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Professional Ethics and Trial Publicity: Another Constitutional Attack on DR7-107- *Hirschkop v. Snead*

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COMMENTS

PROFESSIONAL ETHICS AND TRIAL PUBLICITY: ANOTHER CONSTITUTIONAL ATTACK ON DR 7-107—*Hirschkop v. Snead*

I. INTRODUCTION

Philip J. Hirschkop brought an action seeking a declaratory judgment that Disciplinary Rule 7-107 of the Virginia Code of Professional Responsibility,¹ was unconstitutionally vague and overbroad.² DR 7-107, generally referred to as the “no-comment” rule,³ prohibits extrajudicial statements

1. DR 7-107 was adopted by the Supreme Court of Virginia upon petition by the Virginia State Bar and pursuant to VA. CODE ANN. § 54-48 (Repl. Vol. 1974). *Hirschkop v. Snead*, 594 F.2d 356, 362, 374-76 (4th Cir. 1979) (Appendix). See RULES OF COURT, 211 Va. 295, 347-50 (1970). DR 7-107 is set forth in the appendix to this comment.

2. It was Hirschkop's contention that DR 7-107 was facially unconstitutional for vagueness and overbreadth, as it violated his right to freedom of speech protected by the first and fourteenth amendments to the United States Constitution. *Hirschkop v. Snead*, 594 F.2d 356, 362 (4th Cir. 1979). The first amendment provides in part: “Congress shall make no law . . . abridging the freedom of speech . . .” It has been made applicable to the states by the fourteenth amendment. See *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (invalidating injunctive remedies against “malicious, scandalous and defamatory” periodicals).

Hirschkop also had contended in the district court that DR 7-107 was unconstitutional as applied to him. *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137, 1140 (E.D. Va. 1976). Hirschkop, who had been a controversial lawyer in many civil rights and civil liberties cases, had been the subject of eleven of the twenty-two complaints filed with the Virginia State Bar from 1965 to 1975 charging violations of DR 7-107. The final complaint alleged that Hirschkop had done nothing more than tell the press that he was representing an indicted prison official because the official was “a good guy.” *Hirschkop v. Snead*, 594 F.2d 356, 362 (4th Cir. 1979). Eventually, Hirschkop and the Virginia State Bar reached a settlement in which the Bar admitted that the complaints against Hirschkop were “meritless and had been filed in cases where the complainants may have disagreed with the causes supported and espoused” by Hirschkop. *Id.* at 363. Hirschkop agreed to dismiss his claim against the Bar for selective enforcement. The Justices of the Supreme Court of Virginia, who took no part in the settlement agreement, were retained as defendants because in their official capacity they had adopted the rule on petition of the Virginia State Bar. *Id.* at n.4. Thus, the only issue before the Fourth Circuit was the facial constitutionality of DR 7-107. *Id.* at 363.

3. A brief background into the promulgation of DR 7-107 will be helpful for a better understanding of Hirschkop's action. DR 7-107 is the successor of Canon 20 of the ABA CANONS OF PROFESSIONAL ETHICS, which stated:

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

by attorneys regarding pending litigation in which they are involved, "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."⁴

The district court declared that DR 7-107 was constitutionally sound,⁵

The promulgation of DR 7-107 to replace Canon 20 was based on several factors. Initially, the standards of Canon 20 were vague and difficult to apply, and did little to forewarn lawyers of permissible and impermissible areas of speech. *Hirschkop v. Snead*, 594 F.2d 356, 365 (4th Cir. 1979). In addition, there was an increasing number of appeals to state and federal courts on the ground of pretrial publicity. 10 SUFFOLK U.L. REV. 654, 665 (1976). Many of these appeals were related to the technological advances in the communications media, particularly television. *Id. See, e.g., Estes v. Texas*, 381 U.S. 532 (1965) (televising of sensational trial held denial of due process); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (denial of change of venue by trial judge after confession of accused to sheriff had been repeatedly televised in area from which jurors were drawn held denial of due process). As a result of these appeals there was a growing concern among members of the Bar that efforts had to be taken to balance the public's right to know with the right of the accused to a fair trial. The extreme example came in 1964 when the PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (1964), concluded that it would have been impossible for Lee Harvey Oswald to have obtained a fair trial. *Id.* at 242. All of these factors culminated in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), in which the Supreme Court directed courts to adopt rules and regulations to protect their processes from prejudicial influences. *Id.* at 363. *See* note 30 *infra* for a discussion of *Sheppard*, and note 31 *infra* for the *Sheppard* "directive."

The Supreme Court's directive was picked up by the ABA Advisory Committee on Fair Trial and Free Press, which made a tentative draft of recommended restrictions upon statements for publication by lawyers engaged in criminal trials. *See* ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tent. Draft 1966) [hereinafter cited as REARDON REPORT]. The REARDON REPORT was subsequently approved in large part as ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft 1968) [hereinafter cited as ABA PROJECT]. Two other Reports made similar recommendations. *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL, FINAL REPORT AND RECOMMENDATIONS (1967) [hereinafter cited as the MEDINA REPORT]; The Committee on the Operation of the Jury System, 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 (1968) [hereinafter cited as the *Judicial Report*]. It was from the recommendations of the ABA PROJECT and the *Judicial Report* that DR 7-107 was modeled and eventually adopted by the Supreme Court of Virginia. *Hirschkop v. Snead*, 594 F.2d 356, 362 (4th Cir. 1979).

4. REARDON REPORT, *supra* note 3, at 2, 82. Although DR 7-107 does not contain this specific language, the Fourth Circuit has apparently interpreted DR 7-107 as if it did. *See Hirschkop v. Snead*, 594 F.2d 356, 362, 368 (4th Cir. 1979).

It should be noted that the prohibitions of DR 7-107 are very broad in scope; they apply to jury and bench trials, civil and criminal litigation, and administrative and disciplinary proceedings. *See* the appendix to this comment.

5. *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137, 1154 (E.D. Va. 1976).

and the Court of Appeals for the Fourth Circuit in a *per curiam* opinion, in *Hirschkop v. Snead*,⁶ affirmed in part and reversed in part.⁷

The Fourth Circuit summarily rejected Hirschkop's contention that "the first amendment precludes any rule limiting speech by lawyers."⁸ The freedom of speech, the court stated, is not absolute; it may be subjected to governmental restrictions if the restrictions satisfy the two-step test formulated by Mr. Justice Powell in *Procunier v. Martinez*:⁹

First, the regulation . . . in question must further an important or substantial governmental interest unrelated to the suppression of expression
Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.¹⁰

The court held that there was "little question" that DR 7-107 satisfied

6. 594 F.2d 356 (4th Cir. 1979). The case was originally heard before a three judge panel composed of Chief Judge Haynesworth, Judge Winter and Judge Butzner. Judge Butzner prepared a proposed majority opinion of the panel, and the Chief Judge prepared a concurring and dissenting opinion. A rehearing *en banc* was ordered after those two opinions had been circulated but before they were filed. The *per curiam* opinion of the Fourth Circuit was extracted in large part from those two opinions. *Id.* at 361.

7. Initially the Fourth Circuit had to consider whether Hirschkop had standing to maintain his action even though no complaints charging violations of DR 7-107 were pending against him as a result of the settlement agreement with the Virginia State Bar. *See* note 2, *supra*. The court recognized that Hirschkop was licensed to practice law in Virginia and was, therefore, subject to discipline, including disbarment, for violations of DR 7-107. *See* VA. CODE ANN. § 54-73 (Repl. Vol. 1978). In addition, the court noted that the settlement agreement did not deal with the rule's constitutionality and it expressly provided that Hirschkop would not be immune from disciplinary action in the future should he violate DR 7-107. The court noted further that the Supreme Court had relaxed the traditional requirement for standing in first amendment cases where a statute would cause not only litigants, but others not before the court, to refrain from constitutionally protected speech. *See, e.g.,* *Broadrick v. Oklahoma*, 413 U.S. 601, 611-13 (1973) (constitutional attack on Oklahoma's Merit System Act restricting political activities by civil servants). Based on the relaxed rule for standing and the particular facts in this case, the Fourth Circuit held that Hirschkop did have standing to challenge the constitutionality of DR 7-107. *Hirschkop v. Snead*, 594 F.2d at 363. *See generally* *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1140 (action constituted a "case or controversy").

8. *Hirschkop v. Snead*, 594 F.2d at 363. *See generally* *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1143 (district court holding that Hirschkop's contention "flies in the face of right, reason, logic, history—and the law. It weakens his whole case").

9. 416 U.S. 396 (1974) (involving prison mail censorship).

10. *Id.* at 413. *See* *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (balancing test required to restrict comments of lawyers under DR 7-107). *See generally* *Emerson, Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 912 (1963) (discussing balancing test). *See also* 10 *SUFFOLK U.L. REV.* 654, 660-61 (1976) (discussing balancing test used in *Chicago Council of Lawyers v. Bauer, supra*).

the first part of *Martinez*, since “[s]tate and federal courts have a substantial interest in assuring every person the right to a fair trial . . . ‘the most fundamental of all freedoms.’”¹¹ The remaining issue before the court was whether “the scope of the rule and the nature of its restrictions” satisfied the second part of *Martinez*.¹² The resolution of this crucial issue, the court concluded, required the application of the second part of *Martinez* to each type of proceeding to which DR 7-107 referred.¹³

II. CRIMINAL JURY TRIALS

With respect to criminal jury trials, the Fourth Circuit held that “a properly drawn rule restricting lawyers’ comments about pending criminal prosecution [could] be justified by the need to protect the right to a fair jury trial.”¹⁴ The court’s starting premise was that “prejudice from lawyers’ unrestrained comments is most likely to occur in criminal cases heard by a jury.”¹⁵ Furthermore, the court was convinced that there was no less intrusive means of assuring fair criminal jury trials than adopting rules to prohibit extra-judicial statements by lawyers.¹⁶

11. *Hirschkop v. Snead*, 594 F.2d at 363, quoting from *Estes v. Texas*, 381 U.S. 532, 540 (1965).

Judge Phillips, in his concurring opinion in *Hirschkop v. Snead*, 594 F.2d at 376, believed that the dominant focus in the court’s opinion on the substantial state interest of “assuring every person the right to a fair trial,” was too limited. He would have preferred defining the state interest in broader terms: “protecting the integrity of certain essential judicial processes that are critical in the adversary system.” *Id.* For Judge Phillips, this broader definition of the state’s interest made the court’s conclusion more compelling. *Id.* at 378.

12. *Hirschkop v. Snead*, 594 F.2d at 364.

13. *Id.*

14. *Id.* at 365.

15. *Id.* at 364. The court was relying on the findings of the ABA PROJECT, *supra* note 3, at 22, and of the *Judicial Report*, *supra* note 3, at 392. The court was also persuaded by the expert testimony in the district court of the Honorable Bernard S. Meyer, who was a member of the Advisory Committee on Fair Trial and Free Press which drafted the REARDON REPORT, *supra* note 3. Judge Meyer’s testimony, based primarily on the findings of the REARDON REPORT, disclosed that prejudicial publicity posed a substantial threat to a fair criminal jury trial. Judge Meyer also testified that the drafters of the REARDON REPORT had relied heavily on the Supreme Court’s mandate in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), directing courts to adopt rules to assure a fair trial. *Hirschkop v. Snead*, 594 F.2d at 364. See note 30 *infra* for a discussion of *Sheppard*, and note 31 *infra* for the *Sheppard* “directive.”

16. *Hirschkop v. Snead*, 594 F.2d at 365. The alternative techniques available to the court included: (1) exclusion of public from those hearings during trial held in absence of jury; (2) continuance; (3) change of venue; (4) waiver of jury; (5) searching *voir dire*; (6) selection of jury from locality outside of area of intensive news coverage; (7) sequestration of jury; (8) admonitions to jury to avoid news reports relating to trial; (9) cautionary instructions to media regarding critical matters; (10) examination of jurors regarding possible exposure to prejudicial information during trial; (11) mistrial; (12) new trial. See REARDON REPORT, *supra* note 3, at 73-74.

