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Judicial Restrictions on Attorneys' Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech

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I. INTRODUCTION

The fair trial-free expression controversy has been characterized as an irreconcilable conflict[1] between two of our most fundamental civil liberties—the first amendment right of freedom of speech and of the press[2] and the sixth amendment guarantee of a fair trial by an impartial jury.[3] New life was injected into this long-standing debate[4] by the Warren Commission's finding that "Lee Harvey Oswald's opportunity for a trial by 12 jurors free of preconception as to his guilt or innocence would have been seriously jeopardized by the premature disclosure and weighing of the evidence against him."[5] The Report was highly critical of the publicity surrounding Oswald's arrest and stressed the "need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial."[6] The concern over this issue was heightened in 1966 when the Supreme Court granted Dr. Sam Sheppard's petition for habeas corpus, holding that the prejudicial publicity surrounding his murder trial made an impartial verdict impossible.[7] The Court chastised the trial court for allowing a "carnival" atmosphere to prevail[8] and suggested that certain rules and regulations be developed by the

1. Mares v. United States, 383 F.2d 805, 808 (10th Cir. 1967).

2. "Congress shall make no law . . . abridging the freedom of speech or of the press." U.S. CONST. amend. I.

3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI.

4. A. HOWARD & S. NEWMAN, FAIR TRIAL AND FREE EXPRESSION: A BACKGROUND REPORT, SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 94th Cong., 2d Sess. 1 (Comm. Print 1976) [hereinafter cited as HOWARD REPORT]. *See* Judicial Conference of the United States Comm. on the Operation of the Jury System, *Report of the Comm. on the Operation of the Jury System on the "Free Press—Fair Trial" Issue,* 45 F.R.D. 391, 394 n.2, 395 (1969), which notes the charge of prejudicial publicity in such well-known historical cases as the trial of Aaron Burr in 1807, the Lizzie Borden case in 1893, and the trial of Sacco and Vanzetti.

5. THE PRESIDENT'S COMM'N ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY; REPORT OF THE PRESIDENT'S COMM'N ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 239 (1964).

6. *Id.* at 19.

7. Sheppard v. Maxwell, 384 U.S. 333 (1966). The Court noted that during the entire pretrial period the virulent and incriminating publicity made the case notorious. The news media frequently aired charges besides those for which Sheppard was tried and alluded to evidence that was never introduced in court.

8. *Id.* at 358.

courts to protect the integrity of the judicial process.[9]

The combined impact of the Warren Commission Report and the *Sheppard* mandate led to a number of studies by professional groups convened to analyze and make recommendations concerning the free expression-fair trial conflict.[10] Although the recommendations resulting from these studies differed in some respects,[11] it was generally agreed that restrictions on attorneys' extrajudicial commentary concerning pending litigation were an appropriate means of protecting the right to a fair trial.[12] The standards promulgated by the American Bar Association (ABA) for restricting attorneys' extrajudicial commentary were adopted verbatim by the Judicial Conference on the Operation of the Jury System. The majority of the federal courts have reacted by adopting these standards as rules of court.[13]

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9. *Id.* at 363.

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairuess of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Id.

10. *See* ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft 1968) [hereinafter cited as REARDON REPORT]; ASSOCIATION OF THE BAR OF CITY OF NEW YORK, SPECIAL COMM. ON RADIO, TELEVISION, & THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL FINAL REPORT WITH RECOMMENDATIONS (1967) [hereinafter cited as MEDINA REPORT]; Judicial Conference of the United States Comm. on the Operation of the Jury System, *Report of the Comm. on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391 (1969).

11. The Medina Report differed from the Reardon Report in its extenson of the use of restrictions on attorney comments to civil as well as criminal proceedings and its failure to make any distinction regarding the severity of restrictions that would be appropriate at different stages of a criminal proceeding (investigative stage, trial, sentencing). MEDINA REPORT, *supra* note 10, at 25-26.

12. *See* note 10 *supra*. The studies also recommend more liberal use of "traditional techniques"—change of venue, voir dire, sequestration of the jury, granting of continuance—to minimize the effect of prejudicial publicity. *See, e.g.*, REARDON REPORT, *supra* note 10, at 112-49.

13. Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55, 56 (1976). This article reported that 80 out of 94 federal district courts had adopted standing orders based on the ABA standard in 1975. The ABA standard states in pertinent part:

> It is recommended that the Canons of Professional Ethics be revised to contain the following standards relating to public discussion of pending or imminent criminal litigation:
>
> It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.
>
> With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial

statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the defendant, except that the lawyer may make a factual statement of the defendant's name, age, residence, occupation, and family status, and if the defendant has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the defendant, or the refusal or failure of the defendant to make any statement;

(3) The performance of any examinations or tests or the defendant's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) The defendant's guilt or innocence or other matters relating to the merits of the case or the evidence in the case, except that the lawyer may announce the circumstances of arrest, including time and place of arrest, resistance, pursuit, and use of weapons; may announce the identity of the investigating and arresting officer or agency and the length of the investigation; may make an announcement, at the time of the seizure, describing any evidence seized; may disclose the nature, substance, or text of the charge, including a brief description of the offense charged; may quote from or refer without comment to public records of the court in the case; may announce the scheduling or result of any stage in the judicial process; may request assistance in obtaining evidence; and, on hehalf of his client, may announce without further comment that the client denies the charges made against him.

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.

After the completion of a trial or disposition without trial of any criminal matter, and while the matter is still pending in any court, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect judgment or sentence or otherwise prejudice the due administration of justice.

Nothing in this Canon is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

REARDON REPORT, *supra* note 10, at 2.

Although the courts and legal commentators have uniformly recognized the need to restrict extrajudicial commentary by attorneys when necessary to protect the right to a fair trial, there has been little agreement on the appropriate standard for determining when the threat of prejudice warrants the imposition of these restrictions on attorneys' free speech rights. This uncertainty is further complicated by the consideration of whether one standard can be articulated that is equally appropriate in jury and bench trials, in criminal and civil cases, for defense and prosecuting attorneys, and for the issuance of contempt citations and in due process disciplinary proceedings.

The constitutionality of restraints on attorneys' speech has been considered by only two federal circuit courts: the Seventh Circuit, in *Chicago Council of Lawyers v. Bauer,*[14] and, more recently, the Fourth Circuit, in *Hirschkop v. Snead.*[15] Relying on many of the same precedents, the circuits nevertheless developed seemingly contrary standards. This Recent Development compares the analyses of these recent cases and suggests an appropriate standard for the accommodation of the conflicting rights of free speech and a fair trial.

II. JUDICIAL STANDARDS

A. *The Substantial Government Interest—Least Restrictive Means Test:* Procunier v. Martinez

Recently in *Procunier v. Martinez*[16] the Supreme Court rearticulated[17] the appropriate test for determining when a restriction unconstitutionally infringes upon speech. Invalidating regulations that permitted censorship of prisoner mail,[18] the Court held that a government restriction on speech is permissible only if, first, the restriction furthers a substantial governmental interest unrelated to the suppression of speech and, second, the restriction is no greater than essential for the protection of the particular governmental in-

14. 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* 427 U.S. 912 (1976).

15. 594 F.2d 356 (4th Cir. 1979).

16. 416 U.S. 396 (1974).

17. *See* Shelton v. Tucker, 364 U.S. 479 (1960), holding that,

> [E]ven though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Id. at 488.

18. The challenged mail censorship regulations, *inter alia,* proscribed inmate correspondence that "unduly complain[ed], magnif[ied] grievances, express[ed] inflammatory political, racial, religious or other views or beliefs," or contained matter deemed "defamatory" or "otherwise inappropriate." 416 U.S. at 398-400.

terest.[19] For example, the inquiry here would be first, whether the restriction furthers the government's interest in guaranteeing the individual's right to a fair trial[20] and second, whether the impairment of the attorney's speech is the least restrictive means of protecting that interest.

When considering the constitutionality of court rules proscribing extrajudicial commentary by attorneys concerning pending litigation, the Fourth Circuit in *Hirschkop* and the Seventh Circuit in *Chicago Council of Lawyers* relied on the *Martinez* test to establish the contours of their constitutional analysis. The courts agreed that the first part of the *Martinez* test was easily met: the state had a legitimate and substantial interest in assuring every person the right to a fair trial, "a right which the Supreme Court has described as 'the most fundamental of all freedoms.' "[21] The circuits conflicted, however, in enunciating standards that would ensure that the restriction is no greater than necessary to protect the governmental interest.

B. The Clear and Present Danger Test

1. Legal Background

One way that courts have analyzed the second *Martinez* requirement is by asking whether the speech is *protected* by the first amendment. Because protected speech is that speech which may not be *restricted,* the question whether speech is protected is simply the converse of whether the restriction is permissible. Thus, the applicable standard is the same regardless of how the question is framed.

In *Schenck v. United States*[22] the Supreme Court held that the first amendment did not protect a publication opposing military conscription because the publication created a clear and present danger that it would bring about an evil that Congress had a right to prevent, specifically, a threat to the national security.[23] The standard was subsequently restated to require a showing of a "serious and imminent" danger that a serious evil will result.[24] Although a

19. *Id.* at 413.

20. It is important to note that the government's interest must be defined specifically because the means necessary to protect such interests will vary from interest to interest. For example, the means necessary to protect the government's interest in guaranteeing a fair *jury* trial may be different than those necessary to guarantee a fair *bench* trial.

