2] The case was litigated over forty-two months, culminating in a 26 day trial in May and June 2015. A jury awarded Cruz and Kaiser compensatory and punitive damages of $392,750.00. The trial court later reduced the verdict to $194,066.76, and awarded the Plaintiffs attorney fees of $125,5045.45 as well.[3]

During the course of the litigation, Peter Pattakos mentioned the nanny school litigation to Vincent Grzegorek on just a few occasions. Indeed, in imposing sanctions on Pattakos for having done so, the trial court identified just three such communications:

1) a statement by Pattakos, made at some point after the Complaint was filed, that the case might prove interesting to *Scene*;

2) an email exchange, on January 7, 2015, in which Grzegorek said that he missed Pattakos, whom he apparently had not seen in some time, and in which Pattakos replied that he was very busy with preparations for the nanny-school trial, which was set begin soon, and;

3) an email, sent on March 30, 2015, in which Pattakos informed Grzegorek, that opening statements were expected in that case the next afternoon, and implicitly invited him or a *Scene* reporter to attend.[4]

On March 31, 2015, *Scene* published an article regarding the litigation, both in print and online, which accurately characterized the allegations against the school and its principals.

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[2] Complaint, November 8, 2011, at ¶¶ 51–54, 62–66.

[3] *See* Journal Entries dated June 9, 2015 (detailing an award of compensatory damages on various claims against the Defendants on day twenty-three of trial, and in a separate entry, punitive damages on day twenty-six, Ruling for Motion on Sanctions, October 6, 2015, at 7.

[4] Ruling on Motion for Sanctions, at 2, 4–5.

*Scene* repeatedly described the claims against the Defendants, who were not interviewed for the article, as "accusations." It cited material in the record, including an affidavit by a Pennsylvania policeman, which lent credence to the claims of abuse made by Cruz.[5] The trial court acknowledged that Pattakos neither participated in writing the article, nor saw the article before it was published.[6]

It is unclear from the decisions below when and how *Scene* obtained the information upon which the article was based. The trial court (October Ruling, at 12) concluded that Pattakos "had previously supplied to *Scene* all of the information that it ultimately published," and seems to have accepted (*id.*, at 15) his representation that everything he provided to *Scene* was "either in a public record or simply involved scheduling."

The trial court did not find that Pattakos had violated a confidentiality agreement, disclosed materials under seal, or otherwise abused his access to sensitive, non-public information.

Trial began on April 1, 2015, the day after the *Scene* article was published. Defense counsel called the article to the court's attention that day. On April 2, 2015, the court examined the empaneled jury, and learned that three jurors had seen the article. In keeping with their instructions, none of them had read past the headline. The trial then recessed until April 6, 2015, at which point – upon learning that Pattakos had been hospitalized and the timing of his return was uncertain – the court declared a mistrial.[7] A new jury was empaneled and the case was heard in May and June 2015, with the results described above.

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[5] *Id.*

[6] *Id.*, at 6.

[7] Order on Motion for Sanctions, August 20, 2015, at 2.

Between the mistrial and the start of the new trial, the Defendants moved for sanctions, alleging, inter alia, that Pattakos was "responsible" for the *Scene* article, and that its publication on the day that jury selection initially began was his doing.[8]

In August 2015, the court set a hearing on the motion for sanctions. In outlining the evidence to be heard, the court positioned the propriety of sanctions as a question squarely within the framework of Rule 3.6 of the Ohio Code of Professional Responsibility, which – directly and expressly – governs pretrial publicity by attorneys.

> Among the issues will be not only whether the articles and comments posed a "substantial likelihood of materially prejudicing" the trial, the role of Mr. Pattakos in initiating Scene's interest in the present case and how he assisted, if at all, *Scene* in preparing its articles but also whether such actions constitute "an extrajudicial statement" and, if so, they were ones that "the lawyer knows or should know . . . will have a substantial likelihood of prejudicing" the trial as contemplated by Rule 3.6. [9]

This cogent framework, laid out in August 2015, was all but ignored when the trial court sanctioned Mr. Pattakos in October 2015, making its ruling that much more inscrutable.

A sanctions hearing was held in September 2015, and on October 6, 2015, the trial court ruled that Mr. Pattakos could be sanctioned for his role in the publication of the *Scene* article.

