THE ATTORNEY "NO-COMMENT" RULES AND THE FIRST AMENDMENT

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The problems inherent in the "fair trial—free press" controversy are not new; they are almost as old as the Republic.[1] In recent years, however, the magnitude of the controversy has increased dramatically. In most criminal proceedings, publicity will not pose a threat to the right to a fair trial.[2] It is in the "sensational" case, the one in which public interest is most acute, that tensions may develop between the ability of the state to simultaneously ensure the accused's right to a fair trial, and the exercise by others of the freedom of expression.[3]

This Note will consider the conflict with first amendment freedoms arising when governmental authorities attempt to protect a defendant's right to a fair trial by restraining attorney comment. A brief introduction defining the precise nature of this conflict will precede an examination of the standard used in many jurisdictions to determine when such restraints are appropriate. A suggested modification of that standard offering greater security for free speech without compromising the rights of the accused will follow.

The Nature of the Conflict

In 1968, the American Bar Association, in order to check the "overwhelming preponderance of potentially prejudicial material emanating from lawyers,"[4] promulgated Disciplinary Rule [DR] 7-107 of the ABA Code of Professional Responsibility, commonly called the no-

1. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976). At the core of the controversy are the competing social interests of a free flow of information about the administration of justice and the protection of a judicial proceeding's integrity.

2. *See id.* at 551.

3. *Id.*

4. ABA LEGAL ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, THE RIGHTS OF FAIR TRIAL & FREE PRESS: AN INFORMATIONAL MANUAL FOR THE BAR 76 (1969).

comment rules.[5] This DR restricts attorney comment during five types of pending legal proceedings[6] where a reasonable person would expect the comment to be disseminated by means of public communication.[7] Generally, attorneys are allowed to comment only on matters that do not present a "reasonable likelihood" of interference with a fair trial.[8] The rule deems comment by attorneys about certain enumerated matters to be presumptively prejudicial and specifically proscribes such speech.[9]

DR 7-107 is the legacy of the United States Supreme Court decision *Sheppard v. Maxwell*,[10] where the Court reviewed a murder trial stained by "massive, pervasive and prejudicial" publicity,[11] and found that the trial court denied due process by failing to secure an impartial trial.[12] The Court in *Sheppard* indicated that judicial forums must insulate themselves from outside prejudice[13] and that participants in legal proceedings cannot be allowed to interfere with the court's function.[14] Cooperation between participating counsel and the press with regard to information that might interfere with a fair trial is particularly reprehensible and should be subject to stiff sanction.[15] The Court also stated that reversals were but "palliatives"[16] and not in the best interests of the accused or the efficient administration of justice.[17] Rather, the pos-

5. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107 (1977).

6. These restrictions apply to criminal, DR 7-107(A-E); professional and juvenile disciplinary, DR 7-107(F); civil, DR 7-107(G); and administrative, DR 7-107(H), proceedings. The criminal legal process is further subdivided according to its various stages: investigation, DR 7-107(A); pre-trial, DR 7-107(B); jury selection, DR 7-107(D); and sentencing, DR 7-107(E).

7. DR 7-107(A), (B), (D), (E), (G), (H).

8. *See* DR 7-107(D), (F), (G), (H).

9. DR 7-107(B), (G), (H). In the context of criminal proceedings, the presumptive effect of the rule is limited to utterances made "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 . . . ." DR 7-107(B). The rule applies to the following matters:

(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.

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

DR 7-107(B). DR 7-107(G) and (H) forbid extrajudicial statements made during civil and administrative proceedings regarding evidence, the character or credibility of a party or witness, and the attorney's opinion on claims and defenses. *See* DR 7-107(G), (H).

10. 384 U.S. 333 (1966). *See* Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1140-41 (E.D. Va. 1976).

11. 384 U.S. at 335.

12. *See id.* at 354-63.

13. *See id.* at 362-63.

14. *See id.* at 363.

15. *See id.*

16. *Id.*

17. *See id.*

sible sources of such prejudicial items of information should be silenced.[18]

The *Sheppard* decision was of particular relevance to studies being undertaken at the time by a special advisory committee of the American Bar Association.[19] This committee was formed to investigate and recommend solutions to the difficulties presented by prejudicial publicity.[20] After two years of study, the committee recommended to the ABA a set of standards aimed at stemming the occurence of such publicity.[21] Certain of these recommendations related to restricting the release of information by attorneys participating in ongoing judicial proceedings.[22] They are presently embodied in DR 7-107.

Judges[23] and commentators,[24] have approved these rules as well-executed attempts to combat the wave of reversals caused by prejudicial publicity that have plagued the nation's courts.[25] Approbation of the rules has not been universal, however. At least one federal court has declared that the rules overly restrict first amendment rights.[26] Such criticism led the ABA Standing Committee on Association Standards for Criminal Justice to suggest a redrafting of the no-comment rules.[27] The committee recommended replacing the reasonable likelihood standard with one restricting attorney comment only where the comment poses a clear and present danger to the fairness of the trial.[28] Analysis of this new standard will follow a discussion of the first amendment's impact upon the reasonable likelihood standard.

