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Constitutional Law - Attorneys' Right to Free Speech Versus Protection of Fair Trial - DR 7-107 Restricting Attorneys' Speech during Pending Litigation only Constitutional to Protect Criminal Jury Trial from Reasonable Likelihood of Prejudice

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CONSTITUTIONAL LAW—ATTORNEYS’ RIGHT TO FREE SPEECH VERSUS PROTECTION OF FAIR TRIAL—DR 7-107 RESTRICTING ATTORNEYS’ SPEECH DURING PENDING LITIGATION ONLY CONSTITUTIONAL TO PROTECT CRIMINAL JURY TRIAL FROM REASONABLE LIKELIHOOD OF PREJUDICE.

Hirschkop v. Snead (4th Cir. 1979)

Phillip J. Hirschkop, an attorney, brought suit in the United States District Court for the Eastern District of Virginia against, inter alios, the Supreme Court of Virginia seeking a judicial declaration that Disciplinary Rule 7-107 (DR 7-107) of the ABA Code of Professional Responsibility was unconstitutional on its face. The district court issued a memorandum order declaring that DR 7-107, which restricts lawyers’ comments about pending litigation, was a reasonable regulation of lawyers’ speech as to time, manner, and place, and was not unconstitutionally vague or overbroad. The United States Court of Appeals for the Fourth Circuit affirmed in part and reversed in part, holding that DR 7-107 is constitutional as applied to criminal jury trials, but cannot otherwise be constitutionally enforced. Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).

The United States Supreme Court has called the right to a fair trial “the most fundamental of all freedoms.” In order to assure that the trial is free from jury prejudice, a task that has become increasingly difficult with the...
development of mass communication, courts have granted continuances, changed venue, implemented voir dire examinations, given cautionary instructions, reversed verdicts, and issued contempt convictions as well as orders against the sources of prejudicial information.

8. See Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (if prejudicial publicity threatens trial, court should continue trial until publicity subsides or transfer the case to another district where publicity is less intense). Continuances and changes of venue are used to lessen the chance that prejudicial publicity will have an effect on the jury. See id. However, these methods require that the accused give up his sixth amendment right to a speedy trial in the state and district where the crime was committed. See U.S. CONST. amend. VI. See also AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft 1968) [hereinafter referred to as ABA REPORT]. Moreover, these methods are not effective for a sensational trial where the transmission of prejudicial information may extend far beyond the locality of the occurrence and may be remembered by the jurors or republished at the time of the trial. Id.
9. See Conn. v. Higgins, 143 Conn. 138, 140-43, 120 A.2d 152, 153-55 (1956); Chernock v. State, 203 Md. 147, 150, 99 A.2d 748, 749 (1953); Commonwealth v. Figari, 166 Pa. Super. Ct. 169, 171, 70 A.2d 666, 667 (1950). See also ABA REPORT, supra note 8, at 73. Voir dire is the examination that the court or parties may make of a potential juror to, inter alia, detect prejudice. See BLACK'S LAW DICTIONARY 1412 (5th ed. 1979). The authors of the ABA REPORT were concerned with the possibility that potential jurors will conceal prejudice if they wish to serve, or manufacture it if they do not. ABA REPORT, supra, at 56-57.
10. See United States v. Largo, 346 F.2d 253, 253 (7th Cir. 1965); Collins v. Walker, 335 F.2d 414, 416-17 (2d Cir. 1964); United States v. Carlucci, 288 F.2d 691, 695 n.3 (3d Cir. 1961); People v. Malmenato, 14 Ill. 2d 62, 63, 150 N.E.2d 806, 812 (1958). See also ABA REPORT, supra note 8, at 84. A technique available to a defendant who complains of actual or potential prejudice is an "[a]dmonition to the jury to avoid news reports relating to the case during the course of trial." Id. The authors of the ABA REPORT expressed concern about the effectiveness of this alternative because a news story that a juror has read but forgotten may have a subliminal effect on his judgement. Id. at 61.
13. For examples of orders intended to restrict the press, see Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 545 (1976) (order prohibiting the reporting of confessions or other facts "strongly implicative" of accused held unconstitutional); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1306 (Powell, Circuit Justice, 1974), dismissed as moot, 420 U.S. 985 (1975) (order prohibited publication of all pretrial testimony, all interviews with witnesses, defendants' criminal records, any testimony stricken from the record, conclusions of guilt or innocence made by attorneys or police, and any editorial comment that tends to influence the court, jury, or witnesses); United States v. Schiano, 504 F.2d 1, 2-3 (3d Cir.), cert. denied, 419 U.S. 1096 (1974) (order prohibiting publication of information concerning defendant's indictments in other crime vacated as procedurally deficient).