Upon concluding that the adoption of a rule such as DR 7-107 in criminal jury trials was not "unnecessarily broad" in theory,¹⁷ the more controversial issue facing the court was whether the specific restrictions of DR 7-107 on statements by lawyers regarding pending criminal jury trials in which they were involved, were "essential to the preservation of a fair trial."¹⁸ The parties in this action were sharply divided over what comments should be barred. Hirschkop argued that a properly drawn rule could bar only those statements that present a "clear and present danger to a fair trial."¹⁹ Counsel for the Virginia Supreme Court urged, however,

The Fourth Circuit rejected Hirschkop's suggestion that the judge could protect the rights of the accused by entering "gag orders" on an *ad hoc* basis, since prejudicial information is likely to be released during the investigatory stages of the case before the charges against the accused come to the attention of the judge. *Hirschkop v. Snead*, 594 F.2d at 365. *See Shepard v. Maxwell*, 384 U.S. 333 (1966), in which the Supreme Court emphasized that courts must take measures in advance to "prevent the prejudice at its inception." *Id.* at 363. *Cf. REARDON REPORT, supra* note 3, at 25-26, in which the Committee concluded that the likelihood of prejudicial information reaching the public during the investigatory stage was relatively low.

The Fourth Circuit also rejected the argument that other remedial measures such as change of venue, continuances and searching *voir dire* were effective alternatives. The court stated that the use of such tools might impinge upon other constitutional rights of the accused, such as the right to a speedy trial. Moreover, the accused might so doubt the impartiality of the jury that he may feel compelled to waive his right to trial by jury. *Hirschkop v. Snead*, 594 F.2d at 367. *See Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring) (accused might be forced to waive jury trial because of pretrial publicity).

The court did consider, however, the high fiduciary duty of the lawyer to the court and to the public as a substantial reason for imposing rules on the publication of information by lawyers. Lawyers, as officers of the court, have a duty to protect and preserve the right to a fair trial, the court stated. If lawyers release information adversely affecting that right, the court held that they should be subject to disciplinary sanctions. The court rejected the notion that such rules reduced lawyers to second-class citizens. *Hirschkop v. Snead*, 594 F.2d at 366.

17. *Hirschkop v. Snead*, 594 F.2d at 364, quoting from *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

18. *Hirschkop v. Snead*, 594 F.2d at 364-65. DR 7-107 breaks down the categories of pending criminal litigation into four time sequences and enumerates specific restrictions for each time sequence. First, DR 7-107(A) applies to the investigatory period prior to arrest. Second, DR 7-107(B) and (C) apply to the time from arrest until the commencement of the trial or the disposition without trial. Third, DR 7-107(D) applies to the trial stage. And fourth, DR 7-107(E) applies to the post-trial stage prior to sentencing. *See Hirschkop v. Snead*, 594 F.2d 374-76; appendix to this comment.

19. *Hirschkop v. Snead*, 594 F.2d at 365. Hirschkop was relying in large part on *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976). In *Chicago Council*, the only other case involving the constitutionality of DR 7-107, the Seventh Circuit held that "[o]nly those comments that pose a [serious and imminent threat] of interference with the fair administration of justice can be constitutionally proscribed." *Id.* at 249, quoting from its earlier decisions in *In re Oliver*, 452 F.2d 111, 114-15 (7th Cir. 1971), and *Chase v. Robson*, 435 F.2d

that DR 7-107 should be read as prohibiting only "those comments which are reasonably likely to interfere with the administration of justice."²⁰

At the outset, the court noted that the express prohibitions of DR 7-107 were not explicitly qualified by either a "reasonable likelihood" or a "clear and present danger" standard. Apparently, the court stated, the drafters of the "no-comment rule" concluded that the potential for prejudice to the accused's right to a fair trial was so inherent and so great in the areas proscribed under DR 7-107 that no qualification was necessary.²¹ Nevertheless, the court, agreeing with counsel for the Virginia Supreme Court, held that the drafters of DR 7-107 were concerned only with speech that had a "reasonable likelihood of interference with a fair trial," and that it did not strain the language of the rule to read such a qualification as implicit in each of its express prohibitions.²² Moreover, the court was satisfied that the

1059, 1061-62 (7th Cir. 1970). In *In re Oliver*, the Seventh Circuit held that the trial court's adoption of a blanket prohibition, prospective in nature, against all comments by lawyers in cases tried before a judge or jury and without regard to whether such comments posed a serious and imminent threat to the administration of justice, was violative of the first amendment. In *Chase*, the Seventh Circuit held that "gag orders" on comments of defense attorneys and their clients violated their first amendment rights unless the record contained sufficient facts showing that their comments would cause a serious and imminent threat to the administration of justice. For a discussion of *Chicago Council*, *supra*, see 10 SUFFOLK U.L. REV. 654 (1976).

The Supreme Court has apparently construed the "clear and present danger" and "serious and imminent danger" terminology as interchangeable, meaning essentially the same thing. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (appeal from conviction under Ohio Criminal Syndicalism Statute); *Pennekamp v. Florida*, 328 U.S. 331, 336 (1945) (contempt of court proceeding for publishing articles and cartoons critical of judges); *Bridges v. California*, 314 U.S. 252, 262 n.5 (1941) (contempt of court proceeding for publishing comments about pending litigation).

20. *Hirschkop v. Snead*, 594 F.2d at 365. The Virginia Supreme Court wanted DR 7-107 to be read consistently with its prototype found in the ABA PROJECT, *supra* note 3, at 2, 82, even though DR 7-107 does not contain that specific language. See generally *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969) (involving contempt conviction for violation by defendants of court imposed "gag order"); *Younger v. Smith*, 30 Cal. App. 3d 138, 157-64, 106 Cal. Rptr. 225, 238-42 (1973) (involving contempt conviction for violation by lawyers of court imposed "gag orders"). Both *Tijerina* and *Younger* held that the "reasonable likelihood" standard suffices constitutional scrutiny, and that the Supreme Court has never required a "clear and present danger" to the right to a fair trial, before the court may restrict extrajudicial comments by the participants.

21. *Hirschkop v. Snead*, 594 F.2d at 365, 376.

22. *Id.* at 368. The court was particularly impressed with the assurances of the Virginia Supreme Court that it so construed and would enforce DR 7-107. *Id.* Cf. *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1154-56 (DR 7-107 construed as general rule explained by specific examples intended as mere guidelines). *But cf.* REARDON REPORT, *supra* note 3, at 84-85 (no-comment rule states specific restrictions).

The court did not address itself to Hirschkop's contention that DR 7-107 was unconstitu-

Constitution did not require a tighter standard than that implicit in the rule itself.²³

The court stated further that, from a practical standpoint, the reasonable likelihood standard was more appropriate under DR 7-107 than was the clear and present danger standard because the threat sought to be prevented was not the present danger or the imminent harm, but rather the potential danger of prejudice to a fair trial.²⁴ The court noted that should a prosecutor make a pretrial release of a confession given by the accused, the reasonable likelihood test would be met since there would be a possibility of prejudice to the accused if the confession were subsequently suppressed and held inadmissible. But because the confession could be declared admissible at trial, there would be present only a potential danger at the time of the release and not an immediate threat to the right to a fair trial.²⁵ For this reason, the court doubted whether a clear and present danger test would ever be met. In fact, the court believed that a clear and present danger standard would only cast confusion, rather than clarity, on the speech prohibited by the no-comment rule.²⁶

tionally vague. But one could argue that the court's own analysis makes out a *prima facie* case of vagueness, since no express standard is contained in the rule, requiring the court to look outside the rule for the appropriate standard, and even then there were two conflicting views on what that standard should be. *See generally* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (regulations on conduct are "void for vagueness" if their prohibitions are not clearly defined); Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (vagueness attack on loyalty oaths of certain state employees as a condition of employment); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); 7 CONN. L. REV. 94 (1974).

23. *Hirschkop v. Snead*, 594 F.2d at 368. Thus, the Fourth Circuit has rejected the "serious and imminent threat" test adopted by the Seventh Circuit in *Chicago Council*, *supra* note 19. *See Hirschkop v. Snead*, 594 F.2d at 362, 370. *See generally* *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1156 (Virginia Supreme Court's construction of DR 7-107 held consistent with constitutional requirements).

Moreover, the court was of the opinion that the only reason for any qualification at all was to take care of the extraordinary case in which there was no likelihood of a prejudicial effect. For example, if James Earle Ray should again escape from prison, the court believed that no substantial right of Ray would be adversely affected if the prosecutor should release that Ray was serving a sentence for the murder of Martin Luther King, since that is a widely known fact. *Hirschkop v. Snead*, 594 F.2d at 367.

24. *Hirschkop v. Snead*, 594 F.2d at 368.

25. *Id.* Furthermore, the court stated that the court should have the power to censure such reprehensible and irresponsible conduct by the prosecutor immediately, and should not have to wait until the threatened harm was clear and present. *Id.*

26. *Id.* at 368. The court noted that if the "clear and present danger" test was, in fact, met in this situation, then the issue before the court was only a matter of semantics and not a matter of constitutional doctrine. *Id.* at n.13.

The Fourth Circuit also tried to distinguish the prohibitions under DR 7-107 from other situations which have traditionally invoked the heightened scrutiny of the clear and present danger test. First, the court held that DR 7-107 did not constitute a prior restraint on the speech of lawyers, since one prosecuted for violating the rule could challenge its validity, and could be sanctioned for the violation only after he had been afforded a due process hearing and found guilty.²⁷ In addition, the court distinguished the restrictions under DR 7-107 from the subversive acts cases which involved "pure" first amendment rights rather than a conflict between first and sixth amendment rights.²⁸ Lastly, the court stated that DR 7-107 was distinguishable from those cases involving contempt convictions against the press for publishing critical articles and cartoons about the court, since the no-comment rule applies only to lawyers and is quite explicit in informing them of proscribed areas of speech.²⁹

And finally, in reaching its determination that the reasonable likelihood standard was the appropriate test under DR 7-107, the Fourth Circuit

27. *Id.* at 368-69. *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 248-49 (holding that even though DR 7-107 did not constitute a prior restraint, it did have some inherent features of prior restraint, thus requiring close scrutiny); *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1152 (DR 7-107 is not a prior restraint).

Prior restraints are usually imposed by a judicial decree, violations of which are summarily punishable by the contempt powers of the court without the traditional due process safeguards. As a general rule prior restraints may not be challenged as unconstitutional if there is an opportunity for appeal. *See Chicago Council*, 522 F.2d at 248-49. *See generally Walker v. City of Birmingham*, 388 U.S. 307 (1967) (petitioners may not disobey injunctions where there is opportunity for orderly judicial review).

28. *Hirschkop v. Snead*, 594 F.2d at 369. *See Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis & Holmes, JJ., concurring) (clear and present danger test stated to be a prerequisite in a prosecution under California's Criminal Syndicalism Statute); *Schenck v. United States*, 249 U.S. 47 (1919) (Mr. Justice Holmes formulating the clear and present danger standard as the test for prosecutions under the Federal Espionage Act of 1917).

29. *Hirschkop v. Snead*, 594 F.2d at 369. *Accord, Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1149-50. *See, e.g., Craig v. Harney*, 331 U.S. 367, 369 (1947) (involving a reversal of contempt convictions of a newspaper publisher, reporter and editorial writer for publishing articles and editorials criticizing a guilty verdict in a forcible detainer case); *Pennekamp v. Florida*, 328 U.S. 331 (1946) (involving a reversal of a contempt conviction for publishing highly critical editorials and cartoons about certain judges); *Bridges v. California*, 314 U.S. 252 (1941) (involving a reversal of contempt conviction for publishing editorials regarding a particular case, but after conviction).