The October 2015 Ruling never addressed the pivotal questions that the court itself had framed two months earlier: (a) whether, in having requested that *Scene* cover the trial, Pattakos had engaged in the sort of extra-judicial expression governed by Rule 3.6 in the first instance; (b) whether merely providing public record and scheduling information to *Scene* fell, as Pattakos argued, within the safe-harbor provided by Rule 3.6(b), and; (c) whether publication of the materials provided by Pattakos created a substantial likelihood of materially prejudicing the trial.

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[8] Motion for Sanctions, April 17, 2015, at 4-5.

[9] Ruling on Motion for Sanctions, August 20, 2015, at 4-5.

Instead, the trial court abandoned Rule 3.6 altogether, in one place refusing to decide whether Pattakos had violated that rule, and in another assuming arguendo that he had not.

> Mr. Pattakos argues that all information that he provided to *Scene* was either in a public record or simply involved scheduling. Mr. Pattakos may be correct. For the purposes of this motion for sanctions, the Court accepts his claim.
>
> * * *
>
> While the information communicated to *Scene* by Mr. Pattakos may well have been protected by Rule 3.6 (b), his urging that reporting begin once the jury was selected raised a substantial likelihood that the jury would read about his clients [*sic*] claim.
>
> * * *
>
> In making these observations, the Court passes no judgment on whether Mr. Pattakos has violated Rule 3.6 or any other rule of professional conduct.[10]

Whatever Rule 3.6 might govern – the court reasoned – its scope does not extend to "questions of how and when a lawyer may encourage publication of information protected by Rule 3.6 (b) without violating the prohibition against frivolous conduct contained in R.C. 2323.51."

The trial court inferred the malicious purpose required to impose sanctions under Section 2323.51 from the bare facts that Mr. Pattakos had encouraged *Scene* to cover the case, and that its coverage end up reflecting badly on the Defendants.

> Although Mr. Pattakos did not write the article, he knew that the thrust of any reporting was likely to be to discredit the defendants and that, if believed by members of the public, the reporting would "injure" them. Urging *Scene* to begin coverage constituted initiating harassment.
>
> Although Mr. Pattakos may have hoped that *Scene* would have a reporter at the trial, he knew that *Scene* did not have a reporter in daily attendance at the court house and that it did not publish daily. He should have

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[10] Ruling on Motion for Sanctions, October 6, 2015, at 15-16.

> expected that materials provided by him to *Scene*, rather than the attendance by a reporter at trial, might form the foundation of any article.[11]

The court also faulted Pattakos for having not advised it that he had engaged in discussions with *Scene*, and for failing to "warn the Court of a likely prejudicial publication." The court found his failure to act in this regard frivolous, because "as an officer of the court" Pattakos "was obligated to make reasonable efforts to minimize the likelihood that communications to the media would prejudice a jury." [12]

As we shall see, that is not the law. Indeed, the entire collection of dictionary definitions, ad-hoc standards and one-off rules employed by the trial court to sanction Pattakos had almost nothing to do with the evolved, settled, black letter rules that govern pretrial publicity in Ohio.

The trial court departed significantly from settled law, all-but-making Mr. Pattakos the guarantor of an article he did not write. In the process it erected a vague and ill-defined standard of its own, disregarding both the existence of the established rules governing pretrial contact between lawyers and the media, and the First Amendment requirements that undergird them.

## – LAW & ARGUMENT –

Rule 3.6, which governs pretrial publicity by Ohio lawyers, expressly allows the sort of communications in which Pattakos engaged with Scene.

It does so, as we shall see, because the First Amendment requires as much. Like every rule governing protected expression, Rule 3.6 balances competing interests – here, the interest in free expression and robust media coverage of judicial proceedings, on one hand, and the need to ensure fair trials, unspoiled by prejudicial coverage regarding the litigants, on the other.

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[11] Ruling on Motion for Sanctions, at 12.

[12] Id., at 15.

Rule 3.6 (b) represents a determination, on the part of the Ohio Supreme Court, that certain basic facts – of the sort at issue here – may be freely disseminated to the press without raising the risk of prejudice and a compromised venire. That is a finding of constitutional moment.

The determination that disseminating public record and scheduling information does not, in itself, create a substantial likelihood of material prejudice to a fair adjudication is recited in the official comments to Rule 3.6 (b).