The last two methods of dealing with the sources of prejudicial publicity have been attacked on first amendment grounds. In *Toledo Newspaper Co. v. United States*, the Supreme Court held that a court could utilize its contempt power against a newspaper which violated a court order, provided that there was a "reasonable tendency" that the published information would cause an obstruction of justice. In *Bridges v. California*, the Court overruled the reasonable tendency test of *Toledo* and found that a court could use its contempt power in this context only if it found that the publicity created a clear and present danger to the administration of justice.

Gag orders on the press, unlike contempt citations, are prior restraints on expression and are therefore particularly open to first amendment challenges. In *Nebraska Press Association v. Stuart*, the Supreme Court struck down such a gag order, casting doubt on the question of whether prior restraint on the press could ever be a proper method for preserving a fair trial.

In *Procunier v. Martinez*, the Supreme Court synthesized the holdings of some of its prior cases regarding restrictions on speech and de-

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15. 247 U.S. 402 (1918). The *Toledo* Court upheld the contempt conviction of a newspaper publisher for printing a cartoon regarding a pending civil suit, holding that the cartoon was published with the intent to influence the trial judge. *Id.* at 421-22.

16. *Id.* at 421.

17. 314 U.S. 252 (1941). The *Bridges* Court reversed the conviction of a union official who had allowed the publication of a telegram he had sent to the Secretary of Labor that intimated that a strike might be called should an injunction be issued by a state court. *Id.* at 275-77. The California courts had found that the threat of a strike could have tended to intimidate the state court judge. *Id.* at 277-78. The Supreme Court reversed, holding that this did not amount to a clear and present danger to the administration of justice. *Id.* at 278.

18. *Id.* at 261-63. The Court based its reasoning on *Schenck v. United States*, 249 U.S. 47, 52 (1919), and other cases which have protected political speech except where the speech constituted a "clear and present danger" to government interests. *Id.*. The Court found that "[w]hat finally emerges from the ‘clear and present danger’ cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." 314 U.S. at 263.


21. *Id.* at 570. The gag order was issued prior to a sensational murder case and forbade the publication of any confessions or any other facts "strongly implicative" of the accused until the jury was chosen. *Id.* at 545. The order was struck down as violative of the constitutional guarantee of freedom of the press. *Id.* at 570.

22. *Id.* at 569. In supporting the idea of imposing prior restraints on the press in the interest of a fair trial, the majority would go no further than to say that "we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint." *Id.* at 569-70. Justice Brennan, however, writing an opinion in which Justices Stewart and Marshall joined, advanced the view that prior restraints on the press are never justifiable. *Id.* at 572-73 (Brennan, J., concurring in the judgment). Justices Stevens and White wrote separate opinions stating that they doubted whether such an order would ever be constitutional, but that the question did not have to be addressed in this case. *Id.* at 570-71 (White, J., concurring); *Id.* at 617 (Stevens, J., concurring in the judgment). Thus, it is uncertain whether any prior restraint on the press in the interest of a fair trial is constitutional.

RECENT DEVELOPMENTS

veloped a two-pronged test for deciding when such restrictions are constitutional.24 The rule requires, first, that the regulation must advance an important government interest unrelated to restricting speech, and second, that the regulation must not be more extensive than is necessary to protect that interest.25

Notwithstanding its strict treatment of recent judicial attempts to preserve jury impartiality through the use of gag orders and contempt powers,26 the Supreme Court has reversed a number of convictions because publicity reached such a level that the jury was prejudiced or the integrity of the trial was adversely affected.27 The most important of these cases was Sheppard v. Maxwell,28 where the Court held that a criminal defendant has the right to a trial that is free from the reasonable likelihood of unfairness caused by publicity.29 Thus, while the Supreme Court has made it more difficult to control trial publicity through direct restraints on the press,30 it has become easier for a criminal defendant to prove that his right to a fair trial was not protected in the face of pervasive hostile publicity.31 The Court in the Sheppard opinion did, however, suggest a method for courts to use in restraining prejudicial publicity:

The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors [nor] counsel for the defense . . . should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.32

The type of regulation suggested by the Sheppard Court had existed in Canon 20 of the ABA Canons of Professional Ethics.33 Canon 20 attempted

24. Id. at 414. Martinez involved a suit by prison inmates challenging the constitutionality of the California regulations regarding the censorship of the prisoners' mail. Id. at 399. Rather than basing its decision on the rights of prisoners, the Court preferred to adopt a narrower basis for its decision: the protection of the rights of those who correspond with prisoners to do so without being censored. Id. at 408-09.
25. Id. at 413.
26. See notes 11-25 and accompanying text supra.
29. Id. at 363. The Sheppard Court held that if there is a reasonable likelihood that the trial will be prejudiced by publicity, the court must take remedial action or grant a new trial. Id. The Sheppard Court found that the defendant's trial had not been free from the reasonable likelihood of prejudice and granted a new trial. Id. The Court stated, however, that "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." Id.
30. See notes 15-25 and accompanying text supra.
31. See notes 27-29 and accompanying text supra.
32. 384 U.S. at 363.
33. ABA CANONS OF PROFESSIONAL ETHICS No. 20 (superseded by ABA CODE OF PROFESSIONAL RESPONSIBILITY (1976)). Canon 20 provided:

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
to deal with the problem of prejudicial publicity by limiting lawyers' comments for newspaper publications. Since Canon 20 was never effectively enforced, proposals were made to change it to a specific delineation of the type of conduct that will cause a reasonable likelihood of prejudice in legal proceedings. These proposals materialized into a definite rule in 1968 when DR 7-107 was added to the ABA Code of Professional Responsibility.