One commentator has suggested that these cases involving contempt convictions against the press can be distinguished from cases involving DR 7-107 for three reasons: (1) all of these cases involved representatives of the press and not officers of the court; (2) none of the extrajudicial publications in question related to litigation pending at the time the statements were published; and (3) these cases were based on the court's contempt power rather than on its rule-making power. 10 SUFFOLK U.L. REV. 654, 662 (1976).

relied heavily upon *Sheppard v. Maxwell*,³⁰ in which the Supreme Court stated that, "where there is a reasonable likelihood that prejudicial news will prevent a fair trial," the trial judge must take remedial action.³¹ The court recognized that this statement was made with reference to actions the judge must take to remedy the situation after the harm has been done.³² Nevertheless, the court noted that the Supreme Court also directed courts to "take such steps by rule and regulation" that will "prevent the prejudice at its inception."³³ The court concluded that if remedial action must be taken on the basis of a reasonable likelihood test, the rules to prevent the harm initially must be formulated under the same test.³⁴ Thus, the court determined that the Supreme Court had tacitly approved of the reasonable likelihood test in *Sheppard*.³⁵

30. 384 U.S. 333 (1966). The *Sheppard* trial represents one of the major atrocities of the American legal system. Dr. Sam Sheppard, who was charged with murdering his wife, was the subject of pervasive incriminating pretrial publicity. He was questioned for more than five hours without counsel in a televised inquest; newspapers emphasized his failure to take a lie detector test and published a picture of the alleged bloodstained pillow; his extra-marital love affairs were exploited; headlines demanded his arrest and denounced his innocence; the names and addresses of prospective jurors were published, causing them to receive telephone calls regarding the case. During the trial, the judge and prosecutor were candidates for judgeships in the midst of heated campaigns; the press was given free rein in the small courtroom; they were even assigned seats inside the bar; they hounded Dr. Sheppard and caused frequent confusion in and around the courtroom. During their sequestered deliberations, jurors were permitted to make unsupervised telephone calls. Ultimately, Dr. Sheppard was convicted of murder. The Supreme Court granted Sam Sheppard a writ of habeas corpus on the grounds that he had been deprived of his right to a fair trial. *Id.* at 363.

31. *Id.* Since the so-called Sheppard "mandate" or "directive" is controversial and subject to varying interpretations when taken out of context, it is reprinted here in its entirety.

But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. 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 fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Id. at 363.

32. *Hirschkop v. Snead*, 594 F.2d at 369.

33. *Id.* at 369-70. *Sheppard v. Maxwell*, 384 U.S. at 363. *See* note 31 *supra*.

34. *Hirschkop v. Snead*, 594 F.2d at 370.

35. *Id. But cf. Younger v. Smith*, 30 Cal. App. 3d 138, 156-57, 159, 106 Cal. Rptr. 225, 237, 239 (1973) (stating that "snippets" from *Sheppard* are inconclusive as to which stan-

For these reasons, the Fourth Circuit held that the specific prohibitions of DR 7-107, based upon the reasonable likelihood standard, constituted the least intrusive means of "assuring every person the right to a fair trial" in criminal cases tried before a jury.³⁶

Judge Winter and Judge Butzner dissented from the part of the *per curiam* opinion approving restrictions on lawyers' comments that did not pose a clear and present danger to the fairness of a criminal jury trial.³⁷ The two judges agreed with the fundamental precepts of the majority, that "the governmental interest in fair jury trials of criminal cases and the lack of less restrictive means for achieving this end, justify the promulgation of a rule restricting the comments that a lawyer may make for publication."³⁸ They disagreed with the majority, however, over the applicable standard for such a rule. And they also disagreed that the applicable standard for restricting lawyers' comments could be found in *Sheppard v. Maxwell*.³⁹

dard—reasonable likelihood or clear and present danger—is applicable to fair trial-free press issue).

36. *Hirschkop v. Snead*, 594 F.2d at 370. Thus, the Fourth Circuit held that with respect to criminal jury trials DR 7-107 satisfied the second part of *Martinez*, *supra* notes 9-13, requiring that restrictions on speech must be "no greater than [are] necessary or essential" to protect the governmental interest involved. *Procurier v. Martinez*, 416 U.S. 396, 413 (1974).

In a final matter regarding criminal jury trials, the court held that DR 7-107(D), which prohibits statements about "other matters that are reasonably likely to interfere with a fair trial," was "void for vagueness." *Hirschkop v. Snead*, 594 F.2d at 370-71. *Accord* *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 255-56. The Fourth Circuit stated that "[t]his proscription is so imprecise that it can be a trap for the unwary . . . neither the speaker nor the disciplinarian is instructed where to draw the line between what is permissible and what is forbidden." *Hirschkop v. Snead*, 594 F.2d at 371. *See* *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (regulations on conduct are "void for vagueness" if their prohibitions are not clearly defined); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (vagueness attack on loyalty oaths of certain state employees as a condition of employment). *See generally* *Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); 7 *CONN. L. REV.* 94 (1974).

37. *Hirschkop v. Snead*, 594 F.2d at 378-79 (Winter & Butzner, JJ., concurring and dissenting). Judge Winter and Judge Butzner joined in that portion of the *per curiam* opinion reversing the district court and dissented from that part affirming it. For this reason they would have remanded the case for a declaratory judgment that DR 7-107 was unconstitutional in its entirety. *Id.*

38. *Id.* at 381. *See* notes 14-16 *supra* and accompanying text. *See generally* *Procurier v. Martinez*, 416 U.S. 396, 413 (1974); *Sheppard v. Maxwell*, 384 U.S. at 363 (1966).

39. 384 U.S. 333 (1966). *See* *Hirschkop v. Snead*, 594 F.2d at 379. *Cf.* *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973) (*Sheppard* is inconclusive as to what is the proper standard). *But cf.* note 31 *supra* and accompanying text (proper standard can be found in *Sheppard*).

Judge Winter and Judge Butzner pointed out that the Supreme Court, in *Sheppard*, did not explicitly approve of the reasonable likelihood test for limiting lawyers' comments in all cases.⁴⁰ In fact, they noted that the Supreme Court was not addressing the first amendment implications of such a rule.⁴¹ For this reason, the judges concluded that it was doubtful that the Supreme Court would implicitly approve of a shift from the clear and present danger test to a reasonable likelihood standard.⁴² Furthermore, Judge Winter and Judge Butzner suggested that the reasonable likelihood standard of *Sheppard* was not suitable for determining the parameter of lawyers' first amendment rights.⁴³ The reasonable likelihood test, they stated, was retrospective in nature, formulated for the purpose of gauging whether adverse publicity had denied a defendant due process. DR 7-107, on the other hand, was prospective in nature, designed to inform lawyers in advance of permissible areas of speech. Because lawyers frequently do not know the impact their remarks will have, Judge Winter and Judge Butzner believed that the reasonable likelihood standard would cause lawyers to speculate whether their remarks may at some later date be judged to have created a reasonable likelihood of prejudice because of contingencies they did not foresee. The inevitable result of this type of speculative standard, the judges argued, is that lawyers will take the "prudent course," avoiding all comment no matter how remote the chance of prejudice at the time.⁴⁴

Judge Winter and Judge Butzner were more of the opinion that the proper standard to be applied to DR 7-107 could be found in the traditional line of authority resolving the conflict between the first amendment and other important governmental interests.⁴⁵ They cited as the leading case in this area *Schenck v. United States*,⁴⁶ in which Mr. Justice Holmes wrote:

The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.⁴⁷

40. *Hirschkop v. Snead*, 594 F.2d at 380 (Winter & Butzner, JJ., concurring and dissenting). See *Sheppard* "mandate" note 31 *supra*.

41. *Hirschkop v. Snead*, 594 F.2d at 380 (Winter & Butzner, JJ., concurring and dissenting).

42. *Id.*

43. *Id.*

44. *Id.* Judge Winter and Judge Butzner cited the particular facts in this case as indicative of the rule's present effect. See note 2 *supra*.

45. *Hirschkop v. Snead*, 594 F.2d at 379 (Winter & Butzner, JJ., concurring and dissenting).

46. 249 U.S. 47 (1919). See generally note 28 *supra*.

47. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

Although the judges recognized that the clear and present danger standard has not provided a ready answer in every situation,⁴⁸ they believed it had provided a working principle to protect freedom of speech.⁴⁹ This opinion was buttressed by a trilogy of Supreme Court decisions⁵⁰ rejecting a lesser standard than "clear and present danger" for imposing restrictions on speech regarding pending litigation. In *Bridges v. California*,⁵¹ which was affirmed by *Pennekamp v. Florida*⁵² and *Craig v. Harney*,⁵³ the Supreme Court rejected the notion that the difference between the "reasonable likelihood" and the "clear and present danger" standards was nothing more than a futile exercise in semantics.⁵⁴ Moreover, the judges stated that *Bridges* had disposed of the argument that for a temporary restriction on speech a less rigorous test was required.⁵⁵

Finally, Judge Winter and Judge Butzner expressed the opinion that, though lawyers are officers of the court, this did not justify a different standard for measuring their first amendment rights, thereby reducing them to second class citizenry.⁵⁶ Thus, Judge Winter and Judge Butzner

48. See *Younger v. Smith*, 106 Cal. Rptr. at 240, stating: "The 'clear and present danger' test never has been the universal solvent of First Amendment problems which it is popularly thought to be." See generally Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952); Strong, *Fifty Years of "Clear and Present Danger: From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 52-55; Note, *The Clear and Present Danger Standard: Its Present Viability*, 6 U. RICH. L. REV. 93 (1971). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 608-17 (1978).

49. *Hirschkop v. Snead*, 594 F.2d at 379 (Winter & Butzner, JJ., concurring and dissenting).

50. See note 29 *supra*.

51. *Supra* note 29.

52. *Supra* note 29, at 334-35.

53. *Supra* note 29, at 371-72. See generally *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (affirming "clear and present danger" test of *Bridges* while reversing publisher's conviction under Virginia law prohibiting the divulging of identification of a judge who was the subject of investigation by Judicial Inquiry and Review Commission); *Wood v. Georgia*, 370 U.S. 375 (1962) (using clear and present danger test to reverse sheriff's contempt conviction for criticizing racious activity of pending grand jury).

54. *Bridges v. California*, 314 U.S. 252, 273 (1941). Cf. note 25 *supra* (might be only a matter of semantics).

55. *Bridges v. California*, 314 U.S. at 269. See *Hirschkop v. Snead*, 594 F.2d at 379-80 (Winter & Butzner, JJ., concurring and dissenting). *But cf.* *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1146-47 (temporarily muting lawyers' "important but relatively insubstantial" right to free speech is outweighed by need to protect right to fair trial).

56. *Hirschkop v. Snead*, 594 F.2d at 381 (Winter & Butzner, JJ., concurring and dissenting). See generally *Spevack v. Klein*, 385 U.S. 511 (1967) (lawyers cannot be disbarred for exercising right against self-incrimination in disciplinary hearing); *Sherbert v. Verner*, 374 U.S. 398 (1963) (state may not impose unemployment eligibility requirements so as to make worker abandon freedom of religion).

concluded that DR 7-107 did not meet constitutional requirements, as it imposed restrictions on lawyers' comments that did not pose a clear and present danger to a fair criminal jury trial.⁵⁷

In essence, the Fourth Circuit has concluded that, to adequately and efficiently protect the right to a fair criminal jury trial and to assure the due administration of justice, rules must be adopted proscribing, at some point, the extrajudicial comments of both prosecutors and defense attorneys. One of the significant features of the *Hirschkop* decision is its illustration of the two conflicting views regarding the point at which the speech of lawyers must give way to the right to a fair trial, the majority of the court adopting the "reasonable likelihood of interference" standard, and Judge Winter and Judge Butzner advocating the "clear and present danger of interference" standard. The question that remains unanswered throughout both opinions, however, is why should DR 7-107 apply to defense attorneys at all. Since the Fourth Circuit avoided this question, it might be useful to examine it at some length here.⁵⁸

The apparent source of the application of DR 7-107 to both prosecutors

57. *Hirschkop v. Snead*, 594 F.2d at 381. *Accord Chicago Council of Lawyers v. Bauer*, 522 F.2d at 249-51.

Judge Winter and Judge Butzner also noted that the ABA had recognized that "the reasonable likelihood test [was] too relaxed to provide full protection to the first amendment interests of attorneys," and had revised its 1968 standard, which was the prototype for DR 7-107. *Hirschkop v. Snead*, 594 F.2d at 381 (Winter & Butzner, JJ., concurring and dissenting), quoting from ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 8-1.1, at 3 (Tent. Draft 1978) [hereinafter cited as ABA STANDARDS 1978].

The new ABA standard proscribes only a lawyer's dissemination of information that "would pose a clear and present danger to the fairness of the trial." ABA STANDARDS 1978, *supra*, at 1. The revision was prompted, first, by a recognition that the first amendment implications of the reasonable likelihood standard had received only cursory discussion in the REARDON REPORT, *supra* note 3, at 93. ABA STANDARD 1978, *supra*, at 2. Secondly, the revision was required as a result of the Seventh Circuit's decision in *Chicago Council*, *supra* note 19, holding that a "serious and imminent threat" standard was required by the first amendment. ABA STANDARDS 1978, *supra*, at 1-3. And lastly, but most importantly, the First Edition failed to recognize that extrajudicial statements by lawyers in criminal trials do not inevitably affect the fairness of the trial. *Id.* at 4.

