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The Free Speech-Fair Trial Controversy: D R 7-107

THE FREE SPEECH—FAIR TRIAL CONTROVERSY: DR 7-107

A lawyer's right to free speech[1] and a litigant's right to a fair and impartial trial[2] may conflict during different stages of civil or criminal litigation. An extra-judicial statement by a lawyer may influence the impartiality of either type of judicial proceeding.[3] Restrictions on the freedom

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[1] The right to free speech is guaranteed by the first amendment, which states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[2] The sixth amendment, which guarantees an impartial trial to a criminal defendant, states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

The Constitution also guarantees litigants in a civil proceeding the right to a fair and impartial proceeding. The seventh amendment guarantees the right to a jury trial in civil suits. U.S. CONST. amend. VII. Such a guarantee implies that the jury will be impartial. Moreover, the Supreme Court requires that judicial decisions, both civil and criminal, be made in the calmness and solemnity of the courtroom. *See* Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966). The right to a jury trial is meaningless unless the decision rendered in the courtroom is an impartial one. *See id.* at 362.

[3] *See* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (justice requires that the decision in a judicial conflict results from evidence and argument in open court); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (outside influences, whether private talk or public print, must not effect the outcome of a trial).

Two cases illustrate the conflict between the constitutional rights of the lawyer and the litigant. In 1933, Bruno Richard Hauptman was tried and convicted for the kidnap and murder of the Lindburgh baby. The publicity surrounding the trial was extensive. Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 454 (1940). Forty-five direct telegraph wires serviced approximately 700 newspapermen covering the trial making it possible for information concerning the trial to reach the major capitals of the world. *Id.*

Recognizing the opportunity for publicity, the prosecution and defense organized public relations campaigns. *Id.* at 460. Defense counsel made public statements concerning the innocence of his client, detailing plans for the defense, and promising future "bombshells" and surprises. The prosecuting attorney also took his case to the media by holding daily press conferences. The Hauptman trial was subsequently characterized as "perhaps the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial." *Id.* at 454 (quoting ABA SPECIAL COMM. ON PUBLICITY IN CRIMINAL TRIALS (1936)).

Sheppard v. Maxwell, 384 U.S. 333 (1966), is a more recent example of the conflict between the rights of lawyer and litigant. Although Dr. Sam Sheppard was convicted of the murder of his wife, *see* 165 Ohio St. 293, 133 N.E.2d 340 (1956), the Supreme Court granted his federal habeas corpus application because publicity resulting from extensive newspaper and television coverage denied him a fair trial. 384 U.S. at 335. The extent of this coverage is evident from the fact that the court conducted an inquest before trial in a high school gymnasium, which was broadcast live on television. *Id.* at 339. Throughout the trial, the prosecution repeatedly made inadmissible evidence available to the press. *Id.* at 360. The Court stated that a "carnival atmosphere," *id.* at 358, prevailed to the extent that "bedlam reigned at the courthouse." *Id.* at 355.

Not every criminal proceeding attracts the attention received by these two cases. However, national attention is not required before a lawyer must question whether to speak and

to make extra-judicial statements are both necessary and constitutionally permissible to avoid prejudice to the fair administration of justice.[4] Absolute restrictions on the lawyer's freedom of speech, however, are not constitutionally permissible to insure an impartial trial.[5]

The American Bar Association (ABA) drafted Disciplinary Rule 7-107 (DR 7-107) of the ABA Code of Professional Responsibility[6] as a compromise to the conflict between the constitutional rights of the lawyer and the litigant.[7] DR 7-107[8] specifically delineates topics on which lawyers may not

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risk prejudice to a pending trial. Local media coverage alone can create the potential for such prejudice.

[4] The Supreme Court specifically recognizes that the guarantee of free speech contained in the first amendment is not absolute. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976); Konigsberg v. State Bar of California, 366 U.S. 36, 49-50 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957); American Communications Ass'n v. Douds, 339 U.S. 382, 394 (1950). Moreover, restrictions on the freedom of discussion are clearly permissible for the purpose of protecting the fair and orderly administration of justice. Pennekamp v. Florida, 328 U.S. 331, 347 (1946). Justice will not allow lawyers, by extra-judicial statements, to frustrate the court's function of rendering impartial adjudication. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

[5] A restriction on the freedoms guaranteed by the first amendment must be no greater than is essential to protect the particular governmental interest involved. Procunier v. Martinez, 416 U.S. 396, 413 (1974). More specifically, a first amendment restriction must be neither overbroad nor vague. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960) (an overbroad proscription prohibits comment that poses no threat to a fair and impartial trial). Vagueness encompasses the situation where the prohibitions of free speech are not defined clearly so that the lawyer is not given adequate notice of proscribed comment. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Overbroad and vague prohibitions facilitate arbitrary and discriminatory enforcement because there are no standards to guide the application of the prohibition. Such prohibitions also suppress more speech than necessary because the indefiniteness of the prohibition causes the lawyer to avoid the area of comment for which he may be subject to sanction. *See id.* at 109.

[6] ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107; *see* notes 9-10 *infra.* The problem of prejudicial publicity caused by extra-judicial statements is not novel. Lord Chancellor Hardwicke stated that nothing is more destructive to an impartial trial than to prejudice the public's mind against parties to a lawsuit before the case is heard. Portman, *The Defense of Fair Trial from* Sheppard *to* Nebraska Press Association: *Benign Neglect to Affirmative Action and Beyond,* 29 STAN. L. REV. 393, 395 (1977)[hereinafter cited as *Benign Neglect*]. However, the prejudicial publicity problem did not reach alarming proportions until the twentieth century when advances in media technology increased both the speed and scope of news dissemination. *Benign Neglect, supra* at 396; *see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 548-49 (1976); note 3 *supra.*

DR 7-107 is not the American Bar Association's (ABA's) first attempt to deal with extra-judicial comment. Canon 20 of the old ABA Canons of Professional Ethics prohibited newspaper publications by a lawyer regarding pending or anticipated litigation because such publications interfered with a fair trial. *See* ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 80 n.2 (App. Draft 1968)[hereinafter cited as REARDON REPORT].