21. 594 F.2d at 363 (citing Estes v. Texas, 381 U.S. 532, 540 (1965)); 522 F.2d at 248 (citing Estes v. Texas, 381 U.S. 532, 540 (1965)).

22. 249 U.S. 47 (1919).

23. *Id.* at 52.

24. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

number of courts have preferred this standard, it is substantively indistinguishable from clear and present danger.[25]

The serious and imminent danger standard has been applied frequently in the context of regulation of commentary regarding pending judicial proceedings[26] and by a few courts that have considered the constitutionality of restrictions on attorneys' speech.[27] The cases most frequently cited as support for this standard are a quartet of decisions in which the Supreme Court overturned contempt citations, holding that the contempt power could be used to restrict free expresson outside the courtroom only if it could be shown that the expression was a clear and present danger to the conduct of a fair trial.[28] Although the analysis of the first amendment issues in the contempt cases is frequently applied to the question of the constitutionality of restrictions on attorneys' speech, it is essential to note the following factual distinctions: first, the alleged contemner in each of these cases was a private citizen or a member of the press rather than an attorney participating in ongoing litigation; second, the decisions concerned the permissible scope of the contempt power, not a rule of court providing for a due process hearing for alleged violations; third, the cases involved remarks directed toward a judge or a grand jury—none involved a jury trial; and last, the contempt convictions were based on *published* articles or editorials that the trial court found might prejudice pending litigation.[29] Various courts have relied on these distinctions as support for their rejection of the severe and imminent threat standard and adoption of the less restrictive reasonable likelihood test,[30] a position that is

25. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 3 (1978). The ABA points out that the "serious and imminent threat" was used in Bridges v. California, 314 U.S. 252 (1941), to articulate the "working principle" on which the clear and present danger was based. It is part of the "judicial gloss on the clear and present danger test and is not distinct from it." ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS at 3-4.

26. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-63 (1976); Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

27. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975), *cert. denied sub nom.* 427 U.S. 912 (1976); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970); United States v. Marcano Garcia, 456 F. Supp. 1354 (D.P.R. 1978); Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 801-02, 76 Cal. Rptr. 168, 171 (1969). For a criticism of the severe and imminent danger standard, see Cole & Spak, *Defense Counsel and the First Amendment: "A Time to Keep Silence, and a Time to Speak,"* 6 ST. MARY'S L.J. 347, 352-58 (1974).

28. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

29. *See* HOWARD REPORT, *supra* note 4, at 5; Comment, 51 CHI.-KENT L. REV. 597 (1975).

30. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* 427 U.S. 912 (1976); United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).

supported by the limitations the Court placed on its holding in *Wood v. Georgia.*[31] Overturning the contempt conviction of a sheriff who issued a press statement criticizing a judge's charge to a grand jury because there was no showing of a clear and present danger to the administration of justice, the Court emphasized the investigative nature of the grand jury proceeding and noted that no individual was on trial.[32] The Court stated that the "limitations on free speech assume a different proportion when expression is directed toward a trial,"[33] but declined to "consider the variant factors that would be present in a case involving a *petit jury.*"[34]

Although the continued viability of the severe and imminent threat standard has been questioned,[35] its validity in the context of publication cases was recently reaffirmed by the Supreme Court in *Landmark Communications, Inc. v. Virginia.*[36] Reversing a ruling of the Virginia Supreme Court, the Court held that the publication of truthful information regarding confidential proceedings of a commission established to hear complaints about judges' disability or misconduct did not constitute a clear and present danger to the administration of justice. The publication was protected by the first amendment and thus was not subject to criminal sanctions. The Court stressed, however, that it was not deciding the constitutionality of a State's requirement that the proceedings be confidential or its right to punish a participant who breaches that confidentiality.[37]

A similar result was reached in *Nebraska Press Association v. Stuart,*[38] in which the Supreme Court strenuously disapproved prior restraints on the press. The Court, holding that a restraint on the press in a pending multiple murder trial was an unconstitutional infringement of first amendment rights, noted that in the overwhelming majority of criminal trials pretrial publicity presents a few unmanageable threats to the right to a free trial.[39] Although

31. 370 U.S. 375 (1962).

32. *Id.* at 389.

33. *Id.* at 390.

34. *Id.* at 389.

35. Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond,* 1969 SUP. CT. REV. 41, 52-55. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 608-17 (1978).

36. 435 U.S. 829 (1978).

37. *Id.* at 837.

38. 427 U.S. 539 (1976). *See* Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys:* Ratio Decidendi v. Obiter Dictum, 29 STAN. L. REV. 607 (1977).