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18. *See id.*

19. *See* ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968) [hereinafter cited as REARDON REPORT].

20. *See* Reardon, *The Fair Trial-Free Press Controversy—Where We Have Been and Where We Should Be Going*, 4 SAN DIEGO L. REV. 255, 257-58 (1967). *See generally* AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, FREE PRESS AND FAIR TRIAL (1967); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF SPECIAL COMMITTEE ON RADIO, T.V., FREE PRESS & FAIR TRIAL (1967); *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391 (1968).

21. *See* REARDON REPORT, *supra* note 19, at 1.

22. *See id.* at 76-97.

23. *See* Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1157 (E.D. Va. 1976) (DR 7-107 is constitutional even though it is "far from perfect"); People v. Dupree, 88 Misc. 2d 780, 787-91, 388 N.Y.S.2d 203, 207 (Sup. Ct. 1976).

24. *See* Cole & Spak, *Defense Counsel and the First Amendment: "A Time to Keep Silence, and a Time to Speak,"* 6 ST. MARY'S L.J. 347, 371-72 (1974); Note, *Chicago Council of Lawyers v. Bauer: Gag Rules—The First Amendment vs. the Sixth*, 30 SW. L.J. 507, 513 (1976).

25. *See* Cole & Spak, *supra* note 24, at 348.

26. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

27. *See* AMERICAN BAR ASSOCIATION, ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 2-3 (2d ed. tent. draft 1978) [hereinafter cited as the GOODWIN REPORT].

28. *See id.* For the text of the proposed standard, see Appendix, pp. 83-84 *infra*.

The Clear and Present Danger Standard

The Supreme Court has consistently employed the clear and present danger standard in the context of contempt citations for extra-judicial comment criticizing the administration of justice.[29] The leading decision in this area is *Bridges v. California*.[30] The *Bridges* court invalidated the contempt conviction of a union leader, Harry Bridges, who criticized a California state court ruling and threatened a massive strike if the court sought to enforce it.[31] The Supreme Court pointed out that the clear and present danger standard had developed into the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[32] Although the Court assumed that the unfair administration of justice was "a substantive evil" worthy of protection,[33] it concluded that mere expression of disrespect for the judiciary was not so serious an evil that restriction of speech was justified.[34] The Court then scrutinized Bridge's comments and concluded that the likelihood that they would result in the unfair administration of justice was not so extreme as to justify the contempt conviction.[35]

Bridges and the later decisions invalidating contempt convictions[36] indicate that general criticism of the administration of justice or the integrity of a particular judge does not pose a clear and present danger to the fair administration of justice and is thus not subject to sanction.[37]

29. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-11, at 623 (1978). The Court's adherence to this standard is evidenced by its decisions in the so-called "contempt cases." *See* Wood v. Georgia, 370 U.S. 375, 384 (1962); Craig v. Harney, 331 U.S. 367, 373 (1947); Pennekamp v. Florida, 328 U.S. 331, 334 (1946); Bridges v. California, 314 U.S. 252, 263 (1941). In the recent decision of Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844-45 (1978), the Supreme Court reaffirmed its adherence to the rationale of these cases.

30. 314 U.S. 252 (1941). *See* L. TRIBE, *supra* note 29, § 12-11, at 624.

31. *See* 314 U.S. at 275-78.

32. *Id.* at 263.

33. *Id.* at 271. *See also* L. TRIBE, *supra* note 29, § 12-11, at 623.

34. *See* 314 U.S. at 270-71.

35. *Id.* at 275-78.

36. In Wood v. Georgia, 370 U.S. 375, 380-81 (1962), a sheriff was convicted of contempt for criticizing a grand jury's investigation of electoral corruption. In Pennekamp v. Florida, 328 U.S. 331, 333-34 (1946), a newspaper editor was held in contempt for criticizing the decisions of a local judge. Craig v. Harney, 311 U.S. 367, 369-70 (1947), examined newspaper articles generally critical of a local judge up for reelection.

37. L. TRIBE, *supra* note 29, § 12-11, at 623-24. Judicial officials are spared the rough and tumble world of politics and are generally reluctant to become part of public controversy. T. EMERSON, THE FREEDOM OF EXPRESSION 458-59 (1970). Questions of judicial administration, however, are not unlike other public issues subject to public debate, and there is certainly no dearth of outspoken supporters who will take the judiciary's side. *Id.* at 458. If freedom of expression is not restricted in other areas of public controversy, it should not be restricted here. *Id.* Judges have well-defined and extensive powers to control their proceedings, but these powers cannot extend to control abstract criticism of the judiciary. *Id.*

The present ABA no-comment rules apparently were not intended to apply to extra-judicial attorney comment made during bench trials. *See* Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1142 n.5 (E.D. Va. 1976); Cole & Spak, *supra* note 24, at 375. Neither the language of DR 7-107 nor the committee report that recommended its adoption comprehends the bench trial context.