[7] Spurred by the trial of Dr. Sam Sheppard, *see* note 3 *supra,* and the assassination of President John F. Kennedy, the ABA created an advisory committee to deal with the problem of a fair trial and a free press. Both of these events underscored the pervasive influence that extra-judicial statements can have on the administration of justice. For example, grave doubt existed whether Lee Harvey Oswald could have received an impartial trial given the massive publicity concerning the assassination of President Kennedy. REPORT OF THE PRESIDENT'S

comment during the pendency of a criminal[9] or civil proceeding.[10] The proscription of speech applies only when such comment presents a reasona-

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COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 238 (1964).

The advisory committee's findings and recommendations were published in the Reardon Report. These recommendations became sections (A) through (D) of DR 7-107. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107 n.85; *see* note 9 *infra.*

[8] Disciplinary Rules, along with Canons and Ethical Considerations, comprise the three parts of the ABA Code of Professional Responsibility. The Canons express general standards of professional conduct expected of lawyers. ABA CODE OF PROFESSIONAL RESPONSIBILITY, PRELIMINARY STATEMENT. The Ethical Considerations are aspirational in nature and represent the ideals to which every lawyer should strive. *Id.* Disciplinary Rules dictate the mandatory minimum level of acceptable conduct by lawyers. *Id.* Failure to comply with a Disciplinary Rule may subject a lawyer to disciplinary action. *Id.*

[9] DR 7-107's prohibitons only cover extra-judicial statements that a reasonable person would expect some form of public communication media to disseminate. Sections (A) through (E) of DR 7-107 apply to criminal proceedings. DR 7-107(A), dealing with the investigatory stage of the criminal process, prohibits statements that do more than state:

(1) Information contained in the 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; or

(5) A warning to the public of any danger.

DR 7-107(B) deals with the criminal process from the initiation of proceedings until the commencement of trial. This section prohibits statements that relate 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 a 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; or

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

DR 7-107(D) deals with the period during jury selection and the trial itself. This section prohibits statements that relate to the trial, the parties, the issues, or "other matters that are reasonably likely to interfere with a fair trial." DR 7-107(E) prohibits any statement that is "reasonably likely to affect the imposition of sentence" during the period between the completion of trial and the imposition of sentence.

[10] The Reardon Report, *see* notes 6-7 *supra*, did not contain any recommendation regarding civil trials. However, DR 7-107(G) does address the problem of prejudicial comment during a civil trial. This section prohibits statements that relate 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) [The attorney's] opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule; or

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

ble likelihood of prejudice to the fair administration of justice.[11] All other topics are free for discussion.[12] This precise proscription is an attempt to insure that the restrictions of comment in DR 7-107 are no broader than necessary to protect the impartiality of litigation.[13] Two recent circuit court decisions, *Chicago Council of Lawyers v. Bauer*[14] and *Hirschkop v. Snead*,[15] examined the constitutionality of DR 7-107's restrictions on the attorney's first amendment right to free speech.

In *Bauer*, an association of Chicago lawyers and several of its members sought injunctive and declaratory relief from the application of DR 7-107 by the District Court for the Northern District of Illinois.[16] The plaintiffs argued that DR 7-107 is unconstitutionally vague and overbroad[17] because the application of the disciplinary rule is not limited to situations presenting a clear and present danger of a serious and imminent threat to the administration of justice.[18] The prevention of extra-judicial comment posing only a reasonable likelihood of prejudice to a fair trial,[19] according to the plaintiffs, is an unconstitutional abridgement of an attorney's first amendment rights.[20]

The Seventh Circuit, in *Bauer*, agreed with the plaintiffs, holding that DR 7-107's proscriptions only apply to an attorney's comments that pose a serious and imminent threat[21] to the fair administration of justice during

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[11] *See* notes 9-10 *supra*. *See also* Hirschkop v. Snead, 594 F.2d 356, 365, 367 (4th Cir. 1979). *But see* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975).

[12] *See* notes 9-10 *supra*.

[13] The proscriptions of DR 7-107 are open to constitutional attack because of overbreadth if the disciplinary rule prohibits more speech than is necessary to protect the impartiality of a trial. *See* note 5 *supra*.

[14] 522 F.2d 242 (7th Cir. 1975).

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

[16] 522 F.2d at 247. Relief in *Bauer* was sought from both Rule 1.07 of the District Court for the Northern District of Illinois' Local Criminal Rules and DR 7-107. *Id.* The local rule incorporates DR 7-107 into the local rules of court. *Id.* at 247 n.2.

Courts are competent to make and enforce reasonable rules for the attorneys that appear in that court. *See* Wood v. Georgia, 370 U.S. 375, 383 (1962). An authorized and enacted rule of court has the force of law. Weil v. Neary, 278 U.S. 160, 169 (1929). Moreover, the court has the power to punish attorneys for misbehavior in the practice of law. *Ex parte* Bradley, 74 U.S. (7 Wall.) 364, 374 (1868). Violation of a court rule constitutes such misbehavior. The punishment for violation of a court rule is distinct from punishment for contempt of court. *Id.*

[17] *See* note 5 *supra*.

[18] 522 F.2d at 247. The plaintiffs in *Bauer* recognized the right of courts to protect trials from prejudice, and therefore, did not attempt to free from restriction comments that actually would impair a fair trial. *Id; see* note 4 *supra*.

[19] *See* text accompanying note 11 *supra*.

[20] 522 F.2d at 247.

[21] The *Bauer* court, rather than stating that the Constitution allows a restriction of speech when it presents a "clear and present danger" to the fair administration of justice, phrased the test in terms of a "serious and imminent threat" to the fair administration of justice. While the test is most often stated as "clear and present danger," *see* note 51 *infra*, there is no substantive difference between the labels. AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 3-4 (2nd

bench and jury trials.[22] The court upheld most of the specific proscriptions contained in DR 7-107,[23] but held that the proscriptions are effective only when the serious and imminent threat standard is met.[24] The *Bauer* court did hold, however, that DR 7-107's proscriptions of speech during civil trials and during the post-trial period are unconstitutional.[25]

In *Hirschkop,* a Virginia attorney contended that DR 7-107[26] was an unconstitutional violation of his first amendment right to free speech.[27] The Fourth Circuit rejected the plaintiff's contentions and upheld DR 7-107's proscriptions when a lawyer's extra-judicial comment presents a reasonable likelihood of prejudice to the impartiality of litigation.[28] The court held that the substantial interest of the state and federal judiciary to guarantee litigants fair trials was an interest that justifies infringement of an attorney's first amendment free speech guarantee.[29] The *Hirschkop* court, however, held that the restrictions of DR 7-107 were unconstitutional as applied to the criminal post-trial period,[30] to a criminal bench trial,[31] or to a civil trial.[32]

The *Bauer* and *Hirschkop* courts thus differed materially on the question whether DR 7-107 employs the correct constitutional balance between the lawyer's right to free speech and the litigant's right to a fair and impartial trial. Although both *Bauer* and *Hirschkop* agreed that DR 7-107 should not apply to civil trials, the two courts adopted different standards to determine when DR 7-107's restrictions on free speech are constitu-

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ed. tent. draft 1978). Since both tests require the same inquiry, the two labels will be used interchangeably throughout this note. *See id.*

[22] 522 F.2d at 249.