39. 427 U.S. at 553. The Court noted tbat the cases which have resulted in reversals of conviction on these grounds are relatively rare. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966);

recognizing that pervasive, adverse publicity does not necessarily result in an unfair trial, the Court indicated in dictum that to the extent such publicity is influenced by what attorneys, police, and other officials do to precipitate news coverage the "strong measures" outlined in *Sheppard v. Maxwell*[40] are means by which a trial judge can avoid the resulting costs to society or the accused.[41]

2. Restraints on Attorneys—*Chicago Council of Lawyers*

The Seventh Circuit has consistently applied the serious and imminent threat test when evaluating the constitutionality of restraints on attorneys' extrajudicial commentary. In *Chase v. Robson,*[42] a criminal case arising out of the destruction of selective service records, the court issued a writ of mandamus against the trial court judge ordering him to vacate his order prohibiting government and defense counsel from making public statements regarding the jury or jurors, the merits of the case, evidence, witnesses, or rulings of the court. The court agreed that it is fundamental to the American system of justice that issues of law and fact in a criminal proceeding be resolved in the courts, but found the exercise of first amendment rights to be equally fundamental in the absence of a clear showing that the exercise of those rights is a serious and imminent threat to the right of a fair trial.[43] Subsequently, the Seventh Circuit extended *Chase* and invalidated a general court rule proscribing *all* attorneys' statements regarding any pending jury or non-jury case.[44] As in *Chase,* the challenged court rule apparently would also have failed to withstand a constitutional challenge under the reasonable likelihood standard because it was a blanket prohibition against all comment in all cases, whether tried before a judge or jury. Such a rule, the court stated, "cannot stand without making a mockery of the free speech gnaranty of the first amendment."[45]

The Seventh Circuit decision in *Chicago Council of Lawyers v. Bauer*[46] was the first appellate review of the ABA rules restricting attorneys' extrajudicial commentary concerning pending litigation. In an action for a declaratory judgment, a group of Chicago lawyers

Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

40. *See* notes 7-9 *supra* and accompanying text.

41. 427 U.S. at 554.

42. 435 F.2d 1059 (7th Cir. 1970). For a critical analysis of *Chase v. Robson,* see Cole & Spak, *supra* note 27.

43. 435 F.2d at 1061.

44. *In re* Oliver, 452 F.2d 111 (7th Cir. 1971).

45. *Id.* at 115.

46. 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* 427 U.S. 912 (1976).

contended that the rules were vague and overbroad because of their adherence to a standard requiring only a "reasonable likelihood" of prejudicial effect rather than the more narrow clear and present danger standard.[47]

The court initially stated that the challenged rules might satisfy the second *Martinez* requirement if restricting the speech of a small segment of the population, namely attorneys, would significantly decrease the danger to fair trials engendered by prejudicial comment.[48] The court intimated that because attorneys have a special interest in maintaining the integrity of the judicial system, the more restrictive reasonable likelihood test might appear justifiable.[49] The court added, however, that countervailing factors refute this hypothesis. Attorneys, "a crucial source of information and opinion, . . . are often in a position to act as a check on government by explosing abuses or urging action."[50] Concluding that the reasonable likelihood test was too restrictive, the court opted for the less restrictive serious and imminent threat standard.[51] The court emphasized, however, that the severe and imminent danger standard alone was not sufficient to cure the constitutional infirmity of vagueness—it is also necessary to formulate specific rules that furnish the context necessary to determine what may be a serious and imminent threat.[52]

Although the court explicitly stated that the serious and imminent threat standard was an essential element of any prohibition of attorneys' extrajudicial speech, it also noted that rules could be properly promulgated which would declare "comment concerning certain matters to be *presumptively* a serious and imminent threat."[53] The court went on to state that "many of the challenged rules," all of which utilized the reasonable likelihood standard, "could be considered as rules establishing such a presumption."[54] The result of this presumption would be to shift the burden of proof from the accusor to the accused, placing the responsibility on the latter to prove that his statements did not pose a serious and imminent threat.[55] Thus, although the court purported to invalidate the

47. Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689, 690 (N.D. Ill. 1974).
48. 522 F.2d at 250.
49. *Id.*
50. *Id.*
51. *Id.* at 251.
52. *Id.* at 249-50.
53. *Id.* at 251.
54. *Id.*
55. *Id.* The court found that the following could constitutionally be presumed to pose a serious and imminent threat to a criminal proceeding: first, during the investigative stage—extrajudicial comments by attorneys associated with the investigation on behalf of the

reasonable likelihood standard, it is unclear whether it actually did.