That determination is more than a public-policy statement that the people are better served when the right to engage in certain pretrial communications with the press is firmly secured to lawyers, though, to be sure, it is certainly that as well. Rather, it reflects the conclusion of the Ohio Supreme Court – effectively codifying governing United States Supreme Court precedent – that the state lacks a constitutionally cognizable interest in prohibiting certain communications with the press. Rule 3.6 (b) is a regulatory exception, a necessary concession to the First Amendment, and for that reason, to punish what Rule 3.6 (b) expressly allows is to punish expression which the First Amendment also protects.

That is something that no American court, on the basis of any statute, may lawfully do, but it is also precisely what the trial court did here.

### A. Rule 3.6 Is an Evolved, Clear and Constitutionally Tested Restriction On Pretrial Publicity, Which Balances the Right to Free Expression Against the Need for the Impartial Adjudication of Cases.

The rules governing extrajudicial attorney speech are not arcane. The Ohio Supreme Court adopted Rule 3.6 to address precisely the sort of attorney speech for which Mr. Pattakos was fined. The adoption of that Rule, by Ohio and an overwhelming majority of other states, reflects an evolved constitutional balancing between two rights of the highest order: the right to free expression and the right to a fair trial.

### 1. The Origins of Rule 3.6.

The organized bar first endeavored to regulate the pretrial speech of lawyers more than a century ago. The American Bar Association adopted its (voluntary) Canons of Professional Ethics in 1908. Canon 20 reflected a dim view of lawyers speaking to the press in any event, but even that early attempt at regulation recognized a distinction between record facts and commentary.

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement.[13]

Canon 20 lived a life of benign dormancy, seldom enforced as a standard of conduct during its five decades, and ultimately found inadequate to the task of restricting comments in the press when the question of trial publicity became a matter of general concern in the 1960s.[14]

In 1964, the Warren Commission expressed concern that, had he not been murdered, it might have been impossible to seat a fair jury before which to try Lee Harvey Oswald for the assassination of President Kennedy, one of several developments that lead the ABA to empanel its Advisory Committee on Fair Trial and the Free Press that same year.

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[13] A.B.A. Canons of Prof. Ethics, Canon 20 (1908).

[14] *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 373 (1960) (long disused); Suzanne F. Day, *The Supreme Court's Attack on Attorney's Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1366 (1993)(rendered antiquated by the developments of the 1960s).

In 1966, the Supreme Court granted habeas corpus to Dr. Sam Sheppard, finding that "the inherently prejudicial publicity which saturated the community and . . . disruptive influences in the courtroom" combined to deny him a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). In its opinion the Court urged courts to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.*

In 1964, the ABA also empaneled a Special Committee on the Evaluation of Ethical Standards (the Wright Committee) to revise the Canons of Professional Responsibility. That Committee promulgated the Model Rules of Professional Responsibility in 1969.[15]

Model Rule 7-107 limited attorney contacts with the press during the various phases of a criminal trial. With respect to the sort of expression most akin to what is at issue in this appeal, the Model Rule provided:

> (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
>
> (1) - Information contained in a public record
>
> * * *
>
> (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.[16]

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[15] Day, 43 CASE W. RES. L. REV. at 1366 and n.76.

[16] A.B.A. MODEL RULES OF PROF. RESP., DR 7-107 (1969) (viewed online at americanbar.org, last visited May 11, 2016).

In response to the Supreme Court's call for judicial action, the Judicial Conference of the United States also issued a comprehensive set of findings and recommendations regarding pretrial publicity in 1969. Its report detailed what the Committee considered acceptable, and non-prejudicial media contact at the various stages of a criminal proceeding.

Like the Wright Committee, the Commission recommended retaining one aspect of old Canon 20, when it recommended that:

> During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.[17]

From the time DR 7-107 was first promulgated, courts struggled to identify what level of threat to a fair adjudication justified limiting the pre-trial speech of lawyers. The Seventh Circuit found that nothing less than a "serious and imminent threat" to fair trial would suffice.