58. *See Hirschkop v. Snead*, 594 F.2d at 367-68, where the court analyzed the threat that statements by prosecutors have on the defendant's right to a fair trial, thus, necessitating the barring of those statements by DR 7-107(B). However, the court's opinion is devoid of similar analysis with respect to defense attorneys. *Cf. Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250-51, where the Seventh Circuit expressed its "disquietude" over barring comments by defense attorneys, but nevertheless, believed that it was constitutionally permissible to protect "public justice, [a] no less important [interest] than an accused's right to a fair trial."

and defense attorneys can be traced to *Sheppard v. Maxwell*,⁵⁹ in which the Supreme Court stated:

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 fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.⁶⁰

The major problem with the Supreme Court's directive regarding defense counsel is that it far exceeded the appropriate scope of the Court's decision.⁶¹ The issue before the Court was whether Dr. Sheppard had been denied due process as a result of the trial judge's failure to take sufficient measures to prevent the "carnival atmosphere" surrounding the trial.⁶² The evidence showed that the bulk of the pretrial publicity was prosecution oriented, and there was no evidence suggesting that Dr. Sheppard's lawyer generated publicity prejudicial to the prosecution.⁶³ The appropriate scope of the holding in *Sheppard*, then, can be found in the following language:

59. *Supra* note 30 and 31. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 251; *Freedman & Starwood, Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 610 (1977) [hereinafter cited as *Freedman & Starwood*]. The *Freedman & Starwood* article was critical of dictum in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 n. 8 (1976) (disapproving prior restraints on press), suggesting that the least drastic alternative for preserving the right to a fair trial was "gagging" the participants, including the defendant and his attorney, rather than imposing prior restraints on the press. See *Freedman & Starwood, supra*, at 607-13. Although the article did not deal exclusively with DR 7-107, see *id.* at 608, its criticism is instructive and analogical to the discussion here.

60. *Sheppard v. Maxwell*, 384 U.S. at 363 (emphasis added). See generally *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 n. 8 (1976) (condoning *Sheppard* dicta); *id.* at 601 n. 27 (Brennan, J., concurring) (dicta to same effect).

61. See *Freedman & Starwood, supra* note 59, at 610.

62. See *Sheppard v. Maxwell*, 384 U.S. at 363, where the Supreme Court granted a reversal on the grounds that the "trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." See generally *Freedman & Starwood, supra* note 59, at 610-11.

63. There was evidence, however, showing that Dr. Sheppard's lawyer attempted to counter adverse publicity and to create a favorable climate for his client, see REARDON REPORT, *supra* note 3, at 42-43, but the only suggestion that defense oriented publicity prejudiced the prosecution was in unsupported dictum, where the Supreme Court stated "that many of the prejudicial news items can be traced to the prosecution, as well as the defense." *Sheppard v. Maxwell*, 384 U.S. at 361. See generally *Freedman & Starwood, supra* note 59, at 611 n. 28, stating: "Given the posture of the case and the attitude of the press toward the defendant, such efforts [to influence the public] were doomed to failure."

Due process requires that the *accused* receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.⁶⁴

Thus, the Supreme Court's mandate with respect to defense attorneys was ill-advised dictum, providing a shaky foundation for the application of no-comment rules, such as DR 7-107, to attorneys for the defense.

Furthermore, it is yet to be seen whether DR 7-107 can pass constitutional muster when scrutinized solely on the basis of its silencing of defense attorneys.⁶⁵ When extrajudicial statements of defense attorneys are prohibited, the interest sought to be protected is no longer the right of the accused to a fair trial,⁶⁶ rather, defense attorneys are silenced to protect the government's interest in the "fair administration of justice."⁶⁷ This amorphous phrase apparently applies collectively to the state's interest in a fair trial,⁶⁸ public justice,⁶⁹ and the preservation of the integrity of the judicial processes.⁷⁰ But the "fears of defense-generated publicity" ignores the "truism" that the Constitution protects the rights of the individual from the state, and not the reverse.⁷¹ Seemingly, courts and commentators have reasoned backwards with regard to DR 7-107.

This point can be illustrated as follows: the right of "the accused" to a "public trial, by an impartial jury" is expressly protected by the sixth amendment; his right to "due process" or fairness is expressly protected

64. *Sheppard v. Maxwell*, 384 U.S. at 362 (emphasis added). See *Freedman & Starwood*, *supra* note 59, at 611. See also note 31 *supra* (*Sheppard* mandate), and note 62 *supra* (grounds for reversal).

65. See note 58 *supra*.

66. See notes 72-76 *infra* and accompanying text.

67. See *Hirschkop v. Snead*, 594 F.2d at 362 ("fair administration of justice"). See also REARDON REPORT, *supra* note 3, at 2.

68. See, e.g., *Singer v. United States*, 380 U.S. 24, 36 (1965) (government has a legitimate interest in a fair trial); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.), cert. denied, 396 U.S. 990 (1969) ("concept of a fair trial applies both to the prosecution and the defense"); *State v. Van Duyne*, 43 N.J. 369, 389, 204 A. 2d 841, 852 (1964) ("right of the state to a fair trial cannot be impeded or diluted by out-of-court assertions" by defense or prosecution).

69. See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250 ("public justice is no less important than an accused's right to a fair trial").

70. See, e.g., *Hirschkop v. Snead*, 594 F.2d at 376 (Phillips, J., concurring) (state interest "in protecting the integrity of certain essential judicial processes that are critical in the adversary system").

71. *Freedman & Starwood*, *supra* note 59, at 607-08. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250 (fifth and sixth amendments protect the accused and not the government).

by the fifth and fourteenth amendments. The prosecutor's first amendment right to free speech will inevitably conflict at some point with these constitutionally guaranteed rights of the accused,⁷² requiring that the prosecutor's right give way.⁷³ However, the government's interest in the due administration of justice is not constitutionally protected.⁷⁴ As one court has said, "[t]he Sixth Amendment speaks only of the right of an accused and the Fifth Amendment only of the right of persons *and not of the government*."⁷⁵ Thus, on a constitutional level there is no conflict between the defense attorney's first amendment right to free speech and the government's interest in a fair trial that would necessitate that the former give way to the latter.⁷⁶

This is not to suggest that the defense lawyer's right to free speech is absolute, as Hirschkop contended before the Fourth Circuit;⁷⁷ it is not. Nevertheless, for the government to restrict the speech of defense attorneys, there must be a showing of a compelling governmental interest, which is furthered by the least restrictive alternative.⁷⁸

72. See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 248 ("irreconcilable conflicts do arise" between the first and sixth amendments).

73. The rights protected by the first and sixth amendments have never been ranked in hierarchical fashion, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 661 (1976), but the general view is that the prosecutor's first amendment right to free speech must give way to the accused's right to a fair trial when they conflict. See, e.g., *Hirschkop v. Snead*, 594 F.2d at 363-70; *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 248; *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1143-56.

Freedman and Starwood state that the comments of the prosecutor, as representations of the state, are also limited by the requirements of the due process clauses in the fifth and fourteenth amendments. Freedman & Starwood, *supra* note 59, at 617.

See generally Comment, *Silence Orders—Preserving Political Expression by Defendants and Their Lawyers*, 6 HARV. C.R.-C.L. L. REV. 595 (1971) [hereinafter cited as *Silence Orders*] (criticizing imposition of no-comment orders on defendants and their attorneys, particularly in cases involving politically motivated defenses). The comment states that the prosecutor's interest in a fair trial is "to seek justice, not merely to convict." *Id.* at 600, quoting from ABA, *The Prosecution Function*, in STANDARDS FOR CRIMINAL JUSTICE 25 (Tent. Draft 1970). Thus, the comment argues that there is no conflict between silencing the prosecution and its interest in a trial. *Silence Orders*, *supra* at 600.

74. See Freedman & Starwood, *supra* note 59, at 607-08.

75. *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250 (emphasis added). See generally Freedman & Starwood, *supra* note 59, at 608, where the decision in *Chicago Council* is criticized for elevating "public justice" to a constitutionally protected status on par with the accused's fifth and sixth amendment rights to a fair trial.

76. See Freedman and Starwood, *supra* note 59, at 612 n.35. *But cf.* the authority cited in notes 68-70 *supra*.

77. See *Hirschkop v. Snead*, 594 F.2d at 363; note 8 *supra*.

78. See notes 9-13 *supra* and accompanying text. Although the Fourth Circuit performed the traditional balancing test in *Hirschkop v. Snead*, it did so only with respect to prosecutors

First, concerning the element of compelling governmental interest, it should not be assumed that the government's interest in the due administration of justice is any more compelling than defense counsel's right to freedom of speech. The source of the defense attorney's right to freedom of expression is two-fold: first, he has an individual right to freedom of speech and, second, just as importantly, he has an interest based on his "role as the defendant's champion against a 'hostile world.'" ⁷⁹ Respecting the defense lawyer's individual right, since he is often regarded as the most credible and knowledgeable source of information and opinion with respect to pending litigation in which he is associated, there is often-times an acute need to allow his unrestrained speech. A case in which he is involved may demonstrate the necessity for reform in our legal system.⁸⁰ In addition, he serves an important watchdog function against police and government abuse and the miscarriage of justice in the case in which he is involved.⁸¹

It has been argued that the defense lawyer's right to free speech is not actually infringed by the proscriptions of DR 7-107, but is merely postponed until after the final disposition of the trial.⁸² But such "moratoria on public discussion . . . [cannot] be dismissed as an insignificant abridgment of freedom of expression."⁸³ Moreover, this argument fails to

and not with respect to defense attorneys. See *Hirschkop v. Snead*, 594 F.2d at 366-68. See also note 58 *supra*.

79. Freedman & Starwood, *supra* note 59, at 614.

80. *Id.* at 616. Relying on the ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 8-1 (1975), Freedman and Starwood state that the attorney has an affirmative professional duty to urge improvement in the legal system, at least insofar as trial publicity is consistent with his client's specific interests. Freedman & Starwood, *supra* note 59, at 616 n.59. See *Silence Orders*, *supra* note 73, at 601 (defendants and their attorneys are the best source of relevant information).

81. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250 (lawyers involved in trials are often in position to act as a check on government by exposing abuses or urging action); Freedman & Starwood, *supra* note 59, at 616 (duty of defense lawyer to speak out publicly about injustices in case); *Silence Orders*, *supra* note 73, at 601-02 (watchdog function in scrutinizing action in indicting political dissidents). *Cf.* *Hirschkop v. Snead*, 594 F.2d at 370 (DR 7-107(C) (11) would permit lawyer to state that statute under which his client was charged was unconstitutional). *But cf.* *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1146-47 (injustice of statute is issue to be decided in court and not in public).

Freedman and Starwood also note that a lawyer may have a substantial interest in going public to set the record straight when he is "the subject of well-publicized personal attacks as a result of representing an unpopular client or cause." Freedman & Starwood, *supra* note 59, at 616.

82. See, e.g., *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1146-47 (comments by lawyer cannot be so vital that they cannot await the end of the case); Cole & Spaks, *Defense Counsel and the First Amendment; A Time to Keep Silent and a Time to Speak*, 6 ST. MARY'S L.J. 347, 378 n. 163 (1974).

83. *Bridges v. California*, 314 U.S. 252, 269 (1941). See *Hirschkop v. Snead*, 594 F.2d 379-

recognize the often immediate need for the action urged by the lawyer, and the fact that public attention often can be compelled only during the pendency of the litigation.⁸⁴ It has also been contended that the defense attorney, as an officer of the court, has a duty to remain silent during the litigation.⁸⁵ This "[w]ith privilege . . . goes responsibility" argument proves too much.⁸⁶ It is too late in the day to deny that "[l]awyers also enjoy first-class citizenship,"⁸⁷ or to argue that speech of defense attorneys may be balanced on a different scale.