[23] *See* note 9 *supra.*

[24] 522 F.2d at 249.

[25] 522 F.2d at 257-58; *see* notes 9-10 *supra.*

[26] The Virginia Supreme Court adopted DR 7-107 as a rule of court pursuant to statutory authority. *See* VA. CODE § 54-48 (1978) (Supreme Court may prescribe regulations concerning a code of ethics governing attorneys' professional conduct); note 16 *supra.* The version of DR 7-107 adopted by the Virginia Supreme Court is the same as DR 7-107 in the ABA Code of Professional Responsibility. *See* Rules of Court, 211 Va. 295, 347-50 (1970).

[27] 594 F.2d at 362. Hirschkop contended that the first amendment precludes any rules which limit in any way the freedom of speech. *Id.* at 363; *but see* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 247 (7th Cir. 1975) (plaintiff conceded that some degree of limitation on lawyer's first amendment rights is constitutionally permissible).

[28] 594 F.2d at 362. The *Hirschkop* court indicated that DR 7-107 was intended by its drafters to ban comment on enumerated topics absolutely. *Id.* at 365, 367; *see* notes 9-10 *supra.* The court held, however, that there are situations when comment, even on the specified topics, ought not result in the filing of charges against an attorney. 594 F.2d at 367-68. Therefore, the court decided that DR 7-107 only prohibits comment that poses a reasonable likelihood of prejudice to the fair administration of justice. *Id.* at 362.

[29] 594 F.2d at 363-64.

[30] *Id.* at 372. In Virginia, the jury, rather than the judge, sometimes imposes the criminal sentence. When the jury so acts, the *Hirschkop* court held that the provisions of DR 7-107(E) must remain in effect. *Id.*; *see* note 9 *supra.*

[31] *Id.* at 371-72.

[32] *Id.* at 373.

tional.[33] Additionally, *Bauer* applied the prohibitions of DR 7-107 to bench trials, while *Hirschkop* did not.[34] An examination of these issues is helpful to the practicing attorney as the basis for understanding his obligations concerning extra-judicial comment.[35]

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[33] The *Bauer* court held that DR 7-107 only prohibits statements presenting a serious and imminent threat of prejudice to the administration of justice. *See* text accompanying note 24 *supra*. *Hirschkop* held that DR 7-107 applies to comments presenting a reasonable likelihood of prejudice. *See* text accompanying note 28 *supra*. *See generally* text accompanying notes 36-66 *infra*.

[34] *Cf.* text accompanying notes 25, 30-32 *supra*.

[35] Both *Hirschkop* and *Bauer* held that DR 7-107 is not a prior restraint. 594 F.2d at 368-69; 522 F.2d at 248-49. Though the Supreme Court has never clearly defined what constitutes a prior restraint, a prior restraint is generally interpreted as a formal prohibition on speech in advance of the utterance or publication of that speech. Litwach, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 519-20 (1977) [hereinafter cited as *Doctrine of Prior Restraint*]. The Fourth and Seventh Circuits' determinations that DR 7-107 is not a prior restraint of free speech is significant because any first amendment restriction labeled a prior restraint comes to a court with a heavy presumption of invalidity. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 557-58 (1976) (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)). A prior restraint is the most serious and least tolerable infringement of first amendment rights. *Id.* at 559. A reviewing court has never sustained a restriction of speech labeled a prior restraint imposed to protect an accused's sixth amendment rights. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-33 (1978)[hereinafter cited as TRIBE].

There are certain characteristics evident in a prior restraint that are absent from DR 7-107. A court functions in an adjudicative role when it imposes a prior restraint. *In re* Oliver, 452 F.2d 111, 113-14 (7th Cir. 1971). *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 544 (1977) [hereinafter cited as *Puzzle of Prior Restraint*]. Though only valid for a specific, brief period, a prior restraint prohibits all comment within its ambit. 420 U.S. at 560. A violation of a prior restraint is summarily punishable as contempt. 594 F.2d at 368; *Doctrine of Prior Restraint, supra* at 553. Moreover, the sanction is immediate and irreversible in most cases because, even if a reviewing court later declares the prior restraint unconstitutional, the contempt conviction remains valid. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); 522 F.2d at 248.

In contrast, a court adopting DR 7-107 acts in a legislative rather than in an adjudicative role. *See In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971). DR 7-107 is a broad rule based on anticipated, rather than actual, facts. Although violation of the rule is punishable as contempt, there is no summary punishment. 594 F.2d at 368. At a full due process hearing one may challenge the constitutional validity of the restriction and, if successful, will not be guilty of contempt. 522 F.2d at 248. Moreover, rather than preventing all comment within its ambit, DR 7-107 only prevents speech which threatens the impartiality of litigation. *See* Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790-91 (E.D. La. 1977). This is true even when the attorney comments on a topic specifically proscribed in DR 7-107.

A reviewing court must avoid the temptation simply to label a restriction of speech a "prior restraint" and then, without analysis, strike down the restriction as unconstitutional. Such an approach is of little benefit to the lawyers who must make the decision whether to speak in a given situation. The same two-step analysis required to determine the correct constitutional standard to apply to DR 7-107 should apply when a court is reviewing a restriction of speech that may be a prior restraint. *See* text accompanying notes 36-66 *infra*.

The reviewing court's focus of inquiry should be the specific restriction of speech rather than the label given to that restriction. Otherwise, the protection against unwarranted restrictions of free speech not labeled prior restraints will be diminished. *Puzzle of Prior Restraint, supra* at 540. Any restriction of free speech, whether labeled or not, inhibits the free exercise

In determining which standard to apply to proscriptions of speech under DR 7-107, the reasonable likelihood test or the clear and present danger test,[36] a court must use a two-step analysis. First, the reviewing court must determine the constitutionally correct label to attach to the standard determining when the proscriptions of DR 7-107 are in effect. Second, the court must delineate the inquiry required under the appropriate label. A reviewing court must fully explore both steps to ascertain whether a particular comment threatens the impartiality of litigation and, if it does, whether the Constitution allows its proscription.