The Fourth and Tenth Circuits, and a number of state supreme courts, held that the First Amendment required only a "reasonable likelihood" of prejudice.[18]

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[17] Report of the Committee on the Operation of the Jury System on the "Free Press – Fair Trial" Issue, 45 F.R.D. 391, 404 (1969). The Committee issued a Revised Report in 1980, during the period in which the A.B.A. was engaged in overhauling the Model Code, and in the process drafting what would become Rule 3.6. The Revised Report modified the quoted recommendation to prohibit extrajudicial statements "a reasonable person would expect to be disseminated by means of public communication," but preserved intact the exception for public records. Revised Report of the Committee on the Operation of the Jury System on the "Free Press – Fair Trial" Issue, 87 F.R.D. 518, 526 (1980).

[18] Compare *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975) and *Chase v. Robson*, 435 F.2d 1059, 1061-62 (7th Cir. 1970), with *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969), *cert denied*, 369 U.S. 990 (1969), and *Hirshkop v. Snead*, 594 F.2d 356, 370 (4th Cir. 1979). *See generally*, Day, 43 CASE W. RES. L. REV. at n.83-89 and accompanying text.

Against this backdrop of divided judicial authority, the A.B.A. convened the Kutak Commission in 1977 to draft a replacement for the Model Code, and by extension, DR 7-107. The Commission issued a final draft of Rule 3.6 in 1983. The new Rule steered a middle course between imminent threats and reasonable likelihoods, providing that:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. [19]

Significantly, from its inception, the Model Rule provided a safe harbor for lawyers who confined their communications to the press to objective statements taken from the public record, and brief explanations of a given claim or defense.

> (c) Notwithstanding the foregoing paragraph (a) and (b) (1–5), a lawyer involved in the investigation or litigation of a matter may state without elaboration.
>
> (1) the general nature of the claim or defense;
>
> (2) the information contained in a public record;
>
> * * *
>
> (4) the scheduling or result of any step in litigation . . . [20]

**2. Rule 3.6 and <u>Gentile</u>**

By 1991, 32 states had adopted Rule 3.6 directly, or a substantially similar rule that permitted restrictions on pretrial expression only in the face of a "substantial likelihood of material prejudice" to a fair adjudication.

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[19] Model Rule 3.6, as contained in Report 401 to the A.B.A. House of Delegates, 1983, obtained online at americanbar.org, last viewed May 12, 2016.

[20] *Id.*

Eleven other states (including Ohio) retained DR 7-107, which required only a "reasonable likelihood of prejudice" in order to do so. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1068, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991) (Rehnquist, C.J., announcing the Court's decision regarding Parts I and II of the opinion).

In *Gentile*, a sharply divided Court both (a) resolved the question of how great a risk of pretrial prejudice was necessary, as a First Amendment matter, to justify restricting extrajudicial speech, and (b) emphasized that, no less than other restrictions on protected expression, rules limiting pretrial publicity must be crafted with clarity and cannot be vague.

Shortly after his client was indicted for stealing cash and drugs, criminal-defense lawyer Dominic Gentile held a press conference in which he outlined his client's defense, took a number of questions from the media, and declined to answer several others because, he explained, ethical rules prevented him from elaborating. *Gentile*, 501 U.S. at 1041-42 (Kennedy, J., announcing Part III of the decision).

Gentile was sanctioned under Nevada Supreme Court Rule 177(2), governing pretrial publicity, which prohibited attorneys from making:

> an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

*Gentile*, 501 U.S. at 1033 (Kennedy, J., quoting Nev. S. Ct. R. 177(2)).

Despite this prohibition, Rule 177(3) listed topics that an attorney could discuss regarding a pending case "notwithstanding" the prohibitions contained elsewhere in the rule.

Those topics included the same safe-harbor provisions contained in Model Rule 3.6 (c). *Gentile*, 501 U.S. at 1061-62 (Appendix B to the Opinion of Justice Kennedy).

During disciplinary proceedings, Gentile argued that the remarks he made during his press conference were protected by the safe-harbor provisions of Rule 177(3)(a), as general statements regarding his intended defense. The Nevada Supreme Court held, without elaboration, that Rule 177(3) did not provide Gentile with a safe harbor. *Id.*, at 1050 (Kennedy, J.).

On *certiorari*, Gentile challenged Rule 177 as both facially overbroad (because it allowed discipline for attorney speech absent a clear and present danger of actual or imminent prejudice) and as void for vagueness (in that, as interpreted by the Nevada Supreme Court, Rule 177(3) provided inadequate guidance to lawyers seeking to conform their conduct to the Rule).