The recent decision of *Landmark Communications, Inc. v. Virginia*[38] indicates the Supreme Court's willingness to adhere to the clear and present danger standard when testing restrictions of expression based on the state's interest in the fair administration of justice. In *Landmark*, a newspaper publisher was convicted under a statute forbidding publication of information regarding confidential proceedings of a judicial investigation commission.[39] The Court held that such a provision could not exist alongside the first amendment.[40] Justice Burger, writing for the Court, found that the matters sought to be proscribed lay "near the core of the First Amendment": "The operations of the courts and the judicial conduct of judges are matters of utmost pub-

Cole & Spak, *supra* note 24, at 375. To that extent, the *Reardon Report* speaks of waiver of jury trial as a remedy for prejudice. REARDON REPORT, *supra* note 19, at 73-76. Furthermore, the restriction on attorney comment is limited to the pre-trial and trial stages. Moreover, if the ABA had truly been concerned with the danger of prejudice stemming from criticism of the court, it would have extended the rules' proscriptions to the appellate stage. However, the terms "tribunal," EC 7-33, "fair trial," DR 7-107(D), (E), and (G), "imposition of sentence," DR 7-107(E), and "litigation," DR 7-107(G), could be construed to require the attorney to act in accordance with DR 7-107 throughout all phases of the judicial or administrative process, including appeals. *See* Bauer v. Chicago Council of Lawyers, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

The Seventh Circuit has questioned the propriety of not applying the rule to bench trials. *See id.* at 256-57. The court resolved the question in favor of the accused's fair trial interests and held that no distinction should be made between bench and jury trials. *Id.* at 257. The court stated that "judges are human" and that "[i]f prejudicial material can be kept from ever coming to the attention of a judge a potential benefit is derived." *Id.* Although a judge must be "able to thrive in a hardy climate," Craig v. Harney, 331 U.S. 367, 376 (1947), some comment can be so inflammatory that it must be admitted that certain judges will be swayed. Nevertheless, a judge's susceptibility to prejudice from extrajudicial public statements is measured by a different standard than the susceptibility of others. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 925-26 (1963). In comparison to a juror, a witness, or one of the parties, "the judge must be presumed to possess a higher degree of fortitude in the face of public pressure . . . ." *Id.* at 926. For example, in Craig v. Harney, 331 U.S. 367 (1947), three newspapermen were held in contempt for reports and editorials that the trial court found to be designed to misrepresent the nature of a pending case and to prejudice and influence the court. Justice Douglas, writing for the court, observed that judges "are supposed to be men of fortitude." *Id.* at 376. Questions of judicial administration, especially if the judicial office is elective, were held to be properly the subject of public debate. *See id.* at 377; T. EMERSON, *supra* note 37, at 457-58. The Court reversed, finding that the comments did not pose a clear and present danger to the administration of justice. 331 U.S. at 377. Although there may be situations where a person's speech will be worthy of punishment, the Court pointed out that "[t]he fires which . . . [the speech] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Id.* at 376. Since the possibility of prejudice remains, the better approach would be that adopted in *Chicago Council of Lawyers*, recognition of the potential for prejudice in the bench trial and appellate context and application of the no-comment rules accordingly. 522 F.2d at 256-57.

DR 7-107 also restricts attorney comment during the sentencing stage. DR 7-107(E). The court in *Chicago Council of Lawyers* stated that restriction of attorney comment at this stage would not be constitutionally permissible even if the more speech protective "serious and imminent threat" standard were employed. 522 F.2d at 257. Since the trial court can consider almost any factor in its sentencing decision perhaps including otherwise prejudical material, United States v. Tucker, 404 U.S. 443, 446 (1972), no restriction is justified. 522 F.2d at 257.

The new version of the no-comment rules proposed by the ABA applies to both jury and bench trials and from the beginning of the criminal investigation until the trial's conclusion, which includes sentencing. GOODWIN REPORT, *supra* note 27, at 2.

38. 435 U.S. 829 (1978).

39. *Id.* at 832.