In *Bauer,* the Seventh Ciicuit determined that DR 7-107 only prohibits speech posing a serious and imminent threat to the administraion of justice.[37] The *Bauer* court stated that this standard gives a lawyer sufficient notice as to what speech DR 7-107 prohibits, but does not proscribe more comment than is necessary to prevent prejudice to litigation.[38] The court in *Bauer,* however, did not cite Supreme Court authority requiring this particular label for a constitutionally valid restriction of free speech.[39] Nor did the court provide a detailed discussion explaining why the reasonable likelihood label is constitutionally invalid.

The *Hirschkop* court differed from the *Bauer* approach in deciding when the proscriptions of DR 7-107 are in effect. The court first stated that when drafted, DR 7-107's restrictions were meant to prohibit all comment on the delineated topics in the rule.[40] The *Hirschkop* court, however, decided that the prohibitions in DR 7-107 should not apply absolutely.[41] According to the Fourth Circuit, there may be an "unusual" instance where an extra-judicial comment presents no potential for prejudice to the impartiality of litigation.[42] Therefore, the *Hirschkop* court stated that DR 7-107's proscriptions apply only when extra-judicial comment presents a

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of first amendment rights. Thus, in determining whether a restriction of speech is constitutional, a court should examine the nature of the speech involved, the specific restriction, and the justification for such a restriction.

[36] *See* text accompanying note 33 *supra.*

[37] 522 F.2d at 249.

[38] *Id.; see* note 5 *supra.*

[39] *See* 522 F.2d at 249. The Seventh Circuit imposed a clear and present danger label on the authority of two earlier Seventh Circuit cases holding that such a label is correct to determine when a valid proscription of first amendment rights exists. *Id; see In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970).

The court in Markfield v. Association of the Bar of New York, 49 App. Div. 2d 516, 370 N.Y.S.2d 82 (1975), adopted the clear and present danger label used in *Bauer* to determine when the proscriptions of DR 7-107 are in effect. *Markfield* reviewed a decision admonishing an attorney for violation of DR 7-107(D) of the ABA Code of Professional Responsibility. *See* note 9 *supra.* Noting that the Disciplinary Rule attempts to balance an attorney's right of free speech with the need to guarantee a fair and impartial trial, the *Markfield* court held that the application of DR 7-107 is limited to those situations where the extra-judicial statements present a clear and present danger to the administration of justice. 49 App. Div. 2d at 517, 370 N.Y.S.2d at 85.

[40] 594 F.2d at 365, 367; *see* note 28 *supra.*

[41] 594 F.2d at 362.

[42] *Id.* at 368.

reasonable likelihood of prejudice to a trial's impartiality.[43] The court felt that this label was more definite than any other label, thereby providing the practicing lawyer the best notice of proscribed comment.[44]

The *Hirschkop* analysis for determining the appropriate label is deficient in two respects. First, the Fourth Circuit defined the instance when extra-judicial comment does not create prejudice to pending litigation as unusual, and thus began its analysis with the assumption that extra-judicial comment is generally prejudicial to a trial's impartiality. If this assumption is correct, then DR 7-107 would apply in the average case. General application of the DR 7-107 proscriptions, however, is constitutionally inadequate due to overbreadth.[45] Therefore, DR 7-107's proscriptions of free speech, rather than being appropriate in the average case, must be reserved for the relatively few cases where extra-judicial comment may result in prejudice.[46]

The second deficiency in the *Hirschkop* analysis is that the court applied the reasonable likelihood label simply because the label provides the practicing attorney the best notice of proscribed comment.[47] While notice of proscription is indeed an issue in determining whether DR 7-107's proscriptions are constitutional,[48] it is not the only issue. A reviewing court also must determine whether the proscription of speech is more extensive than necessary to protect the impartiality of litigation.[49] The *Hirschkop* court failed to focus adequately on this overbreadth issue.

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[43] *Id.* at 362.

[44] *Id.* at 368. The *Hirschkop* court demonstrated the definiteness of the reasonable likelihood standard with an illustration. If a prosecutor announces to the press that he has a full confession from the accused, the impartiality of the trial is threatened because the confession may be inadmissible. A juror may hear of the confession through the newspaper and render a decision based on the inadmissible confession. The reasonable likelihood standard is thus met. The potential prejudice to impartiality, however, is not certain. The defendant may decide not to contest the confession for some reason or the admission may come in over the defendant's objection. Because of these uncertainties, the clear and present danger test may not be met.

The *Hirschkop* court thus focused on the uncertainty of future events to determine the correct constitutional standard for DR 7-107. Because of this uncertainty, the court expressed doubt that one could determine whether a statement, when first made, could create a clear and present danger to a trial's impartiality. According to the *Hirschkop* analysis, too many unknown variables exist at the time the statement is made to predict the effect of the statement on the pertinent litigation. The *Hirschkop* court therefore required only a reasonable likelihood of prejudice for the proscriptions of DR 7-107 to take effect.

[45] *See* note 5 *supra.*

[46] In relative terms, the total number of criminal proceedings in which an extra-judicial statement may create a potential for prejudice is of limited proportions. REARDON REPORT, *supra* note 6, at 22. Further, only a small percentage of criminal cases ever reach a jury, most jury trials do not generate publicity, and much crime news is unnoticed. TRIBE, *supra* note 35, § 12-11.

[47] *See* 594 F.2d at 368.

[48] *See* Note, *Trial Publicity - Speech Restrictions Must Be Narrowly Drawn,* 54 TEX. L. REV. 1158, 1162 (1976).

[49] *See* note 5 *supra.*

The *Hirschkop* court also failed to address Supreme Court precedent stating when a restriction on the first amendment right to free speech is constitutionally permissible.[50] This precedent includes a long line of decisions holding that restrictions on the freedom of speech are constitutional only when there is a clear and present danger of evil.[51] Nor did the *Hirschkop* court discuss Supreme Court precedent indicating that a reasonable likelihood label is constitutionally unacceptable.[52] Support for adoption of the reasonable likelihood label is not very compelling due to the failure of the Fourth Circuit to discuss and distinguish this precedent.