As noted above, the defense lawyer also has a special interest in speech emanating from his position as the professional advocate of the accused.⁸⁸ As one commentator⁸⁹ has noted:

[C]ircumstances will virtually never occur in which the right to freedom of speech could be of more importance to an individual than in the course of criminal proceedings. The prosecutor is privileged to publish to the world—including the defendant's family, friends, neighbors, and business associates—what in almost any other context would constitute libel per se.⁹⁰

It may take some time for the accused to refute the heinous allegations in the indictment and releases to the press; and even then, the aura of mis-

80 (Winter & Butzner, JJ., concurring and dissenting); *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250; *Silence Orders*, *supra* note 73, at 601.

84. See note 83 *supra*.

85. See, e.g., *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) (lawyer's duty to obey ethical precepts may require him to abstain from otherwise constitutionally protected speech); *Id.* at 666 (Frankfurter, J., dissenting) (lawyer involved in criminal trial "is not merely a person and not even merely a lawyer"); *Hirschkop v. Snead*, 594 F.2d at 366 (lawyers enjoy many privileges others do not; with privilege goes responsibility of not speaking during pending litigation); *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1147-48 (as members of bar, lawyers are "extraordinary citizens," subject to greater restrictions on their freedom of speech). See generally 10 *SUFFOLK U.L. REV.* 654, 672-76 (1976) (criticizing *Chicago Council* for not focusing on fact that no-comment rules are directed specifically and exclusively toward lawyers as officers of court, who are subject to ethical limitations on speech).

86. *Hirschkop v. Snead*, 594 F.2d at 366. See note 85 *supra*.

87. *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (held that lawyer may not be disbarred for exercising his right to remain silent at disciplinary hearing). See note 56 *supra*.

88. See note 79 *supra* and accompanying text.

89. *Freedman & Starwood*, *supra* note 59.

90. *Id.* at 613. The authors also note that in one important respect, the prosecutor's right of expression is much broader than that of other citizens since he can publish charges in an indictment that might otherwise constitute defamation or libel. *Id.* at 617. For cases demonstrating the extraordinary privilege of expression possessed by the prosecutor, see, e.g., *Murphy v. Florida*, 421 U.S. 794 (1975); *Sheppard v. Maxwell*, *supra* note 30; *Rideau v. Louisiana*, *supra* note 3; *Beck v. Washington*, 369 U.S. 541 (1962); *Stroble v. California*, 343 U.S. 181 (1952); *United States ex rel Bloeth v. Denno*, 313 F.2d 364 (2d Cir.), *cert. denied*, 399 U.S. 916 (1963); REARDON REPORT, *supra* note 3, at 26-46.

deeds may persist.⁹¹ It is doubtful, though, that the often-times unsophisticated and inarticulate voice of the defendant will be heard.⁹² Indeed, he may be disbelieved.⁹³ As a practical matter, moreover, the defendant may never have access to the press.⁹⁴ All of these reasons point to the need for the "champion" of the accused to speak for him.⁹⁵

It appears to be the fear of many critics that the unadulterated speech of the defense attorney may run counter to the interests of his client. The *ABA Project* suggests that speech "which enhances the prominence of the attorney may well result in prejudice to the client."⁹⁶ It is difficult to respond to this assertion, as it is supported by a dearth of authority.⁹⁷ Suffice it to say, then, that for those seriously concerned about this conflict in interest, other provisions of the Disciplinary Rules appear to be readily adapted to deal with the problem.⁹⁸

91. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250; *Freedman & Starwood*, *supra* note 59, at 613.

92. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250; *Freedman & Starwood*, *supra* note 59, at 614.

93. As the Seventh Circuit stated in *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250: Only slight reflection is needed to realize that the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment. A bare denial and a possible reminder that a charged person is presumed to be innocent until proved guilty is often insufficient to balance the scales.

See also *Freedman & Starwood*, *supra* note 59, at 611; *Silence Orders*, *supra* note 73, at 600.

94. See *Freedman & Starwood*, *supra* note 59, at 614, noting that accused is often either without bail or the means to pay it, thus, excluding him from access to the press.

It has also been suggested that the accused might seriously damage his case if he were forced to deal personally with the press on his own behalf. *Id.* at n.46 and accompanying text.

95. Two other reasons have been suggested for allowing the defense attorney to go public: (1) to raise defense funds and (2) to secure witnesses. Kaplan, *Of Babies and Bathwater*, 29 *STAN. L. REV.* 621, 625 n.13 (1977). *Contra*, *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 254 (judicial system has adequate solution for defendants without funds).

96. *ABA PROJECT*, *supra* note 3, at 20. *Accord*, *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1142 (stating that public relations campaigns by cult of lawyers seeking nationwide notoriety are "more often for the pecuniary and ego benefit of the lawyer and at the expense of the best interests of his client").

97. *Cf.* *United States ex rel Bloeth v. Denno*, 313 F.2d 364, 374 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963) (murder conviction reversed because jury failed to meet standards of impartiality). The Second Circuit expressly held that, even though the defense attorney contributed to the pretrial publicity by publicizing his client's defense of insanity, there was no evidence that the attorney was disloyal or incompetent. *Id.* at 373. *But cf. id.* at 378 (dissenting opinion), stating that the defendant was not entitled to a new trial since the bulk of prejudicial publicity was attributable to the defense.

98. See, e.g., DR 5-101(A) which provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests," and DR 7-101(A) which provides in part: "A lawyer shall not

The major concern with defense-generated publicity is, however, that it may severely prejudice the prosecution's case.⁹⁹ Assuming, *arguendo*, that the governmental interest in the due administration of justice is compelling, it is yet to be seen whether the application of DR 7-107 to defense attorneys constitutes the least restrictive means for furthering that interest. The answer to this can be found by analyzing the nature and extent of the fair trial-free press issue.

In reviewing the matter, the Supreme Court noted in *Nebraska Press Association v. Stuart*¹⁰⁰ that "[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [a fair trial]."¹⁰¹ Rather, it is only in the sensational cases that tensions develop between a fair trial and free speech.¹⁰² In fact, in many cases in which the

intentionally: . . . (3) Prejudice or damage his client during the course of the professional relationship." ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT (1975). See generally *Geders v. United States*, 425 U.S. 80, 93 (1976) (Marshall, J., concurring) (presumption that an attorney will observe his responsibilities to the court and his client, and that court is not justified in limiting lawyer's opportunity to serve his client because of fears that he may disserve the legal system by violating accepted ethical standards); *Freedman & Starwood*, *supra* note 59, at 616 (suggesting after-the-fact sanctions when necessary are less restrictive means of dealing with this problem).

It has also been contended that another reason for restricting extrajudicial statements of the defense attorney is because the prosecutor is already at a disadvantage since the defendant is free to speak out in his defense. See ABA PROJECT, *supra* note 3, at 20. This contention has been thoroughly dispensed with above. See notes 88-95 *supra* and accompanying text.

99. See, e.g., *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1971); *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137 (E.D. Va. 1976); ABA PROJECT, *supra* note 3, at 20 ("state's right to a fair trial can be seriously threatened by defense counsel").

100. 427 U.S. 539 (1976).

101. *Id.* at 551. Accord *Hirschkop v. Snead*, 594 F.2d at 364. See ABA STANDARDS 1978, *supra* note 57, in which it was stated: with regard to extrajudicial statements by lawyers: "[W]hile such statements might undermine trial fairness, it is by no means inevitable. Indeed, in the vast majority of criminal cases, extrajudicial statements by trial attorneys have no impact at all. The failure to take full account of this consideration is the central weakness of the [ABA PROJECT]." *Id.* at 4 (footnotes omitted).

102. *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 551. Accord *Hirschkop v. Snead*, 594 F.2d at 364. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532, 540 (1965) (reversing defendant's swindling conviction because defendant was denied due process as a result of televising his highly publicized trial); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (denial of change of venue by trial judge after confession of accused to sheriff had been repeatedly televised in area from which jurors were to be drawn, held denial of due process); *Irwin v. Doud*, 366 U.S. 717, 727 (1961) (where eight of twelve jurors had stated in *voir dire* their belief that accused was guilty, held jury did not meet constitutional standard of impartiality); *Marshall v. United States*, 360 U.S. 310, 311-13 (1959) (where jurors were exposed to newspaper article containing information trial judge had held inadmissible, held that defendant had been denied due process); PRESIDENT'S COMMISSION ON THE ASSASSINATION

defendant has been the subject of pervasive adverse publicity, the Supreme Court has pointed out that reversals of convictions as a result of the denial of due process are rare indeed.¹⁰³ This fact alone makes it suspect that defense-generated publicity will ever sufficiently prejudice the prosecution's case.¹⁰⁴

One of the reasons why reversals are so rare is that those remedial measures suggested in *Sheppard*—searching *voir dire*, continuances, change of venue and sequestration of the jury¹⁰⁵—are usually sufficient to retrieve the harm of adverse publicity.¹⁰⁶ In addition, the bulk of empirical studies on the effects of pretrial publicity on the jury demonstrates that extrajudicial comments have virtually no impact on the decision-making processes of the jury.¹⁰⁷ It is not that jurors are without prejudice or that they are

OF PRESIDENT JOHN F. KENNEDY 242 (1964) (stating that it would have been impossible for Lee Harvey Oswald to have gotten a fair trial).

103. *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 554. *Accord Hirschkop v. Snead*, 594 F.2d at 364. See, e.g., *Murphy v. Florida*, 421 U.S. 794, 803 (1975) (held that defendant received fair trial even though members of jury learned from news accounts about prior felony conviction or facts about crime with which he was charged); *Beck v. Washington*, 369 U.S. 541, 548-49 (1962) (grand jury which indicted defendant held not biased by adverse publicity circulating in area where he was indicted and tried); *United States ex rel Darcy v. Handy*, 351 U.S. 454, 462-464 (1961) (held that defendant had not been prejudiced by news coverage surrounding trial); *Stroble v. California*, 343 U.S. 181, 191-93 (1952) (held that defendant had not been denied a fair trial by pretrial publicity, caused as a result of District Attorney's statement to press that he believed defendant was guilty); *United States v. Haldeman*, 559 F.2d 31 (D.C.Cir. 1976), cert. denied *Mitchell v. United States*, 431 U.S. 933 (1977) (despite pervasive "Watergate" news coverage, defendants were not denied a fair trial); *CBS, Inc. v. Young*, 522 F.2d 234, 240, 242 (6th Cir. 1975) (rejecting claim that prejudicial publicity surrounding Kent State controversy deprived defendant of fair trial); *Calley v. Callaway*, 519 F.2d 184, 204, 206 (5th Cir. 1975) (*en banc*), cert. denied 423 U.S. 888 (1976) (record did not support claim that adverse publicity relating to My Lai Massacre tainted fairness of Calley's trial); *United States v. Liddy*, 509 F.2d 428 (D.C.Cir. 1974) (properly conducted *voir dire* dispensed with claim that defendant has been prejudiced as a result of "Watergate" news coverage); *Wansley v. Slayton*, 487 F.2d 90 (4th Cir. 1973), cert. denied, 416 U.S. 994 (1974) (adverse publicity too remote in time to effect fairness of trial); *Margoles v. United States*, 407 F.2d 727 (7th Cir.), cert. denied, 396 U.S. 833 (1969) (trial court's *voir dire* and examination of jurors during trial regarding prejudicial articles adequately assured that the accused received a fair trial).

104. See *Freedman & Starwood*, *supra* note 59, at 607.

105. See *Sheppard v. Maxwell*, 384 U.S. at 363.

106. See, e.g., *Murphy v. Florida*, 421 U.S. at 802 (publicity subsided seven months before jury trial and *voir dire* thoroughly dispelled chance of biased jury); *Stroble v. California*, 343 U.S. at 195 (passage of time, thorough *voir dire* diminished impact of initial adverse publicity); *United States v. Haldeman*, 559 F.2d at 64-70 (*voir dire* examination succeeded in eliminating any unfairness that might otherwise have resulted from "Watergate"). See *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 569 (court could not say that alternatives to prior restraint would not have dissipated harm); *Hirschkop v. Snead*, 594 F.2d at 364 (passage of time and other circumstances may dissipate harm).

107. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research*

paragons of virtue; rather, studies show that jurors are willing and able to put aside extrajudicial information and to reach a fair verdict based upon the evidence before them.¹⁰⁸

But because those few sensational cases do arise in which the harm of prejudicial publicity cannot be retrieved, except by a new trial, DR 7-107 was promulgated.¹⁰⁹ The important point to be made, however, is that in all of those sensational cases necessitating DR 7-107, the prejudice was to the defendant's right to a fair trial, and was caused either by the prosecutor "going public" or by the judge's failure to take sufficient action to preserve due process, and not by any extrajudicial comments issued by the defense attorney.¹¹⁰ Indeed, the *Reardon Report*, which recommended the prototype of DR 7-107, concluded from its research that the preponderance of

Evidence on the Impact on Jurors of News Coverage?, 29 STAN. L. REV. 515, 528 (1977) [hereinafter cited as Simon]. Simon reached this conclusion after surveying the following studies: Kline & Jess, *Prejudicial Publicity: Its Effects on Law School Mock Juries*, 43 JOURNALISM Q. 113 (1966); Padawer-Singer & Barton, *The Impact of Pretrial Publicity on Jurors' Verdict*, THE JURY SYSTEM IN AMERICA 14-15 (1975) (only study supporting proposition that pretrial publicity may effect jurors); Simon, *Murder, Juries, and the Press*, 3 TRANSACTION 40 (May-June 1966); Simon & Eimerman, *The Jury Finds Not Guilty: Another Look at Media Influence on the Jury*, 48 JOURNALISM Q. 343 (1971); Tans & Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 JOURNALISM Q. 647 (1966); Wilcox & McCombs, *Crime Story Elements and Fair Trial/Free Press*, unpublished report summarized in Wilcox, *The Press, the Jury and the Behavioral Sciences*, 9 JOURNALISM MONOGRAPHS 20 (1968). See ABA STANDARDS 1978, *supra* note 57, stating that ". . . in the majority of criminal cases, extrajudicial statements by trial attorneys have no impact at all." *Id.* at 4 (footnotes omitted). See generally ABA PROJECT, *supra* note 3, at 16, recognizing absence of empirical data which could determine the actual effect of prejudicial publicity on the jury, and recommending further research along these lines.

108. Simon, *supra* note 107, at 528, stating:

Perhaps more importantly [than empirical studies], recent experience in actual trial situations compels the same conclusion. The facts are that, despite substantial adverse publicity, Angela Davis, John Connally and John Mitchell all were acquitted. These verdicts may be the most reliable and powerful data we have about jurors' ability to withstand pretrial publicity.

(footnotes omitted).

A related misconception courts and lawyers seem to have about pretrial publicity is that it will inevitably permeate the minds of the jurors. The fact of the matter is that most prospective jurors do not keep up with the news. As the court illustrated in *United States v. Haldeman*, 559 F.2d at 62-63 n.37: "Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally."

109. See *Sheppard v. Maxwell*, 384 U.S. at 363.

110. See notes 102 and 103 *supra* and accompanying text. See generally *Carsey v. United States*, 392 F.2d 810, 812 (D.C.Cir. 1967) (greater damage to fair trial by misconduct of prosecutor).

prejudicial information was generated by releases to the press by police officials or by prosecutors.¹¹¹ Although defense counsel were found to go public in an attempt to counter adverse publicity or, occasionally, to create a favorable climate in the press, there was no evidence cited in the *Reardon Report* of defense counsel sufficiently prejudicing the prosecution's case.¹¹² In fact, the Supreme Court has yet to confront a case in which defense-generated publicity was so pervasive that irreparable harm was done to the prosecution's case.¹¹³ As one commentator¹¹⁴ has stated:

That is hardly surprising, of course, since "the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment." The presumption of innocence notwithstanding, the impact of an indictment upon the general public is so great that few defendants will be able to overcome it, much less turn it to their advantage.¹¹⁵

Despite all of this information demonstrating that the prospect is "remote, if not fanciful,"¹¹⁶ that the unbridled speech of defense lawyers will prejudice the prosecution of criminal matters, DR 7-107 has been

111. See REARDON REPORT, *supra* note 3, at 26, 28, 30-36, 39, 41, 98.

112. *Id.* at 37, 42, 175-76 (describing the occurrence of defense-generated publicity as "relatively infrequent," and "occasional"). See MEDINA REPORT, *supra* note 3, at 43-55 (to same effect as REARDON REPORT).

Despite the findings of the REARDON REPORT, the Committee suggested that DR 7-107 apply to both prosecutors and defense attorneys. REARDON REPORT, *supra* note 3, at 80-86. The decision of the REARDON REPORT was apparently based on the Committee's reading of three cases. First, the Reardon Committee relied on *Sheppard v. Maxwell*, 384 U.S. at 361, in which the Supreme Court stated in dictum that prejudicial publicity was attributable to the defense attorney. REARDON REPORT, *supra* note 3, at 42-43, 80 n.1. *But see* note 63 *supra* and accompanying text.

Second, the REARDON REPORT decision was based on *United States ex rel. Bloeth v. Denno*, 313 F.2d at 378 (dissenting opinion), in which it was stated that the majority of the prejudicial publicity could be traced to the defense. REARDON REPORT, *supra* note 3, at 37, 86. The important realization in *Bloeth* is that even though the defense attorney embarked on a publicity campaign, the prosecution was still able to convict the defendant, further demonstrating the improbability of defense-oriented publicity prejudicing the prosecution.

And finally, the Reardon Committee was influenced by dictum in *State v. Van Duyne*, 43 N.J. 369, 204 A.2d 841, 852 (1964), in which the court stated that Canon 20, predecessor of DR 7-107, applied to prosecutors and defense attorneys. REARDON REPORT, *supra* note 3, at 86. The claim in *Van Duyne* was, however, that adverse publicity caused by the police and prosecutor had deprived the defendant of a fair trial.

For another example of the defense attorney attempting to influence the public, see *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225 (1968).

113. See Freedman & Starwood, *supra* note 59, at 611.

114. *Id.*

115. *Id.*, quoting from *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250. *Accord, Silence Orders*, *supra* note 73, at 600, 604.

116. Freedman & Starwood, *supra* note 59, at 612 n.35.

equally applied to defense lawyers for the stated reason that it is the least restrictive means of furthering the government's substantial interest in a fair trial.¹¹⁷ This application to defense attorneys is not based upon case authority or empirical data, but, at best, is based upon the mere speculation that the prosecution's case may be prejudiced.¹¹⁸ Thus, the question still remains: is there any real justification for applying the proscriptions of DR 7-107 to defense attorneys?

117. See *Hirschkop v. Snead*, 421 F. Supp. at 366; *Chicago Council*, *supra* note 19, at 250; ABA PROJECT, *supra* note 3, at 19-20; ABA STANDARDS 1978, *supra* note 57, at 2 n.4.

The only good reason ever stated for applying no-comment rules to prosecutors and defense counsel alike was that, on the basis of fair play, both sides should be playing by the same set of rules. See, e.g., ABA PROJECT, *supra* note 3, at 20 (fear that prosecutor will not remain silent if defense goes public); ABA STANDARDS 1978, *supra* note 57, at 2 n.4 (DR 7-107 achieves "parity"); MEDINA REPORT, *supra* note 3, at 18-19 (prosecutor cannot be expected to remain silent if defense embarks on publicity campaign); Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 625 n.13 (1977) ("unfairness of holding down one party . . . while the other kicks away"); 10 SUFFOLK U.L. REV. 654, 657 n.12 (1976) (questioning basic fairness of muzzling prosecution while defense is given free reign to make out-of-court statements). This "fair play" argument fails, however, to perceive the nature of the prosecutor's right to free speech in the fair trial-free press situation. Admittedly, the prosecutor has a constitutionally protected right to freedom of expression. But when that right conflicts with the defendant's right to a fair trial, on the balance, it is outweighed and must give way. See note 73 *supra*. In addition, as an officer of the court and a representative of the state, the prosecutor's right to freedom of speech is inherently restricted by principles of due process. *Id.* And finally, as a practical matter, the prosecutor is hardly justified in responding to statements by the defense, since nothing the defense says is likely to overcome the clout of permissible comments of the prosecution, much less prejudice the prosecution's case. See notes 90 and 112-115 *supra* and accompanying text.

118. *But see* Cole & Spaks, *Defense Counsel and the First Amendment: "A Time to Keep Silence and a Time to Speak"*, 6 ST. MARY'S L.J. 347 (1974), concluding that rules restricting defense lawyers' comments about pending litigation is consonant with the first amendment, and the clear and present danger test is not the constitutional measure of such rules.

See generally *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969) (involving exercise of free speech in a school environment), in which the Supreme Court stated:

[I]n our system, *undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression*. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear But our Constitution says we must take this risk, . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-09 (citations omitted; emphasis added).

For authorities recommending a different standard for defense attorneys, see, e.g., Freedman & Starwood, *supra* note 59; Barth, *Background Paper*, in Report of the Twentieth Century Fund Task Force on Justice, Publicity and the First Amendment, RIGHTS IN CONFLICT 76 (1976); Isaacson, *Fair Trial and Free Press: An Opportunity For Coexistence*, 29 STAN. L. REV. 561, 568-70 (1977); Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 625 n.13 (1977); *Silence Orders*, *supra* note 73, at 604, 606-08.

III. BENCH TRIALS

DR 7-107 also prohibits comments by lawyers involved in pending criminal bench trials.¹¹⁹ With respect to its application to bench trials, the Fourth Circuit agreed with Hirschkop and held that the no-comment rule was "unnecessarily broad" and, therefore, unconstitutional.¹²⁰ The court limited its holding with the recognition that DR 7-107 would be appropriate during the pretrial stages of criminal proceedings,¹²¹ but the court stated that, "when it becomes apparent that the case is to be tried by a judge alone, we see no compelling reason for restricting lawyers' comments in order to assure a fair trial."¹²²

The court noted that no case could be shown in which adverse publicity had been the source of interference with a fair bench trial.¹²³ In addition,

119. *Hirschkop v. Snead*, 594 F.2d at 371; *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 256. See ABA STANDARDS 1978, *supra* note 57, at 2. See generally REARDON REPORT, *supra* note 3, at 22, where the Committee stated: "Our problem is of course principally concerned with the jury trial cases, and a relatively small percentage of those, although it must be remembered that adverse publicity, if it is sufficiently pervasive, may affect a judge . . ."

120. *Hirschkop v. Snead*, 594 F.2d at 371-72. Thus, the Fourth Circuit held that with respect to bench trials DR 7-107 did not satisfy the second part of the *Martinez* test (*supra* notes 9-13) requiring that restrictions on free speech must be "no greater than [are] necessary or essential" to protect the right to a fair trial. *Procunier v. Martinez*, 416 U.S. at 413.

But see Chicago Council of Lawyers v. Bauer, 522 F.2d at 256-57, where the Seventh Circuit held that there was no distinction between criminal trials heard before a jury or a judge. The *Chicago Council* decision suggested a two-fold benefit from rules proscribing speech of lawyers involved in pending criminal bench trials: (1) they prevent the necessity of judges attempting to remove from their minds information that they should not consider, and (2) such rules prevent the appearance of decisions being based on improper evidence. *Id.* at 257.

See generally ABA STANDARDS 1978, *supra* note 57, at 2 n.3, recognizing that there is a strong argument against applying no-comment rules to bench trials.

121. *Hirschkop v. Snead*, 594 F.2d at 371, referring to such pretrial stages as the investigation, grand jury and arraignment proceedings. *Accord, Chicago Council*, 522 F.2d at 256 n.14.

122. *Hirschkop v. Snead*, 594 F.2d at 371. The Fourth Circuit stated that those considerations which lead it to uphold the constitutionality of DR 7-107 with respect to criminal jury trials, see notes 14-36 *supra* and accompanying text, were inapplicable to criminal trials tried before a judge. *Id.* at 371.

123. *Id.* at 371. *Cf. Cox v. Louisiana*, 379 U.S. 559, 565 (1965), where the Supreme Court said:

It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial.