40. *Id.* at 842.

lic concern."[41] The state's asserted interests in the good repute of its judges, its courts, and the commission were insufficient to justify abridgement of the freedoms of speech and the press.[42]

The Court also examined, perhaps unnecessarily,[43] the publisher's conviction in light of the clear and present danger standard. Justice Burger analyzed the contempt decisions, beginning with *Bridges*, and concluded that "comments concerning pending cases or grand jury investigations"[44] do not constitute a clear and present danger to the administration of justice.[45] The Chief Justice observed that if the comment involved in these cases was not punishable, comment that posed, if anything, a greater danger to fair judicial administration, then Landmark's publication was not punishable.[46] It was concluded that the mere risk of injury to the judge's, the court's, and the commission's reputations did not meet the clear and present danger requirement.[47]

The Court has determined the unfair administration of justice to be a substantive evil a state might take legitimate steps to avoid.[48] Such steps may include punishment of expression if the utterance or publication "immediately imperils" the fairness of the judicial machinery.[49] What follows is an examination of how this substantive evil is implicated in the context of extrajudicial comment by attorneys.

The Interests in the Administration of Justice

Basically our society holds an interest in seeing that justice is administered with equality, fairness and swiftness.[50] Restriction of attorney speech is meant to facilitate this interest[51] by curbing prejudicial publicity.[52] A trial's purpose is to examine the facts[53] and apply the appropriate rule of law to those facts.[54] Basic to such a system is the

41. *Id.* at 838, 839.
42. *Id.* at 841-42.
43. The opinion questions the relevance of the clear and present danger standard apparently because the standard is of little use when testing the facial validity of a statute, as distinguished from the constitutionality of its application to an isolated act. *See id.* at 842-43. The Court's use of the clear and present danger approach, *id.* at 842-46, implies that there may be situations where restriction of publication would be justified. That is, publication posing a high likelihood of causing some substantive evil. It would seem, however, that this conclusion is precluded by the Court's unqualified holding that the asserted state interests were insufficient to permit punishment for publication. *See id.* at 841-42.
44. *Id.* at 844-45.
45. *Id.*
46. *Id.* at 845.
47. *Id.*
48. See text & notes 33-34 *supra.*
49. See text & note 32 *supra.*
50. *See* Whitney v. California, 273 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).
51. *See* Note, *Gagging the Press in Criminal Trials*, 10 HARV. C. R.-C. L. L. REV. 608, 610-11 (1975).
52. *See id.* at 611.
53. People v. Vitale, 364 Ill. 589, 592, 5 N.E.2d 474, 475 (1936).
54. Bridges v. California, 314 U.S. 252, 271 (1941).

principle that the conclusions reached in a trial stem from evidence and argument presented in court, under the court's guidance, and not from extrajudicial influences.[55]

The defendant in a criminal matter has an immediate and serious interest in avoiding an unfair conviction.[56] The fair trial guarantees of the sixth amendment assure protection of this interest, and if the state wishes to preserve a conviction, the amendment cannot be ignored.[57] Although the government, in its prosecutorial capacity, and the defense counsel are charged with the duty of preserving a fair trial,[58] it is the court's responsibility to avoid prejudice.[59]

The sixth amendment places a duty on the trial judge to prevent publicity from prejudicing the trial.[60] The Court in *Nebraska Press Association v. Stuart*[61] pointed to the high costs of a failure to meet this duty[62] and referred to measures that could be taken to assure a fair trial.[63] Principal among these measures are voir dire of the jury,[64] continuation of the trial until prejudicial influences subside, change of

55. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

56. *See* Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922, 935 (1974).

57. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976).

58. Carsey v. United States, 392 F.2d 801, 812 (D.C. Cir. 1967).

59. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976).

60. *See id.* The trial will be corrupted if a juror receives prejudicial material through the media that is not included in the evidence. This information will be preserved and considered in deliberation if the juror remembers it, develops a preconceived idea from it, and such bias is concealed in voir dire. *See* Warren & Abell, *Free Press—Fair Trial: The "Gag Order," A California Aberration*, 45 S. CAL. L. REV. 51, 89 (1972).

61. 427 U.S. 539 (1976).

62. *See id.* at 555.

> In the most extreme cases, like *Sheppard* and *Estes*, the risk of injustice was avoided when the convictions were reversed. But a reversal means that justice has been delayed for both the defendant and the State; in some cases, because of lapse of time retrial is impossible or further prosecution is gravely handicapped. Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed.

Id.

63. *Id.* at 553 (quoting Sheppard v. Maxwell, 384 U.S. 333 (1966)):

> 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*. . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. 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.

Id. (emphasis in original).

64. The effectiveness of voir dire in disclosing juror prejudice is open to question. The juror may be unaware of subliminal prejudices induced by publicity and voir dire is probably incapable of bringing them to the surface. *See* Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 WM. & MARY L. REV. 1-11 (1971); Note, *supra* note 55, at 617.

venue, and sequestration of the jury.[65] Although these devices are somewhat effective, they have been criticized as insufficient.[66] Methods beyond these traditional protections include the attorney no-comment rules.[67]

The restriction of expression by participating attorneys can be an effective weapon in the court's arsenal for combating prejudicial trial publicity.[68] But the legitimacy of a state's goal and its power and duty to achieve that goal does not confer broad authority to inhibit the exercise of a fundamental right such as freedom of speech.