Although the *Bauer* court did follow Supreme Court precedent in adopting the clear and present danger label, the Seventh Circuit failed to explain the inquiry required under that label to determine when an extra-judicial comment presents a clear and present danger of prejudice. The failure to engage in this second step of analysis[53] is highly relevant to the practicing attorney. It is of little value to know that the restrictions on

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[50] Neither *Hirschkop* nor *Bauer* cited Supreme Court authority for the different labels adopted. This failure is particularly surprising given the fact that the Supreme Court precedent directly supports the clear and present danger label adopted in *Bauer*. *See* note 51 *infra*.

[51] The Court first mentioned the clear and present danger test in Schenck v. United States, 249 U.S. 47 (1919). In reviewing a conviction under the Espionage Act of 1917, Justice Holmes stated, "[T]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52.

A series of cases in the 1940's reviewing contempt convictions for extra-judicial statements threatening the impartiality of litigation re-affirmed the clear and present danger label for determining the constitutionality of a restriction on first amendment freedoms. In Bridges v. California, 314 U.S. 252 (1941), the Court reviewed contempt convictions resulting from out of court statements made by a newspaperman and a litigant during trial. While noting that defining a correct speech proscription formula is difficult, the Court stated that the clear and present danger test provides adequate guidance in most situations. *Id.* at 261-62; *see* Craig v. Harney, 331 U.S. 367, 378 (1947); Pennekamp v. Florida, 328 U.S. 331, 348 (1946); Thomas v. Collins, 323 U.S. 516, 530 (1945).

The Supreme Court continues to hold that there must be a clear and present danger of evil before the Constitution allows a proscription of free speech. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 744-45 (1978); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-43 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976); Edwards v. South Carolina, 372 U.S. 229, 237 (1963); Wood v. Georgia, 370 U.S. 375, 384-85 (1962).

[52] *See* Craig v. Harney, 331 U.S. 367, 371-72, 376 (1947)(comment that poses reasonable tendency to obstruct justice is not punishable as contempt); Bridges v. California, 314 U.S. 252, 273 (1941) (reasonable tendency to impair administration of justice is not enough to justify restriction of free speech).

The court in Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973), also applied the reasonable likelihood label. *Younger* involved a protective order in a murder case restraining all participants from publicizing any out of court material. The *Younger* court stated that no precedent dictated that either the clear and present danger label or the reasonable likelihood label was constitutionally correct. The court deemed the clear and present danger label unworkable because of the unforeseeable future variants at the time the statement is made. *Id.* at 161-64, 106 Cal. Rptr. at 241-42. The *Younger* court therefore applied the reasonable likelihood label. *Id.* at 164, 106 Cal. Rptr. at 242. *Accord,* United States v. Tijerina, 412 F.2d 661, 666 (10th Cir. 1969).

[53] *See* text accompanying note 36 *supra*.

extra-judicial speech contained in DR 7-107 apply only when a lawyer's comment presents a clear and present danger to the fair administration of justice if the attorney does not know how to determine when a clear and present danger exists.

As originally stated, the clear and present danger label only required an examination of the comment in question and the circumstances of the case.[54] No other factors were considered in determining whether a prohibition of speech was constitutional. This, however, may not be correct under current application of the clear and present danger label.[55] In 1950, in a "restatement" of the clear and present danger test adopted by the Supreme Court, Judge Learned Hand stated that a reviewing court, in determining whether a statement presents a clear and present danger of prejudice, must ask whether the "gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech."[56] Arguably, this "restatement" requires a balancing of the seriousness of the evil with the content of the prohibited statement.[57]

The requirement of a balancing test under DR 7-107 is supported by the Supreme Court's recent discussion of the application of the clear and present danger label.[58] In *Landmark Communications, Inc. v. Virginia,*[59] the Supreme Court held that a reviewing court, under the clear and present danger test, must examine the imminence and magnitude of the evil that would result if the statement is made, and then balance this evil against the need for free and unfettered expression.[60] Thus, the potential for preju-

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[54] *See* note 51 *supra.*

[55] *See* Greer v. Spock, 424 U.S. 828, 863 (1976) (Brennan, J., dissenting); Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg—*And Beyond,* 1969 SUP. CT. REV. 41.

[56] United States v. Dennis, 183 F.2d 201, 212 (2nd Cir. 1950). The defendants in *Dennis* were convicted under the Smith Act for conspiring to overthrow the American government by organizing the Communist Party of the United States. *Id.* at 205.

[57] *See* Konigsberg v. State Bar of California, 366 U.S. 36, 62-68 (1961) (Black, J., dissenting); TRIBE, *supra* note 35, § 12-11; *Puzzle of Prior Restraint, supra* note 35, at 540-41.

[58] Landmark Communications Inc. v. Virginia, 435 U.S. 829 (1978). *Landmark* involved the constitutionality of a Virginia statute prohibiting the dissemination of information regarding proceedings before a review commission authorized to hear complaints about judges' disability or misconduct. *Id.* at 831. A newspaper owned by Landmark Communications published an article accurately describing a pending inquiry by this commission of a named state judge. *Id.* This publication resulted in a conviction for the violation of the Virginia statute. *Id.* at 831-32.

[59] *Id.* at 829.

[60] *Id.* at 842-43. The Supreme Court in *Landmark Communications* did not cite any authority for the requirement of a balancing analysis under the clear and present danger label. *See id.* Rather, the Court cited *Bridges, Pennekamp,* and *Craig* to explain its balancing analysis. *See id* at 844-45; note 51 *supra.* These cases employed the "old" clear and present danger test which requires no balancing and focuses exclusively on the utterance and the particular circumstances of a case. *See* text accompanying notes 54-55 *supra.* Clearly, these cases provide no precedent for a balancing analysis under the clear and present danger label.