Generally, DR 7-107 attempts to ensure fair trials by restricting lawyers' comments regarding pending litigation. Specifically, subsections (A) through (E) deal with criminal cases and restrict the comments of lawyers associated with a criminal case during four specified time periods. DR 7-107(A) provides that during the investigation of a criminal matter, a lawyer is not to comment for publication about the matter except to state information in the public record, report that the investigation is in progress, comment on the general scope of the investigation, request public assistance, or warn the public of any dangers. DR 7-107(B) deals with the period from indictment to arrest.

Id. 34. See ABA REPORT, supra note 8, at 77. See also THE SPECIAL COMMITTEE ON RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL 15-19 (1967) [hereinafter cited as NYC BAR REPORT]. 35. See, e.g., NYC BAR REPORT, supra note 34, at 19-24; JUDICIAL CONFERENCE OF THE UNITED STATES REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391, 404-07 (1968) [hereinafter cited as JUDICIAL CONFERENCE REPORT]. Trescher, A Bar Association View, Symposium: A Free Press and a Fair Trial, 11 VILL. L. REV. 709 (1966). In order to strengthen Canon 20, the Philadelphia Bar Association proposed the following:

Lawyers, both for the prosecution and defense, must completely refrain from making any statement or giving any release with respect to pending criminal cases from the time of the arrest until the final determination; except as to identity of defendant, nature of charge, and time, place and circumstances of arrest.

Disclosures should include only incontrovertible factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest would be highly prejudicial and where the release thereof would serve no law enforcement function, such information should not be made public.

PHILADELPHIA BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON FAIR TRIAL AND FREE PRESS (November 9, 1965) quoted in Trescher, supra, at 717.

36. See AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, APPROVED DRAFT OF STANDARDS 1 (1968 pamphlet).

37. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107(A)-(E) [hereinafter cited as ABA CODE]. For the pertinent provisions of the rule, see notes 38-44 infra.

38. ABA CODE, supra note 37, DR 7-107(A). Subsection (A) provides:

(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.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and,
or arrest until the start of the trial and forbids comment on the character of the accused, the possibility of a guilty plea, the statements or confessions of the accused, the results of any tests, the prospective witnesses, or the expression of any opinion about guilt, evidence, or the merits of the case. DR 7-107(C) lists eleven types of comments that the lawyer is specifically permitted to make during the period from arrest or indictment until the start of trial. Subsection (D) provides that during the jury selection and trial, a lawyer may not comment on the trial, parties, issues, or other matters reasonably likely to interfere with a fair trial. Finally, DR 7-107(E)
provides that after the trial and before the imposition of the sentence, the lawyer is prohibited from making comments which may reasonably be expected to be published and which are reasonably likely to affect the imposition of sentence. 42

In the noncriminal context, DR 7-107(G) regulates the speech of lawyers during the investigation and trial of civil matters. 43 Under this subsection, a lawyer is not to comment for publication about evidence, parties, witnesses, tests, or refusal to take tests, and may not state his opinion as to the merits of claims, defenses, or any other matter reasonably likely to interfere with a fair trial. 44

The ABA’s Advisory Committee Report stated that there are no constitutional problems with these restrictions because the restrictions prevent a serious evil and only restrict the speech of lawyers involved with the case when they are outside the courtroom and for a limited period. 45 Nevertheless, the Seventh Circuit, in Chicago Council of Lawyers v. Bauer, 46 held that DR 7-107 unconstitutionally infringes upon the first amendment rights of attorneys. 47 The court observed that the drafters of the rule found that speech posing a reasonable likelihood of affecting a fair trial could be restricted. 48 The court determined, however, that during criminal trials, at-

42. ABA CODE, supra note 37, DR 7-107(E). Subsection (E) provides:
(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

Id.

DR 7-107(F) applies the rules in DR 7-107(A)-(E) for criminal trials to professional and juvenile disciplinary proceedings whenever they are pertinent. Id. DR 7-107(F).

43. ABA CODE, supra note 37, DR 7-107(G). The text of subsection (G) provides:
(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
(5) Any other matter reasonably likely to interfere with a fair trial of the action.

Id.