Restrictive regulation is justified only when attorney comment will clearly produce the unfair administration of justice.[69] At this point, society's needs require flexibility in the otherwise strict prohibition against restriction of the freedom of expression. Regardless of the evil sought to be avoided, however, society should not be ready to abridge the freedom of speech without examination of its beneficial functions.

In the context of attorney comment, there is a tension between the attorney's freedom of expression and the state's interest in the fair administration of justice. But it is not simply the particular attorney's interest set against that of the state. Rather, the individual's freedom of expression is but a fragment of society's general interest in free speech.[70] Attention must, therefore, be turned to the interests protected by freedom of expression.

Justice Brandeis, concurring in *Whitney v. California*,[71] suggested three basic functions of the freedom of expression.[72] First, this freedom is indispensible to informed decision-making in a democratic government, thus serving an informational function.[73] Second, it furthers in-

65. *See* Note, *supra* note 51, at 617. *See also* REARDON REPORT, *supra* note 19, at 73-74, discussing other techniques for securing a fair trial available to the defendant.

66. *See* REARDON REPORT, *supra* note 19, at 75; Reardon, *The Fair Trial-Free Press Controversy—Where We Have Been and Where We Should be Going*, 4 SAN DIEGO L. REV. 255, 264 (1967); *cf.* People v. Dupree, 88 Misc. 2d 780, 782, 388 N.Y.S.2d 203, 205 (Sup. Ct. 1976) (sequestration, as an alternative to restricting attorney speech, may create sufficient pressures on a juror so that an unfair trial will result).

67. Another alternative is direct restraint upon the media. When in the form of a prior restraint, however, the Supreme Court views such regulation as particularly unpalatable. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-62 (1976).

68. *See* REARDON REPORT, *supra* note 19, at 80-82. Stopping the flow of prejudicial information at its source—attorneys and other trial participants—would seem a more effective method of preserving a fair trial then would the traditional remedies at the court's disposal. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); text &.notes 63-67 *supra*.

69. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

70. *See* text & notes 71-76 *infra*.

71. 274 U.S. 357, 372 (1927), *overruled on other grounds*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (*per curiam*).

72. *See id.* at 375; Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 949 (1968).

73. 274 U.S. at 375; *see also* L. TRIBE, *supra* note 29, § 12-1, at 577; Nimmer, *supra* note 72, at 949.

dividual self-fulfillment through the development and expression of ideas.[74] Finally, the freedom functions as a safety valve to relieve public pressures.[75]

The informational function is of particular relevance to the trial publicity controversy. Justice Brandeis aptly described this function:

> The framers of the Constitution believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and this should be a fundamental principle of the American government.[76]

Attorney comment made during pending litigation is particularly well-suited to the informational function of free expression.[77] The attorney's unique position as a participant in the proceeding enables him to alert the public to activity constituting a perversion of justice.[78] Beyond his role as a trial advocate, the attorney can assume a role as an effective critic of legal institutions[79] because of his familiarity with both the judges and the processes of the judicial system.[80] The attorney might call public attention to defects in a statute, the abuse of discretion exercised by the prosecutor's office during pre-trial proceedings,[81] or corruption of public officials.[82] A ban on such a source of information could create "a vacuum" of information "to be filled by irresponsible sources."[83] The ABA no-comment rules themselves specifically permit disclosure of certain categories of information. Dissemination of material about an ongoing investigation, requests for assistance in the investigation, and warnings of danger are permissible.[84] Further-

74. 274 U.S. at 375 (liberty is "the secret of happiness"); Nimmer, *supra* note 72, at 949.
75. 274 U.S. at 375; Nimmer, *supra* note 72, at 949.
76. Whitney v. California, 274 U.S. 357, 375 (1927) (footnote omitted).
77. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).
78. T. EMERSON, *supra* note 37, at 463-64.
79. *See In re* Sawyer, 360 U.S. 622, 631-33 (1959).
80. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922, 923 (1974).
81. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 253 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *But see id.* at 253-54.
82. *See* Warren & Abell, *supra* note 60, at 82.
83. Younger, *Fair Trial, Free Press and the Man in the Middle*, 56 A.B.A.J. 127, 128 (1970). The conduct of the news media in the *Sheppard* case is a dramatic example of irresponsible use of information. *See* 384 U.S. at 338-49, 352-57. " 'Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre.' " *Id.* at 356. Rumors, inaccuracies, and accusations were manipulated to present to the public highly inflammatory and prejudicial news stories. *See id.*
84. DR 7-107(A)(3)-(5).

more, a lawyer may announce limited facts about the victim, the accused, the charges, the physical evidence, and the proceedings.[85]

Despite the advantages of free attorney comment, the dissemination of certain information may impose a high cost upon the state interest in the administration of justice.[86] The question is to what extent the state can compromise the freedom of speech in an effort to protect its interests.