The decision in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), subsequent to *Landmark Communications,* further complicates the correct analysis required under the clear

dice resulting from the utterance on one hand, is balanced against the advantages gained from that utterance, on the other. This balancing inquiry makes it probable that a reviewing court considering a restriction that would be upheld under the original clear and present danger test,[61] would now declare the same restriction unconstitutional.[62]

The Supreme Court has not explicitly stated, however, that a balancing inquiry is the only inquiry required under the clear and present danger label. On the contrary, three different inquiries, all labeled as the clear and present danger test, have been used in the Court's opinions in the last four years.[63] The practicing attorney or a reviewing court faces a nearly impossible task in determining whether an extra-judicial statement presents a clear and present danger of prejudice to the administration of justice because the inquiry necessary to make that determination is unclear.[64]

Nevertheless, the balancing inquiry under the clear and present danger label represents the most reasonable compromise of the conflict between the right to free speech and the right to a fair trial. If the advantages of comment are slight and there is an imminent threat of prejudice to the trial's impartiality if the comment is made, then the weight of reason dictates a restriction of free speech. The constitutional right to a fair trial outweighs the right to speak in such a situation. If, however, there are compelling reasons for making an extra-judicial statement, a court justifiably may conclude that the right to speak outweighs the danger the speech

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and present danger test. *Pacifica Foundation,* quoting *Schenck, see* note 51 *supra,* adopts the "old" clear and present danger inquiry that requires no balancing at all. The Supreme Court, within one year, thus announced one inquiry under the clear and present danger label in *Landmark Communications,* and a different inquiry under the same label in *Pacifica Foundation.*

[61] *See* note 51 *supra.*

[62] An illustration is helpful in focusing on the distinction between the *Schenck* clear and present danger inquiry and the balancing inquiry that the Supreme Court announced in *Landmark Communications. See* note 51 *supra;* text accompanying note 60 *supra.* A political dissident is on trial and there is evidence of an abuse of prosecutorial discretion in prosecuting the defendant. Evidence of the abuse consists of a statement made by the prosecutor in a campaign speech prior to trial that he despises those who do not respect American democracy and that he intends to clear the streets of these "pinkos."

The defendant's attorney could publicize the prosecutor's prior statement and attempt to portray his client as a "marytr" and thus create public sympathy for the defendant. The *Schenck* clear and present danger inquiry proscribes this conduct by the defense attorney because there is a danger of prejudice to the impartiality of the trial due to the possible impact of public sympathy. *See* note 9 *supra.* When the advantage of publicizing the abuse of prosecutorial discretion is balanced against the possibility of prejudice, a court may find that the former outweighs the latter. Thus, there is no clear and present danger of prejudice under a balancing inquiry.

[63] *See* FCC v. Pacifica Foundation, 438 U.S. 726, 744-45 (1978) (*Schenck* inquiry); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-43 (1978) (true balancing inquiry); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (arguable balancing inquiry under the "Hand restatement"); *see* note 60 *supra*; text accompanying notes 51 and 57 *supra.*

[64] The inquiry required under the reasonable likelihood label adopted by the *Hirschkop* court required no balancing. *See* 594 F.2d at 368. Hence, neither the Fourth nor Seventh Circuit used the balancing analysis that the Supreme Court now seems to favor.

presents to the trial's impartiality. If the extra-judicial comment is made and prejudices the trial's impartiality, there are remedial devices available to rectify the situation.[65] Hence, a balancing inquiry protects both the right to a fair trial and the right to free speech with the least amount of first amendment restriction.[66]

The ABA's advisory committee, established for the purpose of determining the proper balance between the right to free speech and the right to a fair trial,[67] addressed the possibility that distinctions between a jury and bench trial may warrant the application of DR 7-107 only in jury trials.[68] The advisory committee, however, decided against such an approach.[69] The committee felt that even a judge cannot remain totally unaffected by extra-judicial influences.[70] Justification for a restriction of free speech thus exists, according to the advisory committee, during a bench trial.[71]

The *Bauer* court, adhering to the reasoning used by the advisory committee, held that there is no distinction between bench and jury trials in the application of DR 7-107.[72] According to the Seventh Circuit, exposing a judge to as little extra-judicial information as possible obviates the need for the judge to remove large amounts of material from his judicial thought process.[73] The court also said that preventing the judge from hearing extra-judicial comment removes any appearance that the decision was based on improper evidence.[74] Therefore, the *Bauer* court declared that preventing prejudicial publicity from reaching a judge during a bench trial is desirable.[75]

The *Hirschkop* court, rejecting the approach of both the ABA's advisory committee and the *Bauer* court, held that bench and jury trials are distinguishable with respect to DR 7-107.[76] The *Hirschkop* court felt that

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[65] The Supreme Court endorses the use of remedial devices to protect the right to a fair trial. *See* Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966). These devices include change of venue, extensive voir dire of jurors, sequestration of jurors, mistrial, jury instructions, and reversal on appeal. *Id.*

[66] If a reviewing court determines that the right to a fair trial and the right to free speech are equally compelling in a given situation, then the latter right must be restricted in favor of the former. *See* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("trial courts must take strong measures to ensure that the balance is never weighed against the accused"); Estes v. Texas, 381 U.S. 532, 540 (1965) (right to fair trial is the "most fundamental of all freedoms" and must be maintained "at all costs").

[67] *See* note 7 *supra.*

[68] REARDON REPORT, *supra* note 6, at 22.

[69] *Cf.* note 9 *supra.*

[70] REARDON REPORT, *supra* note 6, at 53. A judge is constantly exposed to an extra-judicial influence when ruling on the admissibility of evidence. If deemed inadmissible, the judge must not consider this extra-judicial influence in rendering a decision.

[71] *Id.*

[72] 522 F.2d at 257.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] 594 F.2d at 371-72.

the interests protected through prohibition of comment in jury trials were not as compelling during a bench trial.[77] The Fourth Circuit held that a lawyer's extra-judicial comments are no more prejudicial than the other inadmissible evidence to which a judge is constantly exposed during trial.[78] The *Hirschkop* court thus concluded that, because of the minimal gain to impartiality and the substantial impairment of first amendment rights, DR 7-107 should not apply to a bench trial.[79]

The *Hirschkop* court's decision not to apply DR 7-107 to bench trials is constitutionally correct. A judge must continually hear material that is inadmissible under the rules of evidence. Unlike jurors, the judge is trained in the law. A judge must render decisions based solely on admissible evidence. Because the probability of prejudice is slight, there is no clear and present danger of prejudice from extra-judicial statements during a bench trial. This minimum potential for prejudice does not constitutionally warrant the substantial impairment of the lawyer's first amendment rights resulting from the application of DR 7-107 during bench trials.[80]

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[77] *Id.* at 372.

[78] *Id.* at 371.