Chief Justice Rehnquist, writing for a plurality of four justices and joined by Justice O'Connor, traced the evolution of Rule 3.6 from the turmoil following *Shepherd*. The Chief Justice concluded that Rule 3.6 was never intended to require a "clear and present danger" of "actual prejudice or an imminent threat" to a fair trial before an attorney could be sanctioned for pretrial expression, and that the First Amendment was satisfied by the "substantial likelihood test" embodied in Rule 177 and, by extension, Rule 3.6. *Gentile*, 501 U.S. at 1069, 1075 (Rehnquist, C.J., announcing Parts I and II of the holding).

> The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, 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.
>
> * * *
>
> While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

*Gentile*, 501 U.S. 1075-76 (Rehnquist, C.J.).

While not overbroad, Rule 177 was still unconstitutionally vague.

The plain text of Rule 177(3) permitted attorneys to make certain statements to the press, ostensibly without fear of discipline. The Nevada Supreme Court none-the-less interpreted the rule as providing no safe harbor to Gentile, despite his conspicuous efforts to limit his remarks to what Rule 177(3) allowed. Thus construed, Rule 177 was void for vagueness.

> A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.
>
> * * *
>
> The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary.

*Gentile*, 501 U.S. at 1051 (Kennedy, J., announcing Part III of the holding). By construing Section 177(a)(3) into obscurity, the Nevada Supreme Court had rendered the whole of Rule 177 inscrutable, and thus unconstitutionally vague.

*Gentile* teaches two lessons that apply to this case: (a) the extrajudicial speech of lawyers may be proscribed only narrowly, and then only to prevent a substantial likelihood of material prejudice to an adjudicative proceeding, and (b) even then, vague restrictions on attorney expression are no more permissible than vague restrictions on other, protected expression.

### B. In Adopting Rule 3.6, Ohio Continued an Unbroken Tradition of Exempting from Disciplinary Regulation Attorney Speech That Merely Reports Public Record and Similar Information, Because Such Expression Poses No Constitutionally Cognizable Threat to the Fair Administration of Justice

Ohio adopted Rule 3.6 in 2007, long after most states, and long after *Gentile* clarified the minimum First Amendment standards applicable to rules limiting pretrial publicity. It provides:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:
>
> (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) information contained in a public record;
>
> * * *
>
> (4) the scheduling or result of any step in litigation . . . [21]

OHIO R. PROF. COND. 3.6 (West 2016).

In the 99 years between the adoption, by the A.B.A., of Canon 20, and the adoption, in Ohio, of Rule 3.6, one thing has remained constant. The authorities, committees and commissions charged with regulating pretrial publicity have consistently recognized that, when a lawyer provides the press with (a) information already in the public record, (b) information about scheduling, or later, (c) a brief statement regarding a claim or defense, he engages in a sort of expression materially different from remarks that risk compromising a fair adjudication.

In short, the organized bar has never, in 110 years of regulation, prohibited lawyers from communicating to the press the sort of information Pattakos communicated to *Scene*.

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[21] Rule 1.6 governs confidential information, and is not implicated in this case.

Whatever one might think is the proper balance between the needs of a free press and the need for a fair trial, it is paramount to remember that, at least with respect to certain statements to the press, **that balance has already been struck.** The Ohio Supreme Court, in its Official Comment to Rule 3.6, left no doubt that its rulemaking was intended

> to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved.
>
> * * *
>
> On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

OHIO S. CT. R. PROF. COND. 3.6, Comment 1.

In enacting the safe-harbor provisions of Rule 3.6 (b), the Ohio Supreme Court reached its own reasoned conclusion regarding speech afforded absolute protection from the sanctions otherwise applicable under that Rule.

> Division (b) identifies specific matters about which a lawyer's statements **would not ordinarily be considered to present a substantial likelihood of material prejudice**, and should not **in any event** be considered prohibited by the general prohibition of division (a). Division (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to division (a).

OHIO S. CT. R. PROF. COND. 3.6, Comment 4 (emphases added).

The constitutional risk-benefit analysis applicable to restrictions on attorney speech has already been struck. The Ohio Supreme Court has concluded that statements referring to information in the public record, and regarding scheduling, do not pose a threat to fair adjudication.