The Fourth Circuit distinguished the situation in *Cox* from the restrictions of DR 7-107. In *Cox*, which involved the constitutionality of a statute that proscribed picketing or parading around the courthouse with the intent to interfere with the administration of justice, the Supreme Court stated that it was not dealing with pure speech but with speech mixed with

the court stated that those sensational cases¹²⁴ necessitating the adoption of DR 7-107 were all tried by a jury.¹²⁵ Moreover, the court believed it was unlikely that comments by lawyers regarding pending litigation could threaten the fairness of bench trials, and the court refused to assume that such comments would influence the judge's rulings with respect to the accused or the state.¹²⁶ Indeed, the court pointed out that such a suggestion had been dispensed with in *Pennekamp v. Florida*,¹²⁷ in which the Supreme Court stated that "too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger."¹²⁸

Furthermore, the court stated that judges in criminal trials frequently must determine whether to suppress highly prejudicial and incriminating evidence, such as confessions and lineup identifications. If the evidence is excluded, the judge must nevertheless determine whether the accused is guilty or innocent without considering the evidence which he has held to be inadmissible.¹²⁹ As a practical matter, the court stated that it did not know "what comments a lawyer could make about a pending case that would be more prejudicial than the information a judge must consider as he separates the wheat from the chaff during the course of an ordinary bench trial."¹³⁰

conduct. Since DR 7-107 prohibits only pure speech the Fourth Circuit held that *Cox* was not persuasive authority for applying the no-comment rule to bench trials. *Hirschkop v. Snead*, 594 F.2d at 372. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 256 (*Cox* is relevant but not dispositive).

124. See note 102 *supra*.

125. *Hirschkop v. Snead*, 594 F.2d at 371.

126. *Id.*

127. 328 U.S. 331 (1946) (reversal of contempt conviction for publishing editorials and cartoons which were highly critical of judges).

128. *Id.* at 349. The *Pennekamp* Court also said that "criticism of [judges'] actions could not affect their ability to decide the issues." *Id.* at 348. See *Craig v. Harney*, 331 U.S. 367, 376 (1947) ("[j]udges are supposed to be men of fortitude, able to thrive in a hardy climate"); *Bridges v. California*, 314 U.S. 252, 273 (1941) (to consider that a lawyer's extrajudicial comments would influence a judge's judgment "would be to impute to judges a lack of firmness, wisdom, or honor,—which we cannot accept as a major premise").

But cf. *Estes v. Texas*, 381 U.S. 532, 548-49 (1965) ("our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion"); *Cox v. Louisiana*, 379 U.S. at 565 ("judges are human"); *Pennekamp v. Florida*, 328 U.S. at 357 (Frankfurter, J., concurring) ("since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irrepensible press"); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (possibility that judges will be prejudiced); *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 257 ("judges are human").

129. *Hirschkop v. Snead*, 594 F.2d at 371. See *Chicago Council of Lawyers v. Bauer*, *supra* note 19, at 256-57.

130. *Hirschkop v. Snead*, 594 F.2d at 371.

Since the Fourth Circuit concluded that "the gain to fair bench trials [was] minimal, and the restrictions on first amendment rights [were] substantial,"¹³¹ the court held that with respect to bench trials DR 7-107 was unconstitutionally overbroad.

IV. SENTENCING

DR 7-107(E)¹³² applies to the post-criminal trial stage, prior to sentencing, and proscribes statements by lawyers involved in the trial that "are reasonably likely to affect the imposition of sentence."¹³³ The court noted that in Virginia, when a criminal trial is tried by a jury, it is the duty of the jury to determine guilt or innocence and to impose the sentence.¹³⁴ Thus, the court held that when that procedure was followed, its decision regarding the constitutionality of DR 7-107 in criminal jury trials was applicable.¹³⁵

However, when the judge rather than the jury imposes the sentence, the court held that its decision regarding the unconstitutionality of DR 7-107 in criminal bench trials was applicable.¹³⁶ The court's decision was based on the fact that when a judge imposes sentence on the defendant, he "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come."¹³⁷ In view of this broad discretion granted to a sentencing

131. *Id.* at 372.

132. *See* Hirschkop v. Snead, 594 F.2d at 375 (Appendix); RULES OF COURT, 211 Va. 295, 347-50 (1970); Appendix to this comment, *infra*.

133. Hirschkop v. Snead, 594 F.2d at 372.

134. *See* VA. CODE ANN. § 19.2-295 (Repl. Vol. 1975), which reads: "Within the limits prescribed by law, the term of confinement in the penitentiary or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury, or by the court in cases tried without a jury."

135. Hirschkop v. Snead, 594 F.2d at 372. *See* notes 14-36 *supra* and accompanying text. *Cf.* Chicago Council of Lawyers v. Bauer, 522 F.2d at 257 (no consideration of trials where sentence is imposed by jury). *See generally* ABA PROJECT, *supra* note 3, at 19, stating that Committee was concerned primarily with extrajudicial comments where imposition of sentence is by jury; REARDON REPORT, *supra* note 3, at 46, 93, stating that problem during post-trial stage was small, but that both prosecutor and defense attorney should argue sentencing in court. *See also* notes 58-118 *supra* and accompanying text, questioning why DR 7-107 should apply to defense attorneys as it is applicable here.

136. Hirschkop v. Snead, 594 F.2d at 372. *Cf.* Chicago Council of Lawyers v. Bauer, 522 F.2d at 257 (holding that comments restricted by DR 7-107(E) could never be deemed a serious and imminent threat of interference with a fair trial). *See generally* ABA STANDARDS 1978, *supra* note 57, which has eliminated rule (E) regarding imposition of sentence from its revised standard.

137. Hirschkop v. Snead, 594 F.2d at 372, quoting from *United States v. Tucker*, 404 U.S. 443 (1972) (involving constitutionally invalid convictions). *See also* *Williams v. New York*,

judge, the court saw "no compelling reason for a rule that prohibits lawyers from commenting about all cases pending sentencing."¹³⁸ Thus, the Fourth Circuit held that DR 7-107(E) was unnecessarily broad when sentence is imposed by a judge rather than a jury.¹³⁹

V. DISCIPLINARY PROCEEDINGS

DR 7-107(F)¹⁴⁰ applies the prohibitions of the no-comment rule to professional and juvenile disciplinary proceedings.¹⁴¹ With respect to professional disciplinary hearings, the Fourth Circuit recognized that they were not usually tried by juries.¹⁴² Consequently, the court held that with respect to professional disciplinary proceedings, DR 7-107(F) was unnecessarily broad for the same reasons the court delineated in its opinion regarding the unconstitutionality of DR 7-107 when applied to criminal bench trials.¹⁴³

With respect to juvenile disciplinary proceedings, the court noted that a jury may be involved.¹⁴⁴ When a juvenile in a disciplinary proceeding is tried by a jury, the court's decision upholding the constitutionality of DR 7-107 in criminal jury trials is directly applicable.¹⁴⁵ On the other hand, when it becomes apparent that the juvenile will be tried by a judge, the

337 U.S. 241 (1949) (defendant not denied due process when trial judge imposed death sentence over jury's recommendation of life imprisonment on basis of state law permitting him to consider other relevant materials).

138. *Hirschkop v. Snead*, 594 F.2d at 372.

139. *Id.*, stating that DR 7-107(E) did not satisfy the second part of *Martinez* (*supra* notes 9-13) requiring that restrictions on free speech must be "no greater than (are) necessary or essential" to further the governmental interest involved. *Procunier v. Martinez*, 416 U.S. at 413.

The Fourth Circuit also held that the broad proscription in DR 7-107(E) of statements "reasonably likely to affect the imposition of sentence" was "void for vagueness." *Hirschkop v. Snead*, 594 F.2d at 372. *Cf. id.* at 383 (Widener, J., concurring and dissenting), stating that DR 7-107(E) should be invalidated in its entirety for vagueness. *See generally* note 36 *supra*.

140. *See* Appendix *infra*.

141. *Hirschkop v. Snead*, 594 F.2d at 372.

Apparently the issue of the constitutionality of DR 7-107(F) was not before the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1971).

142. *Hirschkop v. Snead*, 594 F.2d at 372.

143. *Id.* *See* notes 119-31 *supra* and accompanying text.

Seemingly, the Fourth Circuit was not impressed with the built-in limitation of DR 7-107(F), which states that it applies only "when pertinent and consistent with other law applicable to such proceedings." *See* Appendix *infra*. This oversight is harmless, since that part of DR 7-107(F) is probably "void for vagueness." *See generally* note 36 *supra*.

144. *Hirschkop v. Snead*, 594 F.2d at 372.

145. *Id.* *See* notes 14-36 *supra* and accompanying text.

court held that DR 7-107(F) was unconstitutionally overbroad for the same reasons cited by the court for criminal bench trials.¹⁴⁶

VI. CIVIL ACTIONS

DR 7-107(G)¹⁴⁷ prohibits lawyers involved in civil actions from making a broad range of comments during the investigation or litigation of the cases.¹⁴⁸ The Fourth Circuit agreed with Hirschkop and held that DR 7-107(G) was unconstitutionally overbroad.¹⁴⁹ The court recognized that our legal system requires that parties to civil actions be assured the right to a fair trial. ““The very purpose of a court system,”” the court stated, ““is to adjudicate controversies, *both criminal and civil*, in the calmness and solemnity of the courtroom according to legal procedures.””¹⁵⁰

Nevertheless, the court pointed out several differences between criminal and civil litigation that justified a different rule in each type of litigation. Initially, the court stated that civil cases are often more protracted than criminal trials as a result of broader civil discovery rules, the greater complexity of issues in many civil cases, and the priority given criminal cases because of the right to a speedy trial.¹⁵¹ In addition, civil trials often involve important social issues, about which the lawyers involved in the litigation can enlighten the public.¹⁵² Moreover, the *Reardon Report*,¹⁵³ which recom-

146. *Hirschkop v. Snead*, 594 F.2d at 372-73. See notes 119-31 *supra* and accompanying text.

The court noted that its decision was limited to whether DR 7-107(F) was necessary to ensure the fairness of professional and juvenile disciplinary proceedings, and did not involve protection of other interests of privacy and confidentiality, which are governed by other regulations. See VA. CODE ANN. §16.1-299-309.1 (Cum. Supp. 1979) (juvenile proceedings); VA. S. CT. RULES 6: IV: ¶ 13J(5) (professional disciplinary proceedings).

147. See Appendix *infra*.

148. *Hirschkop v. Snead*, 594 F.2d at 373.

149. *Id. Accord*, *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 257-59.

150. *Hirschkop v. Snead*, *supra* note 6, 594 F.2d at 373, quoting *Cox v. Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting) (emphasis added) (involving constitutionality of statute prohibiting speech mixed with conduct). Justice Black's dissenting opinion in *Cox* is the only explicit Supreme Court authority for the application of no-comment rules to civil trials.

151. *Hirschkop v. Snead*, 594 F.2d at 373. *Accord*, *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 258.

152. *Hirschkop v. Snead*, 594 F.2d at 373. *Accord* *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 258. *But cf.* *Hirschkop v. Virginia State Bar*, 421 F. Supp. at 1147 (lawyer is rarely only articulate voice concerning important social issues).

The Fourth Circuit also stated that it was not enough that the lawyer is free to comment at the end of the case because the first amendment protects not only the content of speech but also its timeliness. *Hirschkop v. Snead*, 594 F.2d at 373. Apparently the court must have thought that the need for lawyers to comment on social issues was more important in civil trials than in criminal trials, and that the timeliness of lawyers' speech in criminal trials was

mended the adoption of no-comment rules by courts in criminal prosecutions, did not focus on civil actions.¹⁵⁴ Finally, the court stated that there were no empirical data to justify restrictions on lawyers' speech to protect the fairness of civil actions.¹⁵⁵ The court said that it was unaware of any judgment in a civil action being reversed because of prejudicial publicity; in fact, the principal civil case in which a "gag order" was imposed on a lawyer was reversed because the order violated the first amendment.¹⁵⁶

In conclusion, the Fourth Circuit stated: "The dearth of evidence that lawyers' comments taint civil trials and the courts' ability to protect confidential information establish that the rule's restrictions on freedom of speech are not essential to fair civil trials."¹⁵⁷

Judge Widener dissented from that part of the court's *per curiam* opinion that held that DR 7-107(G) was unconstitutionally broad.¹⁵⁸ Judge Widener stated that "civil jury trials, like criminal, also deserve to be protected."¹⁵⁹ The Judge contended that the line should properly be drawn between jury and bench trials, rather than between criminal jury trials and civil actions.¹⁶⁰

an insubstantial right. See notes 55 and 79-84 *supra* and accompanying text.

153. *Supra* note 3.