[79] *Id.* Basic to the distinction between a bench and jury trial in the application of DR 7-107 is the assumption that prejudicial publicity does, in fact, influence a jury's deliberations and findings. The empirical data that exists on the effect of publicity on a jury is not extensive or conclusive. *Compare* REARDON REPORT, *supra* note 6, at 55-67 *and* Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory,* 29 STAN. L. REV. 431, 449-50 (1977) (prejudicial publicity does have an adverse impact on jurors) *with* Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?,* 29 STAN. L. REV. 515 (1977) (prejudicial publicity may not have an adverse impact on jurors in some situations).

[80] Several Supreme Court cases have reversed contempt convictions for extra-judicial statements allegedly resulting in the coercion and intimidation of a judge during a bench trial. *See* Wood v. Georgia, 370 U.S. 375, 395 (1962); Craig v. Harney, 331 U.S. 367, 378 (1947); Pennekamp v. Florida, 328 U.S. 331, 349-50 (1946); Bridges v. California, 314 U.S. 252, 278 (1941). In these cases, the danger to a fair trial did not exist because the Supreme Court credited the judiciary in general, and these judges in particular, with the intestinal fortitude to withstand verbal attack. *See* Younger v. Smith, 30 Cal. App. 3d 138, 161-62, 106 Cal. Rptr. 225, 241 (1973). Further, several Supreme Court opinions indicate that there is not a clear and present danger of prejudice from extra-judicial statements during a bench trial. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978) (injury to the official or institutional reputation of courts is insufficient to prohibit free speech); Pennekamp v. Florida, 328 U.S. 331, 348 (1946) (external standards of any type cannot depend on the varying degrees of "moral courage or stability" different judges possess in different situations). *See also* TRIBE, *supra* note 35, § 12-11; Note, *The Attorney "No-Comment" Rules and the First Amendment,* 21 ARIZ. L. REV. 61, 64 (1979).

If a particular comment results in prejudice in a bench trial, remedial measures are available to guarantee the accused an impartial trial. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); note 65 *supra.* For example, a new trial is always available whenever prejudice results from an extra-judicial statement during a bench trial. *Id.*

The same analysis that prohibits the application of DR 7-107 during bench trials also applies when there is a sequestered jury. Sequestration isolates the jury from the threat of prejudice caused by extra-judicial statement. Therefore, because little chance of a threat to impartiality exists, there is no need for a first amendment restriction. Nevertheless, those

Both the *Hirschkop* and *Bauer* courts held DR 7-107's prohibition of comment during either a bench or jury civil trial unconstitutional.[81] The *Bauer* court stated that the invocation of the phrase "fair trial" does not as readily justify a restriction of speech when referring to a civil, as opposed to a criminal, trial.[82] Both courts stressed the fact that civil litigation is often much longer than criminal litigation, so that the restrictions on speech would be effective for a longer period of time.[83] Further, according to these courts, civil litigation often involves important social issues, and therefore, a restriction on the speech of a lawyer silences a voice that could be instrumental in informing the public about those issues.[84]

The *Hirschkop* and *Bauer* decisions not to apply DR 7-107 to civil trials because of a reluctance to silence socially beneficial comment are unjustified. If a reviewing court, using the constitutionally required clear and present danger test,[85] does not use a balancing analysis, then any compelling advantages society gains in allowing lawyers to speak when the litigation concerns a matter of social interest are irrelevant.[86] If a court is using a balancing inquiry, the possible prejudice from an extra-judicial statement is balanced against the advantages resulting from the making of the statement to determine which interest is most compelling in a given situation.[87] The social benefits of making a particular statement thus are given due consideration. Hence, under either the original clear and present danger inquiry or the balancing inquiry, there is no valid reason not to apply DR 7-107 to civil trials.[88]

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parts of DR 7-107 pertaining to litigation before the time of the sequestration remain applicable. *See* notes 9-10 *supra.*

[81] 594 F.2d at 373; 522 F.2d at 257-59. Although the Reardon Report, *supra* note 6, did not specifically recommend prohibition of comment during civil trials, a provision providing such a prohibition was nevertheless included in DR 7-107. *See* note 10 *supra.*

[82] 522 F.2d at 257.

[83] 594 F.2d at 373; 522 F.2d at 257.

[84] 594 F.2d at 373; 522 F.2d at 258. The recent litigation concerning A.H. Robbins Co.'s "Dalkon Shield" intrauterine contraceptive device is an example of the "social" civil litigation referred to by the *Bauer* and *Hirschkop* courts. Society has an interest in the safety of such contraceptive devices and a lawyer involved in this type litigation very well could offer insights unavailable from any other source.

[85] *See* text accompanying notes 36-66 *supra.*

[86] If there is no balancing under the clear and present danger label, a reviewing court focuses solely on the extra-judicial statement, and the possibility that the statement will impair a trial's impartiality. The advantages resulting from the statement are not considered. Further, it is also irrelevant that civil litigation may last longer than criminal. *See* text accompanying note 83 *supra.* A restriction of speech that lasts for a long period of time is indeed a negative factor resulting from DR 7-107's application during a civil trial. However, a weighing of advantages and disadvantages does not occur under the original, non-balancing, clear and present danger label. *See* notes 51 and 62 *supra.*

[87] *See* text accompanying note 60 *supra.* In addition to considering the social benefits of an extra-judicial comment, a reviewing court using the balancing inquiry would also consider the length of time a proscription of speech would be effective if DR 7-107 applies to civil trials. *See* note 86 *supra.* The length of time, if extensive, would be a factor weighing against such an application of DR 7-107.

[88] The *Hirschkop* and *Bauer* courts did not apply DR 7-107 to civil trials because of a

The Fourth Circuit in *Hirschkop* stated that the existing empirical evidence indicating the possibility or extent of prejudice on civil litigation resulting from a lawyer's extra-judicial comments does not warrant the first amendment restrictions in DR 7-107.[89] Neither *Hirschkop* nor *Bauer* hesitated to apply DR 7-107 to a criminal proceeding, however, even though existing evidence does not conclusively establish that an extra-judicial statement in such a trial prejudices a jury.[90] Indeed, an extra-judicial statement could influence a jury in a civil trial to the same extent such a statement influences a jury in a criminal trial. Thus, the dearth of evidence on the effect of an extra-judicial statement on a civil proceeding may be the result of a simple lack of investigation in this area.[91]

Our judicial system guarantees a civil litigant an impartial trial.[92] The proscription of extra-judicial comment that presents a clear and present danger to this impartiality is constitutionally legitimate. A reviewing court, assuming a balancing analysis is correct under the clear and present danger label, will give the advantages of extra-judicial comment during civil trials ample consideration. Because both the advantages of comment and the litigant's right to a fair trial are adequately considered, the judicial

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reluctance to proscribe socially beneficial comment by a lawyer. The Supreme Court has rejected this type of reasoning. In Craig v. Harney, 331 U.S. 367 (1947), the Court addressed an argument that more extra-judicial comments are permissible during civil litigation because the pending case may possibly involve a matter of public concern. *Id.* at 378. The Court responded that the nature of the case is a factor to consider in determining whether there is a clear and present danger of prejudice. *Id.* However, the rule prohibiting extra-judicial comment from interferring with the fair administration of justice is fashioned to serve the needs of all litigation. *Id.* Hence, the mere fact that a case is civil in nature does not remove it from the scope of DR 7-107.