44. Id. DR 7-107(H) is similar in scope to DR 7-107(G) and applies to administrative proceedings. Id. DR 7-107(H). Subsection (I) provides that the provisions of DR 7-107(A)-(H) do not preclude a lawyer from replying to public charges of misconduct or to participate in legislative or administrative investigative proceedings. Id. DR 7-107(I). Subsection (J) requires that a lawyer must exercise reasonable care to see that his associates and employees do not make any statements that DR 7-107 would prevent him from making. Id. DR 7-107(J).

45. ABA REPORT, supra note 8, at 81-82.
46. 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).
47. 522 F.2d at 249.
48. Id.
torneys' speech may be restricted by a rule of court only if that speech would result in a "serious and imminent threat" to the fairness of the trial. Moreover, the court rejected all regulations of attorneys' speech during civil trials for three reasons: 1) civil litigation is less important than a criminal case; 2) civil suits tend to last longer; and 3) such suits often deal with important social issues that the public should be informed about by the lawyers involved.

Against this background, the court in Hirschkop considered whether DR 7-107 was an unconstitutional restriction on speech. After deciding that Hirschkop had standing to bring the suit, the court used the two-prong test of Procunier v. Martinez to determine the rule's constitutionality. Applying the first prong of the test, which requires that the restrictions on speech further a "substantial government interest unrelated to the suppression of expression," the court found that protection of fair trials, which is the purpose of DR 7-107, is just such an interest. Turning to the second part of the Martinez test, which requires that the restrictions on speech not be unnecessarily broad, the court found it imperative to examine each type of proceeding to which the rule applies in order to determine the scope of the rule and the nature of its restrictions.

The court first examined the rule as it applies to criminal jury trials. Agreeing with the conclusion of the ABA Advisory Committee Report, the court found that prejudicial publicity is likely to result from the unrestrained comments of lawyers and concluded that some type of restriction is required. The court maintained that ad hoc gag orders do not protect against prejudicial publicity that results from lawyers' pretrial statements.

49. Id., citing In re Oliver, 452 F.2d 111, 114 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970). The Seventh Circuit's use of the serious and imminent threat standard began in Chase where the court relied on two Supreme Court cases which dealt with the correct standard to be used in conjunction with a court's contempt power. See Wood v. Georgia, 370 U.S. 375, 384-85 (1962); Craig v. Harney, 331 U.S. 367, 373 (1947).

50. 522 F.2d at 257-59.

51. 594 F.2d at 362-74.

52. Id. at 363. See note 1 supra. The court cited a number of Supreme Court decisions in which normal standing requirements were relaxed so that first amendment issues could be decided. Id., citing Broadrick v. Oklahoma, 413 U.S. 601, 611-13 (1973); Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965); NAACP v. Button, 371 U.S. 415, 432-33 (1963). This relaxed notion of standing allows a plaintiff to attack a statute on the ground that it may cause others not before the court to be "chilled" in their constitutionally protected speech. 594 F.2d at 363. The court also noted that although there were no longer any complaints pending against the plaintiff, he would still be subject to sanctions for any future violations of DR 7-107. Id.


54. 416 U.S. at 413.

55. See ABA REPORT, supra note 8, at 80-81.

56. 594 F.2d at 363. The court emphasized the importance of the trial court's role in ensuring that the right to a fair trial is protected from prejudicial publicity. Id.

57. 416 U.S. at 413-14.

58. 594 F.2d at 364.

59. Id. at 364-70.

60. See ABA REPORT, supra note 8, at 20-47.

61. 594 F.2d at 364-65. See also ABA REPORT, supra note 8, at 20-47.

62. 594 F.2d at 365.
therefore, the court reasoned that some sort of general restriction, like that imposed by DR 7-107, is the least intrusive, effective method of restricting lawyers' comments. 63

The court then examined DR 7-107 specifically to determine whether it satisfied the second prong of the Martinez test in the criminal jury trial context. 64 The Hirschkop court rejected the contention that speech could only be restricted if there was a clear and present danger that the speech would interfere with a fair trial, and concluded that the specific restrictions of DR 7-107 should be enforced provided that there is a reasonable likelihood that dissemination of such speech by means of public communication would interfere with a fair trial. 65 The court found that the reasonable likelihood standard had been implicitly approved by the Sheppard court 66 and that this standard is a clearer guide for determining the scope of lawyers' protected speech. 67 Moreover, the court noted that while the clear and present danger test is appropriate for some types of restrictions on speech, 68 in this situation it is not needed because DR 7-107 is very specific, applicable only to lawyers, and only effective for limited periods of time. 69 Thus, applying the reasonable likelihood standard, the court found that DR 7-107, as applied to criminal jury trials, was not unnecessarily broad and satisfied the second prong of the Martinez test. 70

After deciding that DR 7-107 met the requirements of Martinez in the criminal jury trial context, the court then addressed the question of whether the specific provisions of DR 7-107 were unconstitutionally vague. 71 With