154. REARDON REPORT, *supra* note 3, at 84, stating that "civil litigation is not included because it falls outside the scope of the Committee's assignment." *Accord, Judicial Report*, 45 F.R.D. at 393 n.1. *But cf. Medina Report, supra* note 3, at 25, recommending no-comment rules in both criminal and civil actions, but without analyzing the differences between the two.

155. *Hirschkop v. Snead*, 594 F.2d at 373. Unfortunately, the court was not concerned about the lack of empirical data to support the application of no-comment rules to defense attorneys in criminal jury trials. See notes 109-13 *supra* and accompanying text.

156. *Hirschkop v. Snead*, 594 F.2d at 373. See *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (gag order involving civil cases arising out of Kent State controversy).

157. *Hirschkop v. Snead*, 594 F.2d at 373. Thus, the Fourth Circuit held that DR 7-107(G) did not satisfy the second part of the *Martinez* test, requiring that restrictions on speech must be "no greater than [are] necessary or essential" to protect the governmental interest involved. *Procurier v. Martinez*, 416 U.S. at 413. See notes 9-13 *supra* and accompanying text.

The Fourth Circuit also held that DR 7-107(G)(5) which prohibits "[a]ny other matter reasonably likely to interfere with the fair trial of the action" was "void for vagueness." *Hirschkop v. Snead*, 594 F.2d at 373. *Accord, Chicago Council of Lawyers v. Bauer*, 522 F.2d at 259. See generally note 36 *supra*.

158. *Hirschkop v. Snead*, 594 F.2d at 381-84 (Widener, J., concurring and dissenting). Judge Widener concurred with the rest of the court's *per curiam* opinion, except with regard to DR 7-107(E), discussed *supra* at note 139.

159. *Hirschkop v. Snead*, 594 F.2d at 382 (Widener, J., concurring and dissenting).

160. *Id.* at 382-83. Judge Widener agreed with the court's opinion that DR 7-107(G) was unconstitutional as to civil actions tried before a judge, but for a different reason. He stated that the rule was invalid because there was "no reasonable likelihood of impairing the integrity of the trial," and not because the rule was overbroad. *Id.* at 383. Query whether there is

Judge Widener disputed the court's rationale for invalidating DR 7-107(G). He suggested that the fact that civil actions are more prolonged than criminal prosecutions does not suffice as a reason for not protecting civil jury trials.¹⁶¹ He also pointed out that the need for public enlightenment by lawyers was much greater in criminal cases, where the state could deprive the accused of his life, than in civil cases, where the defendant usually could be deprived only of his property.¹⁶² Furthermore, Judge Widener stated that no empirical were was necessary to show that, if a criminal jury could be affected by lawyers' comments, a civil jury could be similarly affected, since both juries are comprised of the same people.¹⁶³

In addition, Judge Widener asserted that the specific proscriptions of DR 7-107(G), protecting the fairness of civil actions, were essentially the same as the proscriptions of DR 7-107(B), protecting the fairness of criminal trials.¹⁶⁴ Since the court held that the restrictions of DR 7-107(B) were constitutionally permissible in criminal jury trials, Judge Widener argued that the restrictions of DR 7-107(G) were constitutionally permissible in civil jury trials.¹⁶⁵

The essential differences between the court's *per curiam* opinion and Judge Widener's dissenting opinion is that the court concluded that the state's interest in protecting the right to a fair trial and the due administration of justice was more compelling in criminal jury trials than in civil cases, whereas Judge Widener believed that the state's interest was just as substantial in civil jury trials.¹⁶⁶

any real difference between the rationale of the opinions.

Cf. *Hirschkop v. Snead*, 594 F.2d at 378 (Phillips, J., concurring). Judge Phillips agreed generally with Judge Widener, except in two respects: (1) he believed that the specific prohibitions of DR 7-107(G), regarding civil actions were more broadly stated than those of DR 7-107(B) regarding criminal trials, and (2) he believed that the state has an added interest in protecting the criminal defendant's constitutional right to a fair trial. For these reasons Judge Phillips concurred in the court's *per curiam* opinion. *Id.*

161. *Hirschkop v. Snead*, 594 F.2d at 382 (Widener, J., concurring and dissenting).

162. *Id.* See generally notes 79-81 *supra* and accompanying text.

163. *Hirschkop v. Snead*, 594 F.2d at 382 (Widener, J., concurring and dissenting). See generally VA. CODE ANN. §8.01-345 (Cum. Supp. 1979) (jury selection process in civil actions); VA. CODE ANN. §19.2-260 (Cum. Supp. 1979) (jury selection in criminal trials is generally same as in civil actions).

164. *Hirschkop v. Snead*, 594 F.2d at 383 (Widener, J., concurring and dissenting). *But see* *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 258-59 (specific prohibitions of DR 7-107(G) are overbroad); note 160 *supra*, discussing Judge Phillips' concurring opinion in *Hirschkop v. Snead*, 594 F.2d at 376-78.

165. *Hirschkop v. Snead*, 594 F.2d at 382-83 (Widener, J., concurring and dissenting).

166. Although not expressly, the Fourth Circuit evidently relied heavily on the Seventh Circuit's decision in *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 257-58, where the Seventh Circuit stated that there was a greater need to protect the right to a fair trial in

VII. ADMINISTRATIVE PROCEEDINGS

DR 7-107(H)¹⁶⁷ prohibits lawyers associated with administrative proceedings from making a broad range of comments during the pendency of the proceedings.¹⁶⁸ The Fourth Circuit held that DR 7-107(H) was unnecessarily broad and, therefore, unconstitutional.¹⁶⁹

The court stated that there was no factual basis to justify restrictions on lawyers' freedom of expression to protect the fairness of administrative hearings.¹⁷⁰ The court stated further that it was unaware of any administrative decision being set aside as a result of prejudicial comments by lawyers.¹⁷¹ Also, the court noted, administrative proceedings, like civil actions, often involve issues of public concern, thus requiring that lawyers associated with the proceedings be permitted to comment publicly.¹⁷² Since the prohibitions of DR 7-107(H) are very broad in nature, the court believed that their effect would be to chill public discussion by lawyers regarding those social issues.¹⁷³ Therefore, the Fourth Circuit held that the restrictions of DR 7-107(H) were constitutionally invalid for overbreadth.¹⁷⁴

criminal cases because the sixth amendment explicitly requires a trial "by impartial jury" in criminal cases, whereas the seventh amendment only guarantees a "fair trial" in civil actions. Moreover, the Seventh Circuit stated that the invocation of the fifth amendment right to due process did not justify restricting speech in civil trials. In addition, the criminal accused has a right to a "speedy trial," whereas civil litigants do not. *Id. Cf. Hirschkop v. Snead*, 594 F.2d at 376-78 (Phillips, J., concurring). *But see Hirschkop v. Snead*, 594 F.2d at 382-83 (Widener, J., concurring and dissenting) (criticizing court for giving priority to criminal jury trials over civil jury trials).

167. See Appendix *infra*.

168. *Hirschkop v. Snead*, 594 F.2d at 373-74. Apparently, the issue of the constitutionality of DR 7-107(H) was not before the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975).

169. *Hirschkop v. Snead*, 594 F.2d 374.

170. *Id.* See ABA PROJECT, *supra* note 3; *Judicial Report*, *supra* note 3; REARDON REPORT, *supra* note 3. None of these reports was concerned with prejudicial comments of lawyers during administrative hearings. See also note 155 *supra*, as it applies here.

171. *Hirschkop v. Snead*, 594 F.2d at 374.

172. *Id.* See note 152 *supra* ("issues of public concern" in civil actions).

173. *Hirschkop v. Snead*, 594 F.2d at 374.

174. *Id.* Thus, the Fourth Circuit held that DR 7-107(H) did not satisfy the second part of the *Martinez* test, requiring that restrictions on speech must be "no greater than (are) necessary or essential" to protect the governmental interest involved. *Procurier v. Martinez*, 416 U.S. at 413.

The court also held that DR 7-107(H)(5) which prohibits comments relating to "[a]ny other matter reasonably likely to interfere with a fair hearing" was "void for vagueness." *Hirschkop v. Snead*, 594 F.2d at 374. See generally note 34 *supra*.

VIII. CONCLUSION

The Fourth Circuit's decision in *Hirschkop v. Snead* makes it clear that extrajudicial comments by attorneys, regarding pending litigation with which they are associated, may be prohibited only in criminal cases tried before a jury.¹⁷⁵ This aspect of the court's decision is eminently sound for two reasons. First, although courts try to preserve the fairness and integrity of their processes for all litigants, the right of the criminal accused to a fair trial has historically received the utmost protection by our judicial system. It is not that the rights of other litigants are insubstantial, but that the rights of the criminally accused are given constitutional priority.¹⁷⁶ And, secondly, there is simply no case authority or empirical data that would justify restrictions on lawyers' speech in judicial proceedings other than criminal jury trials.

Despite the virtues of the *Hirschkop* decision, there is one issue that is still debatable, and one question that is yet unanswered. The debatable issue concerns the appropriate standard by which the extrajudicial statements of lawyers may be restricted. The court's *per curiam* opinion and the principal dissenting opinion demonstrate the legal and practical arguments for the "reasonably likelihood" and the "clear and present danger" standards, respectively. The main thrust of those arguments is, however, that neither standard stands on any firmer ground than the other when incorporated into DR 7-107. The debatability of the issue is increased in light of the conflicting decision of the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*.¹⁷⁷ Thus, it is safe to say that the jury is still out on this issue.

Regardless of the appropriate standard for restricting lawyers' speech under DR 7-107, there remains unanswered the fundamental question of why the speech of defense attorneys should be restricted in the first place. Even assuming that the state has a compelling interest in a fair trial that outweighs the first amendment rights of defense lawyers, there has been no showing that the application of no-comment rules to defense lawyers furthers that governmental interest. The empirical studies with respect to the fair trial-free press issue show that the overwhelming preponderance of prejudice to a fair criminal trial is generated by the police or the prosecu-

175. *But see* *Hirschkop v. Snead*, 594 F.2d at 381-84 (Widener, J., concurring and dissenting) (arguing for application of DR 7-107 in civil jury trials); *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 256-57 (holding that DR 7-107 applies in criminal bench trials).

176. Compare the rights of the criminal accused under the sixth amendment with the rights of civil litigants under the seventh amendment.

177. 522 F.2d at 249 (incorporating "serious and imminent threat" standard into DR 7-107).

tor rather than by defense counsel. And there has been no case cited in which the prosecution's case was ever substantially prejudiced by the public dissemination of information by the defense attorney. Indeed, it is highly unlikely that anything the defense might say would ever threaten irreparable prejudice to the prosecution, since "the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment."¹⁷⁸

Unfortunately the Fourth Circuit never addressed itself to this important question. If it had, the court might well have determined that the application of DR 7-107 to defense attorneys was not "necessary or essential"¹⁷⁹ to the protection of the government's interest in a fair trial and, therefore, that in this respect DR 7-107 suffered from overbreadth.

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178. *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250.

179. *Procunier v. Martinez*, 416 U.S. at 413.

APPENDIX

DR 7-107 *Trial Publicity.*

- (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, if permitted by law, the identity of the victim.
 - (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
 - (5) A warning to the public of any dangers.
- (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
- (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
 - (2) The possibility of a plea of guilty to the offense charged or to lesser offense.
 - (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
 - (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
 - (5) The identity, testimony, or credibility of a prospective witness.
 - (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.
- (C) DR 7-107(B) does not preclude a lawyer during such period from announcing:
- (1) The name, age, residence, occupation, and family status of the accused.
 - (2) If the accused has not been apprehended, any information nec-

essary to aid in his apprehension or to warn the public of any dangers he may present.

- (3) A request for assistance in obtaining evidence.
 - (4) The identity of the victim of the crime.
 - (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
 - (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
 - (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
 - (8) The nature, substance, or text of the charge.
 - (9) Quotations from or references to public records of the court in the case.
 - (10) The scheduling or result of any step in the judicial proceedings.
 - (11) That the accused denies the charges made against him.
- (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.
- (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.
- (F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.
- (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.
- (H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a 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 if it is made outside the official course of the proceeding and 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) Physical evidence or 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, defenses, or positions of an interested person.
 - (5) Any other matter reasonably likely to interfere with a fair hearing.
- (I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.
- (J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