In this sense, Rule 3.6 (b) represents more than a safe harbor from disciplinary authorities. It represents a recognition, by the highest court in the state, that the First Amendment limits the outer bounds of what may be proscribed in the name of a fair trial, and that the statements listed in Rule 3.6 (b) can neither be punished nor proscribed, consistent with the First Amendment, because there exists no legitimate reason for doing so.

Speech that abides Rule 3.6 (b) by definition falls within First Amendment's protective ambit, and cannot be punished as an ethical violation, frivolous conduct, or otherwise.

### C. The Trial Court's Erroneous Use of Section 2323.51 to Punish Pretrial Expression Was Also Unconstitutionally Vague, and if Permitted to Stand Would Substantially Chill Attorneys in their Contact with the Media, to the Detriment of the Public and the Press.

Unlike Rule 3.6, Section 2323.51 does not clearly delineate permissible attorney speech. In fact, it has nothing to say about attorney speech at all. Rather it provides for the imposition of sanctions in all cases, on a case-by-case basis for sanctions, and is laid out broadly, so as to capture a vast swath of potential litigation misconduct, as is evident in its central definition, under which the trial court found the actions of Mr. Pattakos frivolous.

> (a) Conduct of an inmate or other party to a civil action . . . that satisfies **any** of the following:
>
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another **improper** purpose, including, **but not limited to**, causing unnecessary delay or a needless increase in the cost of litigation.

OHIO REV. CODE ANN. § 2323.51(a)(1) (West 2016) (emphases added).

Add to this expansive language the fact that what constitutes frivolous conduct is left to the sound discretion of the trial court, *Early v. Toledo Blade Co.*, Sixth Dist. Lucas No. L-11-1002, 2013-Ohio-404, ¶ 19, and one has not only a powerful tool for dealing with the numerous unpredictable scenarios in which litigation misconduct might occur, but also sprawling and constitutionally impermissible mechanism for restricting protected expression.

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement . . . history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

*Gentile*, 501 U.S. at 1051 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58, 361, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Smith v. Goguen*, 415 U.S. 566, 572–73, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)). This warning is squarely in line with decades of well-established First Amendment law.

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

*Greyned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (footnotes and citations omitted). Vague laws that limit speech run added risks:

> where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."

*Grayned*, 408 U.S. at 108-09 (quoting, seriatim: *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); *Cramp v. Board of Public Instruction*, 368 U.S.278, 287, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961), and *Baggett*, 377 U.S. at 372 (collecting cases, internal citations omitted here)). Vagueness in restrictions on expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (citing *Gentile*, 501 U.S. 1048-51).

Here, of course, what risks being chilled is attorney speech to the press.

The right of the press to provide the public with insight into pending litigation is the very interest that must be weighed in assessing restrictions on pretrial publicity. The press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism," *Gentile*, 501 U.S. at 1035 (quoting *Sheppard* 384 U.S. at 350). Likewise, the press safeguards the virtues inherent in a public trial by ensuring that judicial processes are not only subject to critique, but are transparent in the first instance. *Gentile*, 501 U.S. at 1035 (quoting *In re Oliver*, 333 U.S. 257, 270, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (invalidating the contempt conviction, behind closed doors, of a witness summoned before a one man grand jury, and teaching that, as to judicial oversight, "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.").

> "The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself."

*Estes v. State of Texas*, 381 U.S. 532, 542, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (quoting 2 Cooley's Constitutional Limitations 931-32 (Carrington ed. 1927)).

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries.

*Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

In performing its function, the press cannot act alone. The law is complex, and lawyers are uniquely poised to provide insight into what can be, to the public at large, a confusing process. "Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases." *Gentile*, 501 U.S. at 1056 (Kennedy, J.).

> Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion. Often their clients will not be as articulate or informed. And despite our primary focus on prejudicial statements, we must keep in mind that there are important areas of public concern connected with current litigation. We can note that lawyers involved in investigations or trials often are in a position to act as a check on government by exposing abuses or urging action.

*Bauer*, 522 F.2d at 250.