63. Id.
64. Id.
65. Id. at 369. The court read the ABA REPORT as suggesting that when a specific type of comment is proscribed by DR 7-107, it is barred absolutely. Id. at 365. See generally ABA REPORT, supra note 8, at 84-85. The defendant contended, however, that rather than being interpreted as absolute bans, these restrictions should be interpreted as effective only if there was a reasonable likelihood that the comment would affect a fair trial. 594 F.2d at 365. The court agreed with the defendant, stating: "It does not strain the language of the rule to treat . . . [the reasonable likelihood standard] as implicit in each of the expressed prohibitions." Id. at 368. The court further commented that since the statements enumerated in DR 7-107 are clearly prejudicial on their face, the only possible need for an explicit qualification of the rule would be "to take care of the unusual case in which, because of extraordinary circumstances, there is no likelihood of a prejudicial effect." Id. The court used as an example the escape by James Earl Ray from prison. Id. at 367. If that were to occur, the prosecutor could safely claim that he was imprisoned for the murder of Martin Luther King without prejudicing Ray's trial for prison escape. Id.
66. 594 F.2d at 369-70. See also notes 92-97 and accompanying text infra.
67. 594 F.2d at 368. But cf. Chicago Council of Lawyers v. Bauer, 522 F.2d at 247 ("serious and imminent threat" standard clearer than "reasonable likelihood" standard; "reasonable likelihood" standard called "amorphous").
68. 594 F.2d at 368. The clear and present danger standard, the court maintained, is proper for judicially imposed prior restraints on speech—i.e., where a violation of a court order restricting speech is summarily punishable as contempt. Id. Noting that DR 7-107 is not a prior restraint, the court stated: "Here sanctions may be imposed upon a lawyer only after charges have been filed against him, he has been given a due process hearing and has been found guilty." Id.
69. Id. at 366.
70. Id. at 370.
71. Id. at 370-71.
one exception, the court found that the provisions of DR 7-107 were not unconstitutional because of vagueness.\textsuperscript{72} DR 7-107(D), which forbids a lawyer who is participating in a criminal trial from commenting on "other matters that are reasonably likely to interfere with a fair trial," was the subsection which the court found to be vague because it did not give a lawyer adequate opportunity to know what speech is prohibited; thus, the court believed that subsection (D) might have a chilling effect on the lawyer's constitutionally protected speech.\textsuperscript{73}

The court next examined DR 7-107 as it applies to criminal bench trials and determined that it was unnecessarily broad under the second prong of the Martinez test.\textsuperscript{74} The court found that bench trials need no protection from a rule restricting lawyers' speech since the Supreme Court has never reversed a conviction due to prejudicial publicity in a case heard without a jury, and since trial judges must routinely deal with inadmissable evidence yet still come to unprejudiced decisions.\textsuperscript{75}

Finally, the majority looked at DR 7-107 as it applies to civil actions to determine if the second part of the Martinez test was satisfied.\textsuperscript{76} The court held that DR 7-107(G), which prohibits a lawyer associated with a civil action from making a broad range of comments during the investigation or litigation of the case, is unconstitutional because it is overbroad.\textsuperscript{77} The court noted that there have been no civil actions reversed because of prejudicial publicity and no study has documented a problem of prejudice with civil juries.\textsuperscript{78} Moreover, the court observed that the leading case imposing a

\textsuperscript{72} Id.
\textsuperscript{73} Id. at 371.
\textsuperscript{74} Id. at 371-72. See notes 53-58 and accompanying text supra. The court found that the rule must be more than rationally related to fair bench trials and, since the gain in the fairness of trials did not outweigh the loss of the lawyers' first amendment rights, DR 7-107 as applied to criminal bench trials did not satisfy the second part of the Martinez test. 594 F.2d at 371-72.
\textsuperscript{75} 594 F.2d at 371-72. The Hirschkop court distinguished Cox v. Louisiana, 379 U.S. 559 (1965), which upheld a statute making it illegal to picket a courthouse with the intention of influencing a judge, on the ground that the statute in Cox did not regulate pure speech, but speech plus action. 594 F.2d at 372.