C. *The Reasonable Likelihood Test*

1. Legal Background

The first explicit enunciation of the reasonable likelihood test appeared in *United States v. Tijerina.*[56] Defendants in a criminal proceeding were cited for contempt for their violation of a trial court order prohibiting the issuance by defendants, counsel, prosecutors, and potential witnesses of public statements regarding the jury, the merits of the case, or the evidence.[57] Defendants challenged the order as an unconstitutional infringement on their first amendment right of free speech, noting that because the sixth amendment guarantee of a fair trial is for the accused, not the accusor, the right of free speech of a defendant in a criminal proceeding should not be subject to restriction to avoid prejudice to the Government's case. The court dismissed this contention, opining that the public has an overriding interest that justice be done and has the right to demand and expect "fair trials designed to end in just judgments."[58] Defendants argued in the alternative that the order was constitutionally impermissible because of its failure to incorporate the clear and present danger standard. The court distinguished the quartet of contempt by publication cases[59] usually cited as support for the clear and present danger test, noting that, unlike *Tijerina,* none of these cases involved the disobedience of a specific court order.[60] The court failed to produce any direct precedent for the reasonable likelihood standard, however, and relied instead on the *Sheppard* mandate and the fact that the "Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."[61]

A California Court of Appeals in *Younger v. Smith*[62] adopted

Government; second, between time of arrest and commencement of trial—statements regarding character or prior criminal record of the accused; the possibility of a guilty plea; confessions or statements by the accused; results of examinations or tests or refusal to take them; identity, testimony, or credibility of a prospective witness; any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case; last, during the selection of a jury or during trial—statements relating to the trial, parties, or issues in the trial or other matters reasonably likely to interfere with a fair trial. *Id.* at 252-59.

56. 412 F.2d 661, 666-67 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).

57. 412 F.2d at 663.

58. *Id.* at 666 (citing Mares v. United States, 383 F.2d 805, 808-09 (10th Cir. 1967) and Wade v. Hunter, 336 U.S. 684, 689 (1949)).

59. *See* note 28 *supra* and accompanying text.

60. 412 F.2d at 666.

61. *Id.*

62. 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973). Younger, in his capacity as District

the reasonable likelihood standard, but noted that no compelling prior decision mandated the adoption of either standard.[63] Although it adopted the reasonable likelihood standard, the court devoted much of its opinion to a discussion of the need to avoid a mechanistic application of either standard, stating, for example, that "protective orders must be geared to the apparent needs of the moment and their validity must be judged with that necessity in mind."[64]

2. Restraints on Attorneys—*Hirschkop*

The reasonable likelihood standard was recently adopted by the Fourth Circuit in *Hirschkop v. Snead*,[65] in which an attorney[66]

Attorney of Los Angeles County, was cited for contempt for his violation of a "protective order." In an attempt to test the validity of the order, Younger issued an innocuous statement, the content of which was prejudicial to no one, but which was technically a violation of the order. The court reversed the contempt conviction but refused to reach the question of the validity of the protective order, finding "a sterile press release" a poor vehicle by which to reach the conclusion that courts are powerless to restrict potentially prejudicial comments by prior restraints. *Id.* at 153, 106 Cal. Rptr. at 235. The court's adoption of the reasonable likelihood test was in the context of a companion case in which a separate protective order was challenged on constitutional grounds by Joseph Busch, then District Attorney of Los Angeles Courts.

63. *Id.* at 159, 106 Cal. Rptr. at 239.

64. *Id.* at 160, 106 Cal. Rptr. at 240. The court, in commenting on the fact that neither "protective orders" nor the situations in which they arise are static, noted that if it becomes apparent that, "in making its initial order the court reached for a shotgun to kill what has turned out to be a gnat," the order is always subject to modification. *Id.* at 159, 106 Cal. Rptr. at 239.

The court further noted that because the assessment of the need for a protective order must consider so many uncertain factors:

> [P]edantic appellate debates over the correct criterion are good clean fun for those who enjoy that sort of thing, but of precious little help to the trial judge who must silence the sources of prejudicial pre-trial publicity as soon as possible, or risk spending weeks or months trying a case which is doomed to be reversed, should it result in a conviction.

Id. at 160, 106 Cal. Rptr. at 240.

65. 594 F.2d 356 (4th Cir. 1979).