[89] 594 F.2d at 373.

[90] *See* note 79 *supra.*

[91] An extra-judicial statement clearly can have an adverse effect on a civil trial in some instances. *See In re* Porter, 268 Or. 417, 521 P.2d 345 (1974). *Porter* involved the review of a reprimand given a lawyer for extra-judicial statements he made concerning a civil proceeding which violated DR 7-107. 268 Or. at ____, 521 P.2d at 346; *see* note 10 *supra.* The court upheld the reprimand because the statements tended to prevent a fair trial. 268 Or. at ____, 521 P.2d at 349.

The court in *Porter* refused to apply the original clear and present danger test to determine whether a lawyer's extra-judicial statements violate DR 7-107. *Id.; see* note 51 *supra.* The *Porter* court held that the Supreme Court cases using the original clear and present danger test did not involve disciplinary action against lawyers, and therefore were of no precedential value in ruling on a violation of DR 7-107. 268 Or. at ____, 521 P.2d at 349. Such a distinction is unwarranted because the standard used to determine a constitutionally permissible infringement of first amendment rights is the same regardless of the speaker's occupation. Of course, the involvement of a lawyer injects different considerations into the clear and present danger inquiry because the right to a fair and impartial trial competes against the lawyer's first amendment rights. The same analysis, however, applies. The clear and present danger standard is applicable in any situation involving an infringement of the freedom of speech.

[92] The Supreme Court has stated that freedom of discussion, although important, should not divert a trial from the adjudication of both criminal and civil controversies in the calmness and solemnity of the courtroom. Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966).

process should assure the civil litigant the fair trial protection embodied in DR 7-107.[93]

Disciplinary Rule 7-107 is a noteworthy, but inadequate attempt to balance the litigant's right to a fair trial and the lawyer's right to free speech.[94] The *Hirschkop* and *Bauer* opinions also fail to give these rights of free speech and a fair trial maximum protection. Yet, each court improves the protections presently embodied in DR 7-107. The ABA should incorporate these improvements into DR 7-107 to insure that the constitutional guarantees of free speech and fair trial are served fully.[95]

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[93] When the civil trial is before a judge rather than a jury there is no reason to apply DR 7-107. *See* text accompanying notes 67-80 *supra.*

An issue that neither the *Bauer* nor *Hirschkop* courts addressed is whether DR 7-107 should apply to defense counsel during criminal trials. The Reardon Report, while recognizing that a defense counsel's statement infrequently creates a potential for prejudice to a criminal trial, nevertheless felt the relative likelihood of prejudice significant enough to warrant DR 7-107's application to defense counsel. REARDON REPORT, *supra* note 6, at 37.

The argument that DR 7-107 should not apply to defense counsel in criminal proceedings emphasizes the fact that the state, through the prosecutor, must meet the requirements of due process. Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys:* Ratio Decidendi v. Obiter Dictum, 29 STAN. L. REV. 607, 617 (1977). The defense attorney is not subject to this constitutional requirement. If the prohibitions of DR 7-107 protect the accused's sixth amendment rights, then the defendant, through his attorney, should be able to waive those protections. *Id.* The basis of the argument is that the Constitution protects the individual from the state, not the state from the individual. *Id.* at 607.

The argument against the application of DR 7-107 to defense attorneys operates from an incorrect assumption. While the prohibitions of DR 7-107 are primarily for the benefit of the accused, there is no way to waive these protections without injuring the judicial system itself. If the defense attorney takes his case to the newspapers, he is not waiving DR 7-107's protections. Instead, he is creating an unfair advantage for his client. The defense would be able to utilize the press to their advantage knowing that the prosecution could not make use of this extra-judicial channel. Neither the Constitution nor the courts will allow a shift in the settlement of controversies from the courtroom to the newspapers. *See generally* United States v. Tijerina, 412 F.2d 661, 667 (10th Cir. 1969); State v. Van Duyne, 43 N.J. 369, ____, 204 A.2d 841, 852 (1964).

[94] The President of the ABA has charged an ABA special commission with the task of studying and revising the ABA Code of Professional Responsibility. The working draft, which does not yet represent the commission's collective viewpoint, changes DR 7-107 in two substantial ways. *See* ABA COMM. ON THE EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 3.4a (working draft, August 1979) [hereinafter cited as MODEL RULES].

First, the draft clearly states that the prohibitions of the Disciplinary Rule apply only when there is a serious and imminent risk of prejudice to a trial. *Id.* This change clearly states the label of the standard that guides the application of DR 7-107. No effort is made in the draft, however, to identify clearly the inquiry which the serious and imminent threat label requires. *Id. See generally* text accompanying notes 36-66 *supra.*

Second, the draft of DR 7-107 only prohibits an attorney's extra-judicial statements during a jury trial. MODEL RULES 3.4a. The Constitution certainly warrants this limitation. *See generally* text accompanying notes 67-80 *supra.*

[95] The problem of extra-judicial statements threatening the impartiality of trials is not

moot or inconsequential. Stephen Lesher, a veteran reporter, has started a public relations firm whose clients are, for the most part, lawyers. Kierman, *Lawyers: Image Makers Join Legal Profession,* The Washington Post, Sept. 10, 1979, at C-1, col. 1. Lesher says that the judicial system is "ultimately political" and should be "used." *Id.* at C-3, col. 1. "It's like show business. Always leave them laughing. Give them what they want." *Id.* at C-1, col. 1. Lesher claims there is no attempt to influence judges or juries. *Id.* However, one Washington lawyer says that lately it seems that the trial of some cases is "before the court of public opinion." *Id.*