The court further held that DR 7-107(E), which applies to sentencing, is unconstitutional for the same reasons that subsections (A) through (D) were found to be defective when applied to criminal bench trials. Id. The court found that prohibiting a lawyer's speech outside the courtroom will not have any effect on the fairness of the sentence imposed because a judge can consider evidence from almost any source during sentencing. Id. Furthermore, the court found that DR 7-107(E) is unconstitutionally vague since, without giving any guidance to lawyers, it merely forbids all comment that is "reasonably likely to affect the imposition of sentence." Id. Turning to DR 7-107(F), which applies the restrictions of criminal trials to professional and juvenile disciplinary proceedings, the court concluded that this subsection was overbroad under the second part of the Martinez test because in these proceedings there is no jury to be prejudiced. Id. at 372-73. As applied to a juvenile case tried before a jury, however, DR 7-107 was held to be constitutional. Id. at 372.
\textsuperscript{76} 594 F.2d at 373. See notes 53-58 and accompanying text supra.
\textsuperscript{77} 594 F.2d at 373.
\textsuperscript{78} Id. The authors of the ABA Advisory Committee Report did no research on the question of the influence of publicity on civil trials, and the tentative draft of the rule made no recommendations concerning civil proceedings. See ABA REPORT, supra note 8, at 1-15. The authors of a federal judicial conference report on the issue of "Free Press-Fair Trial" specifically stated that the problem of prejudicial publicity in civil cases was beyond their responsibility. See JUDICIAL CONFERENCE REPORT, supra note 35, at 393 n.1.
gag order on lawyers during civil litigation because of prejudicial publicity was reversed for infringing on the lawyers' first amendment rights.79 Lastly, drawing from the Bauer court's reasoning,80 the court stated that the restricting aspects of DR 7-107(G) are accentuated by the fact that civil litigation tends to be protracted, and frequently concerns important social issues.81 The court therefore concluded that insofar as DR 7-107 restricts lawyers' speech during civil litigation, the rule is overbroad and thus fails to satisfy the second prong of the Martinez test.82

Judge Phillips, in a concurring opinion, emphasized that although DR 7-107(G) was unconstitutionally vague,83 jury prejudice, whether civil or criminal, should be minimized.84 Consequently, Judge Phillips maintained that it might be possible to write a constitutional disciplinary rule to restrict lawyers' extrajudicial comments concerning civil jury trials.85

Judges Winter and Butzner filed an opinion concurring in those parts of the majority opinion which found DR 7-107 unconstitutional, but dissented from the majority wherever it upheld the rule's restrictions.86 Both judges argued that the only constitutional justification for restricting speech is the clear and present danger standard.87

79. 594 F.2d at 373, citing CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (per curiam). The CBS case arose when a petition for a writ of mandamus was filed seeking to vacate an order forbidding all parties to a case and their relatives, friends, and associates from commenting to the press or public on a civil suit resulting from the 1970 incident at Kent State University. 522 F.2d at 236. The court vacated the order, stating that the trial court made no clear showing that the forbidden speech would interfere with the rights of the parties to a fair trial. Id. at 241.

80. See notes 46-50 and accompanying text supra.

81. 594 F.2d at 373. DR 7-107(G)(5), which prohibits comment about "[a]ny other matter reasonably likely to interfere with the fair trial of the action" was also found to be void because of vagueness. 594 F.2d at 373.

In addition, the court held that DR 7-107(H), which restricts lawyers' comments during administrative hearings, failed to satisfy the second prong of the Martinez test because there was no evidence that the restrictions on lawyers' free speech imposed by the rule ensure the fairness of administrative hearings. Id. at 373-74. The court observed that these proceedings are not tried before a jury and that there is no proof that a lawyer's unrestrained comments have any effect on their fairness. Id. at 374. DR 7-107(H)(5) was found to be void for vagueness because it did not contain any specific prohibitions, but simply banned all statements relating to "[a]ny other matter reasonably likely to interfere with a fair hearing." Id.

82. 594 F.2d at 373. See notes 53-58 and accompanying text supra.

83. 594 F.2d at 378 (Phillips, J., concurring).

84. Id. at 376-78 (Phillips, J., concurring). Judge Phillips stated that in addition to the danger to the fairness of a trial which might result from the parties trying to influence jurors or potential jurors through the mass media, this sort of action would also be a threat to our entire system of justice. Id. at 376-77 (Phillips, J., concurring). He contended that our litigation process which is designed "to confine decision making to the facts and law formally before the decision-maker," is a rather delicate structure that could be destroyed by allowing the parties to "politicize" the system. Id. at 377 (Phillips, J., concurring). Because of this risk, he claimed that it is possible that a constitutional rule might be written to protect civil juries from prejudice resulting from the extrajudicial comments of attorneys; however, he rejected DR 7-107(G) because he found it vague. Id. at 378 (Phillips, J., concurring).

85. Id. at 378 (Phillips, J., concurring).

86. Id. at 378-79 (Winter and Butzner, JJ., concurring in part and dissenting in part).

87. Id. at 379 (Winter and Butzner, JJ., concurring in part and dissenting in part). Focusing upon Bridges v. California, 314 U.S. 252, 253 (1941); Pennekamp v. Florida, 328 U.S. 331, 336 (1946); and Craig v. Harney, 331 U.S. 367, 371-72 (1947), the dissent concluded that speech cannot be restricted through the use of contempt power unless there is a clear and present
In another opinion, Judge Widener dissented from the majority's holding that DR 7-107(G), which was designed to protect juries from prejudice in civil trials, was unconstitutional.\textsuperscript{88} Judge Widener maintained that the reasons the court advanced for providing the protection of DR 7-107 to criminal trials applied to civil proceedings as well, and that the distinctions drawn by the majority between civil and criminal cases\textsuperscript{89} were not compelling.\textsuperscript{90}