66. The original suit, as filed by plaintiff in the district court, named as defendants the Virginia State Bar as well as the Supreme Court of Virginia. In the initial pleadings, plaintiff asked the court to declare Rule 7-107 unconstitutional and to find, notwithstanding this infirmity, that it had been "selectively or conspiratorily" enforced against him in violation of his constitutional rights. Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1140 (E.D. Va. 1976). Plaintiff, who has been active in civil rights and civil liberties cases, was cited in 11 of 22 complaints filed with the Virginia State Bar from 1965 to 1975 alleging violations of Rule 7-107. One complaint was filed because he told the press he was representing an indicted prison official because the official was "a good guy." 594 F.2d at 362. During the pendancy of this case a settlement was reached between plaintiff and the Virginia State Bar in which the Bar admitted that the complaints against Hirschkop were meritless and had been filed in cases in which "the complainants may have disagreed with the causes . . . espoused" by Hirschkop. Hirschkop, in return, agreed to dismiss his claims against the Virginia State Bar. The settlement did not, however, address the issue of the constitutionality of Rule 7-107 and plaintiff proceeded against the Supreme Court of Virginia only on that issue. *Id.* at 363.

sought a declaratory judgment that a disciplinary rule adopted by the defendant Supreme Court of Virginia[67] unconstitutionally restricted his right to comment publicly on pending litigation. The Fourth Circuit rejected the contention that a properly drawn rule can bar only those comments that present a clear and present danger to a fair trial,[68] holding that an attorney's extrajudicial comments in the context of a criminal jury trial may be constitutionally proscribed if they are reasonably likely to be prejudicial to the fair administration of justice.[69] The primary focus of the court's opinion was criminal jury trials because studies have shown that this is when prejudice from lawyer's unrestrained comments is most likely to occur.[70] The court emphasized language from *Sheppard* declaring that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," a judge should take remedial action or grant a new trial.[71] The court acknowledged that this statement was made with respect to action taken after the harm is done, but opined that the "rules for the avoidance of the harm must be considered under the same test."[72] The court then noted that "pretrial publicity has not been shown to be a source of interference to fair *bench* trials."[73] The court reasoned that judges are already privy to many facts that never reach a jury, such as those involved in suppression hearings and rulings on evidence. Thus, the court held unconstitutional the rule allowing restriction of speech that poses a reasonable likelihood of harm to a bench trial.[74] The court applied this jury/bench dichotomy to sentencing and disciplinary proceedings.[75] Civil actions, because of their protracted length and broad discovery mechanisms, were also considered inappropriate proceedings to allow the reasonable likelihood test to control.[76]

III. ANALYSIS

The adoption of the serious and imminent threat standard by the Seventh Circuit in *Chicago Council of Lawyers* and the adoption

67. The disciplinary rule adopted by the Supreme Court of Virginia was substantively very similar to the standards recommended by the ABA in the Reardon Report. *See* note 13 *supra*.

68. 594 F.2d at 365.

69. *Id.* at 362.

70. *Id.* at 364.

71. 384 U.S. at 363. The *Sheppard* court specifically approved such remedial measures as the granting of a continuance, change of venue, sequestration of the jury, and a new trial.

72. 594 F.2d at 370.

73. *Id.* at 371.

74. *Id.* at 372.

75. *Id.* at 372-73.

76. *Id.* at 373.

of the reasonable likelihood standard by the Fourth Circuit in *Hirschkop v. Snead* appear to place the only two federal appellate decisions on this issue in conflict regarding the appropriate standard for determining when the danger of prejudice to a fair trial warrants restrictions on attorneys' right of free speech. The apparent disparity, however, is diminished by the fact that the Seventh Circuit in *Chicago Council of Lawyers,* while adopting the serious and imminent threat standard, concluded that certain categories of comments[77] could be "presumptively deemed" to be a serious and imminent threat, placing the burden of proof on the alleged violator to refute this presumption.[78] A careful analysis[79] of the categories of comments that the Seventh Circuit deemed to presumptively present a clear and present danger reveals that the court has included every category of comment proscribed by the Fourth Circuit except one—the Seventh Circuit specifically limited restrictions during the investigative stage to attorneys associated with the investigation on behalf of the Government.[80] Both of the challenges at the appellate level were for declaratory or injunctive relief; because neither court was presented with an actual factual situation, the presumption language in *Chicago Council of Lawyers* makes it extremely difficult to determine what type of comments would withstand constitutional scrutiny under the Seventh Circuit's severe and imminent threat standard, but would be constitutionally proscribed under the Fourth Circuit's reasonable likelihood standard. The apparent dovetailing of the standards in this way raises the question whether the courts are engaged in a debate over semantics or viable constitutional issues.

The dovetailing of the Seventh Circuit's presumptions analysis with the Fourth Circuit's reasonable likelihood standard was explicitly recoguized in the 1978 revision of the ABA standards relating to the conduct of attorneys in criminal cases,[81] prompted by the Seventh Circuit decision in *Chicago Council of Lawyers.*[82] The original standards, promulgated in 1968 as the Reardon Report, adopted the reasonable likelihood test as the appropriate standard.[83] The 1978 revision rejected the reasonable likelihood test as too relaxed to provide full protection for attorneys' first amendment interests

77. *See* note 55 *supra.*

78. 522 F.2d at 251.