> The common public perception is that attorney speech about pending cases serves little, if any, useful purpose and that it likely is just a reflection of the lawyer's desire to use the case for personal fame and profit.
>
> * * *
>
> I disagree and contend that there are times that effective representation of a client requires statements to the press.
>
> * * *
>
> Such media publicity can be averse to one side or the other and may include false, damaging information. Unless the adverse speech can be answered, there is danger of the public having a false and unfair

> impression. In such circumstances, attorneys can and should speak out on behalf of their clients.[22]

The trial court itself recognized that media coverage served an important public interest in this case – informing the public about the dangers of and the need to report child abuse, but discounted the degree to which the *Scene* article served that purpose, which it found would have been better served by deferring publication until the Plaintiffs had won. [23]

The less certain lawyers are as to what sorts of communication with the press are permissible, the more likely they are to avoid communications altogether. The result would be a public less informed about the workings of the judiciary and the resolution of disputes.

The trial court abandoned the clear and objective standards of Rule 3.6 (b) for the entirely subjective framework of Section 2323.51. That alone created considerable uncertainty as to what is permitted and what is forbidden. Worse, the trial court did so in a manner that seems to have assumed loosely defined standards – about which Mr. Pattakos had no reason to know, but to which he was expected to conform none-the-less. This is the very soul of vagueness.

Mr. Pattakos was faulted for (a) not informing the court, in advance, of his conversations with *Scene*, nor reporting the article had been published; (b) supplying to *Scene* all the information it eventually published; (c) doing so despite knowing *Scene* published weekly, and might not have a reporter at trial; (d) urging coverage of the nanny-school trial, having previously discouraged coverage, and; (e) soliciting coverage after trial began, knowing that such coverage would not help to achieve a fair resolution of the case.[24]

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[22] Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment,* 47 Emory L.J. 859, 867-69 (1998).

[23] Ruling in Motion for Sanctions, October 6, 2015, at 13-14.

[24] Id. at 6, 15 (not reporting the article to the court); 12 (all the information, aware of the possibility there might be no reporter at trial); 13 (urging coverage); 14 (soliciting coverage).

These considerations are alien to what Rule 3.6, and the First Amendment after *Gentile*, require, and Mr. Pattakos – who learned of them only after the fact – had every right to regard them with complete surprise.

If these are the building blocks of frivolous conduct, no prudent lawyer will ever talk to the press. The law does not require, for example, that a lawyer initiate media contact only to facilitate fair adjudication, but rather requires that he refrain from doing so in a manner that creates a substantial likelihood of material prejudice. Prof.Cond.R. 3.6 (a).

Must a lawyer determine, in advance of providing a newspaper with public record information, how the paper intends to staff coverage of the case in question? Must a lawyer ask, in advance, what other sources a magazine has, and what other materials it has access to, to ensure balanced coverage before revealing when opening statements are set to begin? Must she receive assurances that a television station will not be unduly critical of her adversaries, despite the record evidence of their misconduct? Should she insist on the ability to review, in advance, a publication based in part on information she provided to the press? To suggest a lawyer is obligated to do any of these things would be absurd, and yet, in faulting Mr. Pattakos for not doing as much, the trial court suggested exactly that.

### D. The Decision of the Trial Court Cannot Be Supported by the Suggestion that Mr. Pattakos Solicited Defamation by Scene.

The Rules of Professional Conduct provide the only basis, under Ohio law, for sanctioning the speech of lawyers, and those rules were adopted in deference to the First Amendment.

> Ohio law imposes no blanket prohibition on an attorney's communications to the media. Attorneys and their clients retain a panoply of First Amendment rights and are free to speak to the public about their claims and defenses provided that they do not exceed the contours of protected speech and ethical rules that impose reasonable and necessary limitations on attorneys' extrajudicial statements.

*Am. Chem. Soc. v. Leadscope, Inc.,* 133 Ohio St. 3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 90.

The categories of speech that fall outside the First Amendment are few, and well defined. A classic taxonomy would include defamation, obscenity, fighting words, incitement to imminent lawlessness, and speech itself integral to the furtherance of a criminal act. *United States v. Stevens*, 559 U.S. 460, 469, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (collecting cases, citations omitted).