It is suggested that the \textit{Hirschkop} court, in applying the "reasonable likelihood" standard to uphold DR 7-107 as applied to criminal jury trials, struck the most appropriate balance between the first amendment rights of lawyers and the interests of defendants, the government, and the public in fair jury trials.\textsuperscript{91} In using this standard to strike the balance, rather than the "serious and imminent threat" or "clear and present danger" standards, it is submitted that the court has made a decision in accord with the relevant Supreme Court precedent. In \textit{Sheppard}, the Supreme Court held that if the \textit{reasonable likelihood of a fair trial} is threatened, remedial measures, including reversal if necessary, must be used.\textsuperscript{92} The \textit{Hirschkop} court combined this holding with dictum in \textit{Sheppard}, which indicated that a court should protect itself against prejudicial publicity by the use of court rules,\textsuperscript{93} to hold

\begin{quote}
\textsuperscript{88} 594 F.2d at 381 (Widener, J., concurring in part and dissenting in part).
\textsuperscript{89} See id. at 373; notes 76-82 and accompanying text \textit{supra}.
\textsuperscript{90} Id. at 382-83 (Widener, J., concurring in part and dissenting in part). Judge Widener noted that criminal as well as civil litigation can be protracted, and that attorneys in both types of cases can give the public valuable information. 594 F.2d at 382 (Widener, J., concurring in part and dissenting in part). Judge Widener also stated that no empirical findings were necessary to establish that civil jurors are subject to prejudice from lawyers' extrajudicial speech since civil jurors come from the same population as criminal jurors, and therefore would be prejudiced in the same manner. \textit{Id}.
\textsuperscript{91} See id. at 364-70; notes 59-70 and accompanying text \textit{supra}. It should be noted that there are essentially three standards that could be used by the court when determining the constitutionality of DR 7-107: 1) "reasonable likelihood" of interference with a fair trial; 2) "serious and imminent threat" of interference with a fair trial; and 3) "clear and present danger" of interference with a fair trial. \textit{See} 594 F.2d at 367-69. It is suggested that the standard that would restrict lawyers' speech and protect against prejudicial publicity to the greatest extent is the "reasonable likelihood" standard. The "clear and present danger" standard, on the other hand, strikes the balance most in favor of lawyers' first amendment rights to the detriment of protection of the right to a fair trial. The "serious and imminent threat" standard seems to strike an intermediate balance, not protecting first amendment rights as much as "clear and present danger" nor protecting the right to a fair trial as much as the "reasonable likelihood" standard. \textit{See} also notes 98-101 & 114 \textit{infra}.
\textsuperscript{92} 384 U.S. at 363. For a discussion of \textit{Sheppard}, see notes 25-32 and accompanying text \textit{supra}.
\textsuperscript{93} 384 U.S. at 363.
\end{quote}
that a properly drawn rule should prevent a lawyer from threatening the reasonable likelihood of a fair trial.94

If the Hirschkop court had required DR 7-107 to grant lawyers more freedom of expression than that afforded by the “reasonable likelihood” standard, then the court would have been endorsing a rule that would permit lawyers to make statements which could trigger the Sheppard remedies.95 A rule permitting such a result would, it is submitted, endanger the defendants’ right to a fair trial96 and subject the legal system to the disruption that the Sheppard remedies necessarily entail.97

The Seventh Circuit, on the other hand, in Chicago Council of Lawyers v. Bauer,98 required any rule restricting lawyers’ speech to include the “serious and imminent threat” standard which the Supreme Court has applied when considering the constitutionality of the use of contempt power.99 It is suggested that in relying upon the Supreme Court’s contempt power cases to adopt a standard, the Bauer court did not adequately consider the differences between the contempt situation and the regulation of lawyers’ speech through court rules.100 The contempt cases where the “serious and imminent threat” standard was applied by the Supreme Court involved limitations on the first amendment rights of citizens101 or newspaper publishers.102 DR 7-107, however, is not directed at the public or the press; it is directed at lawyers who are officers of the court and who therefore have a duty to protect the parties’ right to a fair trial.103 This difference, it is submitted, raises serious questions concerning the propriety of the Bauer court’s reliance on these contempt cases.

Unlike the situation involving criminal jury trials, the Hirschkop court did not have Supreme Court precedent to rely upon when analyzing the constitutionality of applying DR 7-107 to civil trials, and thus, it is submitted, the majority came to a less satisfactory result.104 It is submitted that the court’s reasons for distinguishing the prejudice caused in criminal juries