The Reasonable Likelihood Standard

The no-comment rules aid the state in its attempt to preserve the integrity of the trial process by prohibiting extrajudicial attorney expression whenever it appears to pose a reasonable likelihood of interference with a fair trial.[87] The Court in *Sheppard* condemned all prosecutors and defense counsel who become sources of prejudicial material.[88] The no-comment rules are meant to restrain such sources before prejudice can attach in criminal, civil, or administrative proceedings.[89]

The reasonable likelihood standard has been justified on the basis that the rules are limited to restricting the timing of attorney comment only,[90] and that the attorney's status as an officer of the court permits such restriction.[91] Such justifications, however, are without merit.

It is argued that since the no-comment rules are limited to the pendency of the specific legal proceedings there is little harm done to the freedom of expression.[92] The brief duration of such restrictions upon

85. DR 7-107(C) permits disclosure of the following:
(1) The name, age, residence, occupation, and family status of the accused.
(2) If the accused has not been apprehended, any information necessary 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.

86. See discussion at text & notes 50-55 *supra.*

87. *See* DR 7-107(D).

88. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

89. *See* REARDON REPORT, *supra* note 19, at 76.

90. Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1147 (E.D. Va. 1976); *see* REARDON REPORT, *supra* note 19, at 78, 82; Cole & Spak, *supra* note 24, at 377-78.

91. *See* Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1151 (E.D. Va. 1976); REARDON REPORT, *supra* note 19, at 77-78; Cole & Spak, *supra* note 24, at 380-83; Note, *Attorney "Gag" Rules: Reconciling the First Amendment and the Right to a Fair Trial*, 1976 U. ILL. L. FORUM 763, 770; 10 SUFFOLK U.L. REV. 654, 672-74 (1976).

92. *See* authorities cited in note 90 *supra.* A helpful analogy would be time, place, and man-

attorney comment does not substantially impair the flow of information since after the conclusion of a proceeding information can be dispensed freely.[93] The brief impairment of the attorney's liberties is outweighed by the possible danger to a fair trial created by the comment.[94] The *Reardon Report*[95] argued that the reasonable likelihood standard is justified because it delineates "not whether certain disclosures may be made, but when."[96]

Restrictions as to when a comment is permissible, however, may effectively predetermine whether the comment can or will be made at all. The types of "sensational" proceedings to which the no-comment rules are a response are often lengthy.[97] Commentary delayed until after the conclusion of such an extended proceeding may be worthless.[98] In some cases, immediate action is required since "it is only when the litigation is pending and current news that the public's attention can be commanded."[99] The public's interest in a notorious case wanes quickly after it is closed; it is no longer newsworthy.[100] To delay speech that might clearly serve the informational function of the first amendment until a time where it will most likely fall upon deaf ears is more than a mere delay. This type of restriction actually forecloses the contextual effect of such speech, thus extending restriction to its content, not just its timing.[101]

The second general argument asserted in support of the reasonable likelihood standard is based upon the characterization of attorneys as officers of the court. This status confers upon an attorney the fiduciary duty of protecting the integrity of the trial process, including a duty to protect the accused's right to a fair trial.[102] The ethical demands of the profession "may require abstention from what in other circumstances might be constitutionally protected speech."[103] Such status and de-

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ner restrictions. When such restrictions serve significant governmental interests and are not based upon the content of the expression, they have been accepted as permissible limitations upon free speech. *See* Southeastern Promotions, Ltd. v. Conrad, 403 U.S. 546, 555 (1975); Police Department of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972); L. TRIBE, *supra* note 29, § 12-21, at 689.

93. Cole & Spak, *supra* note 24, at 377-78. See note 37 *supra* discussing the application of the no-comment rules to comment made during appellate proceedings.

94. Cole & Spak, *supra* note 24, at 377-78.

95. See note 19 *supra*.

96. REARDON REPORT, *supra* note 19, at 78.

97. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). Civil litigation may be prolonged for many years because of lengthy statutes of limitation and extended discovery. *Id.* The phrasing of DR 7-107(G), covering civil litigation, would permit restrictions upon attorney comment during the entire length of such proceedings. *Id.*

98. *See* Note, *supra* note 91, at 777.

99. Chicago Council of Lawyers v. Bauer, 522 F.2d at 250. *See* text & notes 77-86 *supra*.

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

101. *See* Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972); 6 HARV. C.R.-C.L. L. REV. 595, 601-02 (1971).