79. *Compare* note 13 *supra with* note 55 *supra.*

80. 522 F.2d at 252-59. *See* HOWARD REPORT, *supra* note 4, at 20-22.

81. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS (1978).

82. *Id.* at 1.

83. REARDON REPORT, *supra* note 10, at 2.

and instead adopted the clear and present danger[84] test. The revision, however, actually went one step further than *Chicago Council of Lawyers* by specifically rejecting that opinion's presumption language and clearly stating that the burden of proof is on the party charging a breach of the standard.[85]

Based on this analysis, it appears that both the Fourth and the Seventh Circuits have adopted tests that allow greater restrictions on attorney speech than are allowed under the ABA standard. Because the Supreme Court has not directly addressed this question and has in fact denied certiorari in *Tijerina v. United States*[86] and *Chicago Council of Lawyers v. Bauer*[87] one is forced to infer from dicta in cases such as *Sheppard* and *Nebraska Press Association* the extent to which the Court would find such restraints constitutionally permissible.

IV. A Proposed Dual Standard

In their struggle to enunciate a single standard applicable to diverse situations, the courts have failed to fully recognize the difficulties inherent in this approach. It seems highly unlikely that either test, reasonable likelihood or clear and present danger, will adequately resolve the extrajudicial comment question in the many situations in which it will inevitably arise. The differences between jury and bench trials, contempt and due process proceedings, and comments made by defense and prosecuting attorneys justify more than one standard; thus a dual standard is proposed.

Part of the reason that courts have sought to develop a single standard applicable to diverse situations is that they have treated restrictions on attorneys' speech as *state* interferences with individual rights. Although these restrictions are judicially imposed and thus appear to compel traditional state-individual analysis, there is a critical difference. When a court acts to restrict an attorney's speech, it is balancing one individual's rights against another's—the attorney's right to free speech against the accused's right to a fair

84. ABA Standards Relating to the Administration of Criminal Justice: Fair Trial and Free Press 3 (1978). The ABA delineated the following four-part analysis:

(1) Does the restriction advance a legitimate governmental interest?

(2) Does the public comment pose an extremely serious threat to the governmental interest sought to be protected?

(3) Does the threat appear likely to occur imminently?

(4) Is tbe restriction on public comment necessary to secure the protection or advancement of the governmental interest in jeopardy?

Id.

85. *Id.* at 4.

86. 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).

87. 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.,* 427 U.S. 912 (1976).

trial. Courts have attempted to fit this balancing process into the traditional state-individual analysis by treating the accused's right to a fair trial as an element of the state's interest in the integrity of the judicial process. When framed in this manner, a conflict between the attorney's right to free speech and the state's interest in the integrity of the judicial process, the conflict is hard to resolve against the attorney. Nevertheless, the courts have intuitively found it difficult to resolve the balance in favor of attorneys in many instances. Instead, they have abandoned the traditional clear and present danger standard normally applied to state-individual conflicts and adopted the more restrictive reasonable likelihood standard or the mere presumption that a given comment is a clear and present danger. This Recent Development submits that courts have abandoned strict adherence to the clear and present danger standard because it is highly questionable whether an attorney's free speech rights warrant the same protection when their exercise infringes upon another's constitutional rights as those rights warrant against mere governmental interference. This Recent Development proposes that courts recognize that they are balancing individual rights, a balance that varies from context to context, and adopt a new standard that accommodates this balance.

A variable severe and imminent threat standard has been recommended as an answer to the possible need for a different standard in bench as opposed to jury trials.[88] The variable standard proposal recognizes that comment that would present a serious and imminent threat of prejudice in a jury trial would not present the same threat in a bench trial.[89] This variable standard could also be applied to the defense/prosecution dichotomy. Unfortunately the variable standard fails to provide the framework necessary to overcome the constitutional infirmity of vagueness because it approaches the problem on virtually an ad hoc basis. The suggested dual proposal, however, would be definite enough to sustain a vagueness attack and be flexible enough to accommodate differing situations.

Laid bare, the dual approach is to apply the clear and present danger standard, devoid of presumptions, to those situations in which the possible danger is minimal and to apply the reasonable likelihood test when that danger is great. For example, because the danger of prejudicing a jury is greater than the danger of prejudicing a judge, attorneys' speech should be limited in a jury trial (greater

88. Note, *New Reflections on Fair Trial—Free Press:* Sheppard v. Maxwell *and the American Bar Association Proposals,* 1966 ILL. L.F. 1063.

89. Hirschkop v. Sneed, 594 F.2d 356 (4th Cir. 1979) (distinctions drawn between jury and bench trial).

danger) if there is a reasonable likelihood of prejudice. Conversely, the same speech would be prohibited in a bench trial (minimal danger) only if there is a clear and present danger of prejudice.