94. 594 F.2d 369-70. See text accompanying note 32 supra. The Supreme Court has reaffirmed the necessity of protecting trials from prejudice through the use of rules of court and has cited the ABA Advisory Committee Report recommendations favorably in Nebraska Press Ass’n v. Stuart, 427 U.S. at 564.
95. See note 29 supra.
96. See 594 F.2d at 364-65.
97. See id. at 370.
98. 522 F.2d 242 (7th Cir. 1975).
100. See 594 F.2d at 368-69; Hirschkop v. Virginia State Bar, 421 F. Supp. at 1149-52; note 68 supra.
102. Craig v. Harney, 331 U.S. 367, 369-70 (1947). It should be noted that the Court in Craig stated that it was not defining the full extent to which speech can be restricted to protect the administration of justice. Id.
104. See 594 F.2d at 373.
from that caused in civil juries are not convincing.\textsuperscript{105} The fact that there have been no civil actions reversed because of prejudicial publicity\textsuperscript{106} and that there are no empirical studies indicating that such publicity is a problem\textsuperscript{107} is not, it is submitted, justification for a judicial finding that prejudicial publicity in civil actions is not a problem.\textsuperscript{108} Also, the court’s reasoning that lawyers’ speech should not be restricted during civil trials because civil trials tend to be longer and deal with important social issues\textsuperscript{109} is not dispositive of the issue since criminal trials can also be protracted and deal with issues important to society. It is submitted that unless the court were to make a finding that civil trial fairness is less important than criminal trial fairness, its decision to give these jury trials different treatment is not justifiable.\textsuperscript{110}

The clear impact of \textit{Hirschkop} is that DR 7-107 no longer restricts lawyers’ potentially prejudicial comments concerning cases or proceedings in the Fourth Circuit unless a criminal jury trial is involved.\textsuperscript{111} With the removal of this restriction in proceedings not involving criminal juries, the extent to which lawyers can exercise their freedom of expression seems unlimited.\textsuperscript{112} It is suggested that this lack of restrictive guidelines could be especially troublesome in a much publicized civil jury trial where the lawyers’ extrajudicial statements could become a matter of trial tactics.\textsuperscript{113}

In summary, it should be observed that although the \textit{Hirschkop} court adopted the “reasonable likelihood” standard—the standard which permits the greatest restriction on lawyers’ speech\textsuperscript{114}—it nevertheless found DR 7-107 unconstitutional, except as applied to criminal jury cases.\textsuperscript{115} Moreover, it should be noted that the circuit judge who would go furthest in upholding DR 7-107 found that the rule was only constitutional as applied to

\textsuperscript{105} See 594 F.2d at 382-83 (Widener, J., concurring in part and dissenting in part); notes 89-90 and accompanying text supra.
\textsuperscript{106} See 594 F.2d at 373.
\textsuperscript{107} See id.
\textsuperscript{108} See id.
\textsuperscript{109} Id.
\textsuperscript{110} The Bauer court did find that criminal juries deserve more protection than civil juries. 522 F.2d at 257-58. The court found a basis for this conclusion in the Constitution, reasoning that the sixth amendment requires an “impartial jury” for criminal cases while the seventh amendment merely requires “trial by jury” in civil cases. Id. See U.S. CONST. amends. VI, VII. See also 594 F.2d at 382 (Widener, J., concurring in part and dissenting in part). Judge Widener maintained that the \textit{Hirschkop} majority had made an unstated finding that protecting the first amendment rights of lawyers is more important than protecting civil—but not criminal—jury trials from disruption caused by prejudicial publicity. Id.
\textsuperscript{111} See notes 51-82 and accompanying text supra.
\textsuperscript{112} See 594 F.2d 370-73; notes 74-82 and accompanying text supra.
\textsuperscript{113} See 594 F.2d at 382-83 (Widener, J., concurring in part and dissenting in part). It should also be noted that other methods used to protect juries in criminal cases from prejudicial publicity may not apply in civil trials. Gag orders, for instance, may be improper under the reasoning of CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975). See note 79 and accompanying text supra.
\textsuperscript{114} See note 91 supra.
\textsuperscript{115} 594 F.2d at 371-74. See notes 51-82 and accompanying text supra.
Thus, it is suggested that those parts of DR 7-107 which restrict lawyers' speech in non-jury proceedings are likely to be found unconstitutional in subsequent litigation arising in other circuits and in the states. It is further suggested that the rule's constitutionality, even as applied to criminal jury trials, is not certain since several of the circuit judges who have considered the issue have opined that standards more protective of lawyers' first amendment rights than the "reasonable likelihood" standard must be used.

In upholding DR 7-107 as it applies to criminal jury trials, it is suggested that the court is promoting jury impartiality by the means which is least burdensome on lawyers' first amendment rights yet consistent with Supreme Court precedent. However, in all other types of litigation arising in the Fourth Circuit, the district courts may be forced to seek new methods of protecting against prejudice, and lawyers are left without court approved rules to guide their public speech.

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116. 594 F.2d at 381-83 (Widener, J., concurring in part and dissenting in part).
117. See id. at 378-81 (Winter and Butzner, JJ., concurring in part and dissenting in part); Chicago Council of Lawyers v. Bauer, 522 F.2d at 249.
118. See notes 51-73 and accompanying text supra.
119. See notes 91-103 and accompanying text supra.