102. See authorities cited in note 91 *supra*.

103. *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring). "For example, I

mands collectively create a duty to the public and to the system of justice in addition to the duty a lawyer owes his client.[104]

The attorney's duty to the judicial system does not transform him into an agent of government, thus subjecting him to discipline if questionable expression interferes with the performance of his official duties.[105] In *Cammer v. United States*,[106] the petitioner, a lawyer, had been cited for contempt under a federal statute[107] empowering federal courts to punish "misbehavior of any of its officers in their official transactions."[108] The trial court saw Cammer's polling of the members of a District of Columbia grand jury as to matters not connected with the proceedings or deliberations of the grand jury as contemptuous.[109] The Supreme Court reversed the conviction, holding that an attorney is not an "officer" punishable for contempt under the federal statute.[110] The Court observed, "that an attorney was not an 'officer' within the ordinary meaning of that term."[111] Attorneys cannot be equated with marshals, bailiffs, court clerks, or judges.[112] Unlike those officials, the lawyer engaged in private practice conducts his affairs as an independent decision-maker.[113] The Court concluded: "The word 'officer' as it has always been applied to lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term."[114]

The Court has also rejected the argument that an attorney should be considered a government office-holder.[115] It was observed, "[lawyers] are not officials of the government, by virtue of being lawyers.

doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline." *Id.* at 647.

104. Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1151 (E.D. Va. 1976); *see In re* Griffiths, 413 U.S. 717, 732 (1973) (Burger, C.J., dissenting); ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7; Note, *supra* note 91, at 672.

105. *See* Wood v. Georgia, 370 U.S. 375, 394 (1962); *accord*, T. EMERSON, *supra* note 37, at 464.

106. 350 U.S. 399 (1956).

107. 18 U.S.C. § 401(2) (1976).

108. *Id.*; *see* 350 U.S. at 399-400.

109. 350 U.S. at 400-01, 403.

110. *See id.* at 407-08.

111. *Id.* at 405.

112. *Id.*

113. *Id.*

114. *Id.*

115. In *In re Griffiths*, 413 U.S. 717 (1973), the Supreme Court invalidated Connecticut's requirement of United States citizenship for admission to the bar as an unconstitutional discrimination against resident aliens. *See id.* at 718. One argument presented by the state bar analogized the attorney to an office-holder, empowered to hold governmental authority and thus required to be a citizen. *See id.* at 728. Although it rejected the analogy, the Court did note that attorneys hold "positions of responsibility and influence" which impose upon them commensurate duties. *Id.* at 729. Not included in such duties is the entire responsibility for assuring the fair administration of justice, a responsibility properly imposed on true government officials such as judges. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Bradshaw, *Attorneys as Officers of the Court*, 46 N.Y.ST. B.J. 351, 352 (1974). The lawyer's duty is imposed by his status as an independent professional. *See* Cammer v. United States, 350 U.S. 399, 405 (1956).

Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy."[116]

If attorneys are not agents of the government, restrictions intended to be directed at the government can no more be imposed upon them than upon any private citizen. "It cannot be seriously asserted that a private citizen surrenders his right to freedom of expression when he becomes a licensed attorney in his state."[117] Therefore, the reasonable likelihood standard, which is a less stringent standard for gauging infringement of free speech than the traditional tests,[118] cannot be supported on the basis of the attorney's duty as an officer of the court.[119]

In sum, the arguments made on behalf of the reasonable likelihood standard are theoretically unsound. They are premised upon suspect assumptions regarding the length of proceedings and the status of attorneys. Built upon such defects, the timing and special status justifications do not support the reasonable likelihood standard. Beyond this, it will be seen that the standard itself suffers from the serious constitutional infirmity of overbreadth.[120]

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116. *In re* Griffiths, 413 U.S. 717, 729 (1973).

117. Polk v. State Bar of Texas, 374 F. Supp. 784, 787 (N.D. Tex. 1974).

118. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

119. A distinction should be made between the opposing counsel in criminal proceedings. *See id.* at 253. The prosecutor, as representative of the executive branch of government, is subject to the strictures imposed generally upon the government by the accused's right to a fair trial. *See* Warren & Abell, *supra* note 60, at 72-73. The prosecutor holds a public trust in ensuring that the accused's fair trial interest is protected. *Cf.* United States v. Coast of Maine Lobster, Inc., 538 F.2d 899, 902 (1st Cir. 1976) (prosecutor's public statements must be carefully examined as to their potential prejudicial impact "[b]ecause of the prosecutor's sensitive position and his duty to ensure a fair trial"). It is thus reasonable to impose the standard contained in the no-comment rules upon the prosecution even though it is argued that private attorneys should not be subjected to this subjective standard. Note also that the Code of Professional Responsibility provides special ethical considerations for the government lawyer. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13, 7-14.