The trial court – without any supporting analysis – broadly characterized Pattakos discussions with *Scene* as intended to harass the Defendants, and characterized the *Scene* article itself as something he had urged in an effort to defame them. The trial court concluded:

> Mr. Pattakos's involvement in publication of the *Scene* article was a malicious attempt to injure and was intended to "harass" each of the defendants. Mr. Pattakos had a purpose to defame defendants when he instructed Mr. Grzegorek on January 20 "*Get your reporting pants on. Or at least tell one of your reporters to get his reporting pants on*" and on March 30, 2015 notifying *Scene* that the trial was about to begin. He had abandoned hope of settlement. [25]

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[25] Ruling on Motion for Sanctions, October 6, 2015, at 12.

It bears emphasis here that the trial court never found that Pattakos himself had defamed the Defendants, and absent such a finding, could not, by extension, find that his speech was outside the First Amendment's protective ambit, and thus subject to punishment other than through the operation of an ethical rule.

The conclusion that Pattakos had "a purpose to defame" rests at some slippery distance from a finding of defamation itself. And yet defamation itself is what the First Amendment does not protect. To impinge upon First Amendment freedoms with such approximation will not do, for it has long been settled that

> Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

*Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (collecting cases, citations omitted).

Of course, the trial court could not directly conclude that Pattakos himself had defamed the Defendants through the *Scene* article: such a finding would be legally and factually unsupportable. Mr. Pattakos is nowhere quoted in the article, and cannot be held liable for the republication, by Scene, of his remarks. In this important sense, his case is unlike *Gentile* and (we suspect) the bulk of cases involving pre-trial publicity, in which a lawyer faces discipline for provocative or intemperate statements made to, and spread by, the media, where the risk of an impartial adjudication can be attributed to the content of the lawyer's own remarks.

As a matter of Ohio law, accurately reporting on the contents of a document filed in an ongoing judicial proceeding is privileged, and cannot form the basis for defamation liability.

> The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, unless it is

> proved that the same was published maliciously, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action.

OHIO REV. CODE §2317.05 (West 2016).

For purposes of establishing privilege, a report of material contained in a public record need only to deal with a matter of public concern, and represent a substantially accurate account of the information contained in governmental records. *Sullins v. Raycom Media, Inc.,* 2013-Ohio-3530, 996 N.E.2d 553, 563, ¶ 24 (8th Dist.).

The trial court nowhere finds, nor even suggests, that *Scene* failed to convey the essence of the records in question, or that Mr. Pattakos urged that the magazine do so.

The trial court found had a malicious intent in speaking with the press. But the actual malice needed to vitiate a First Amendment privilege is not found in ill-will or spite. Actual malice is a term of art, with its origins in *New York Times v. Sullivan*, 376 U.S. 354,84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Thus

> Where a defamatory statement falls within the scope of the statutory fair report privilege or common-law qualified privilege, the statement is not actionable unless the plaintiff establishes that the statement was published with actual malice, i.e., with knowledge of its falsity or with reckless disregard of whether it was false or not, to overcome the privilege.

*Sullins*, *supra*, 996 N.E.2d at ¶ 20. The trial court made never found that Mr. Pattakos, or *Scene*, harbored subjective doubts about the veracity of the information that passed between them. That makes a finding of defamation impossible, as a matter of law.

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## – CONCLUSION –

The trial court employed a standard of its own creation to judge the media contact at issue in this case, clothed its ad-hoc rules in the expansive language of Section 2323.51, and turned its back on back letter rules developed over a century that govern precisely the conduct in question here. It rendered the simple complex, the settled uncertain, and the precise impermissibly vague, doing violence in the process to the First Amendment rights of Peter Pattakos, and the public interest served by a vigilant press.

Were the trial court's decision to stand, lawyers would be chilled from providing even public-record information to the public and interested media. And that chilling effect on lawyers would deprive journalists and the public of vital information concerning matters of the functioning of courts that in no way could prejudice proceedings (such as trial dates). The First Amendment rights of amici curiae and others like them would all be decimated by such an unprecedented affirmance. The trial court's decision imposing sanctions should be reversed.

Respectfully submitted,

/s/ Raymond V. Vasvari, Jr.

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## – CERTIFICATE OF SERVICE –

The foregoing was filed today, Friday, May 13, 2016, as an attachment to a Motion for Leave to file the same instanter, via the Court Electronic Filing System. Copies will be served upon counsel of record by and may be obtained through the operation of that System.

Respectfully submitted,

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