Similarly, the comments of defense attorneys should be subjected to a different standard than those of prosecution attorneys. The sixth amendment guarantees a fair trial to the accused; no parallel protection is afforded the government. Courts have considered the governmental interest in the fair administration of justice and in the integrity of the judicial process,[90] and the Reardon Report specifically rejected any distinction between prosecution and defense attorneys.[91] Nevertheless, the *Chicago Council of Lawyers* court noted several considerations that suggest the advisability of such a distinction. Restrictions that limit defense counsel to a bare denial of the charges against his client coupled with a reminder of the presumption of innocence are "often insufficient to balance the scales [of justice],"[92] which are "weighed extraordinarily heavy against an accused after his indictment."[93] The tremendous impact upon the public that results from an indictment is unlikely to be overcome by limited comments made by the defense. On the other hand, comments made by the prosecution, received with the full weight of the government behind them, can be especially damning.[94] Thus, the suggested dual approach would impose a reasonable likelihood standard on the prosecution, but a clear and present danger standard on the defense. Further support for the need for such a distinction is supplied by the courts and the American Civil Liberties Union.[95]

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90. *See id.* at 376-78 (Phillips, J., concurring).

91. REARDON REPORT, *supra* note 10, at 86. The Reardon Report rejected any distinction, concluding that it was "inconsistent with the professional obligation of counsel for either side to resort to the media for public favor in a pending action." *Id.*

92. 522 F.2d at 250.

93. *Id.*

94. Freedman & Starwood, *supra* note 38, at 611.

95. 522 F.2d at 250, 252-59. *See* text accompanying note 80 *supra*. In *Chicago Council of Lawyers* the court recognized a possible need for such a distinction, but concluded that certain proscriptions on defense counsel's speech can be constitutionally invoked. The court limited its distinction to the investigative stages of a crime, holding that restrictions on speech during this period should be limited to the prosecution.

It has been suggested that restrictions on defense counsel are so seldom constitutionally permissible that courts should be limited to after-the-fact sanctions in the few instances when it is necessary. Freedman & Starwood, *supra* note 38, at 616. This ad hoc approach fails to give defense attorneys adequate notice of the type of speech that is likely to result in such "after-the-fact" sanctions—but was sanctioned by the ACLU. Recognizing the need for the adoption of a standard proscribing release of information within specified "potentially prejudicial" categories, the ACLU recommended that such standards only be applicable to prosecutors for three reasons: first, the weight of community bias against the defendant; second, the fact that statements from the defense do not have as much credibility as those released

It has already been established that comment which may be proscribed by a rule affording the alleged violator the opportunity for a due process hearing may be more strictly scrutinized than comment that may result in the issuance of a contempt citation.[96] The opportunity for unwarranted restriction of speech inherent in a contempt proceeding, which lies within the sole discretion of the presiding judge, is great. Thus, speech should be proscribed in those situations only if it presents a clear and present danger of impairing a fair trial. Conversely, in those situations in which an alleged violator has the opportunity for a full due process hearing, comment should be restricted if it presents a reasonable likelihood of prejudice, because the decision to restrict speech is reviewable, removing the possibility of arbritrariness and limiting the danger of impairment of one's freedom of speech.

V. CONCLUSION

It is clear that the articulation of specific categories of proscribed speech coupled with an appropriate standard for evaluating the need to impose such restrictions is necessary to answer the constitutional infirmities of vagueness and overbreadth. The courts have experienced considerable difficulty in articulating a single standard for determining when the state interest in restricting commentary concerning pending litigation overcomes the strong presumption against restraint of first amendment rights.

Although the reasonable likelihood standard has historically been quite different from the clear and present danger standard, the Fourth Circuit's reasonable likelihood test is very similar in application to the Seventh Circuit's clear and present danger standard. Blurring the distinctions between these two standards in an attempt to shape a rule that will be applicable to all situations is not a desirable solution to the problem. The proposed dual standard would maintain the differences between the two standards; the clear and present danger test would always be more difficult to meet. At the same time, flexibility is maintained.

The proposed standard does not provide the courts with a panacea capable of easy application. It merely recoguizes the need for different levels of scrutiny when the facts surrounding the restriction on speech justify it. A court faced with the necessity of analyzing the need for restrictions on speech must continue to undertake

by prosecutors; and last, the lack of a constitutional basis for restrictions on defense counsel. HOWARD REPORT, *supra* note 4, at 45-46.

96. *See* text accompanying notes 28-34 *supra.*

a balancing of the rights in conflict in an attempt to identify as closely as possible the point at which the exercise of one individual's freedom of speech unacceptably infringes on another's constitutional right to a fair trial. As in any developing area of law, careful judicial analysis of these issues will help future courts reach just decisions and articulate succinct, identifiable standards.

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