120. Apart from the overbreadth question, the no-comment rules might be considered to be impermissable prior restraints of expression. In two cases in which courts reviewed the constitutionality of the attorney no-comment rules, however, arguments that the rules placed a prior restraint upon attorney speech were rejected. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1152 (E.D. Va. 1976). In general, the doctrine of prior restraint forbids governmental restrictions upon expression in advance of publication. T. EMERSON, *supra* note 37, at 503-04; L. TRIBE, *supra* note 29, § 12-31, at 725-26. The question whether punishment subsequent to the utterance can be imposed by the government for engaging in expression is not considered. T. EMERSON, *supra* note 37, at 505. Accordingly, the Supreme Court distinguishes between laws that place a prior restraint on the right of free speech (censorship) and penal statutes that mete out subsequent punishment for expression not protected by the first amendment. *See* Southeast Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), where the court stated:

> [A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others before-hand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.

Id. at 559. "A prior restraint . . . has an immediate and irreversible sanction." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). That is, the target speech may never be uttered. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior re-

First Amendment Overbreadth and the Reasonable Likelihood Standard

Overbreadth analysis is a manifestation of the favored status of the first amendment.[121] It facilitates litigation by relaxing the usual requirements for standing.[122] The doctrine allows the court to invalidate a law if its mere existence has a chilling effect upon expression by unnecessarily restricting constitutionally protected as well as unprotected speech.[123] Such overbreadth review proceeds regardless of whether the

straint 'freezes' it at least for the time." *Id.* (footnote omitted). In Near v. Minnesota, 283 U.S. 697 (1931), the Court indicated that protection from prior restraint was not unlimited, but such limitation should only be allowed in "exceptional cases," such as matters of national security or public safety. *Id.* at 716.

The Court's use of the doctrine of prior restraint over the years has been sketchy. The doctrine, however, does signify that the courts will scrutinize with special care laws that appear to be prior restraints. T. EMERSON, *supra* note 37, at 511. Such restraints are considered presumptively unconstitutional, and the government must meet a heavy burden to demonstrate their justification. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

Ordinarily, a person affected by a prior restraint can only challenge its constitutionality judicially while obeying the restriction. *See* Poulos v. New Hampshire, 345 U.S. 395, 408-09 (1958); L. TRIBE, *supra* note 29, § 12-32, at 726. If the restraint is facially void for overbreadth, however, an individual may willfully violate it and be permitted to raise the issue of its unconstitutionality in a later prosecution. *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969). This rule may be inapplicable when an injunction working a prior restraint is violated. *See* Walker v. Birmingham, 388 U.S. 307, 321 (1967).

The Seventh Circuit in *Chicago Council of Lawyers* characterized a prior restraint as constituting "a predetermined judicial prohibition restraining specified expression [which] . . . cannot be violated even though the judicial action is unconstitutional if opportunities for appeal existed and were ignored." Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The court concluded that since the rules were promulgated by a court acting in a legislative role rather than an adjudicative role, *see In re* Oliver, 452 F.2d 111, 113-14 (7th Cir. 1971), the rules could not be considered prior restraints. This conclusion, however, relates only to the question of when and under what conditions a constitutional challenge to an order impinging free expression might be raised. See discussion of *Shuttlesworth* and *Walker supra*. It cannot be denied, however, that the no-comment rules censor certain matters thus working as prior restraints.

121. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970) [hereinafter cited as *Overbreadth Doctrine*]. "Overbreadth may be conceptualized as legislative failure to focus explicitly and narrowly on social harms which are the valid concern of government and are the justification for interfering with expressive activities." *Id.* at 859. *See* Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U.L. REV. 532, 532 (1974) [hereinafter cited as *Burger Court Overbreadth*].

122. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. . . .
>
> In the past, the Court has recognized some limited exceptions to these principles, but only because of the most "weighty countervailing policies." . . .
>
> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give away to other compelling needs of society . . . . As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

Id. at 610-12.

123. *See id.* at 612.

person challenging the statute is actually subject to its provisions.[124]

The Court has been reluctant to employ this doctrine because of the sometimes harsh result of a finding of facial overbreadth: enforcement of the statute is totally forbidden.[125] Thus, the Court is favorably disposed to placing a limiting construction or partial invalidation on the statute to limit its overreaching effect.[126] In light of this preference, overbreadth challenges, and their resulting invalidation of the entire statute in question, have been limited when brought against ordinary criminal laws that may be applied to protected conduct.[127] Likewise, overbreadth scrutiny has been relaxed when the statute regulates "conduct in the shadow of the First Amendment," but does so "in a netural, noncensorial manner."[128]

Justice White, in *Broadrick v. Oklahoma*,[129] concluded that the

124. *Id.*

125. *See* Broadrick v. Oklahoma, 413 U.S. 601, 614 (1973). "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Id.*

126. *See id.* at 613.

127. *See id.* The opinion illustrated this statement by reference to Cantwell v. Connecticut, 310 U.S. 296 (1940), where the Court did not totally invalidate a "breach of the peace" statute even though there were possibilities of its unconstitutional application. 310 U.S. at 308. Instead, the Court reversed Cantwell's conviction on the ground that his conduct, "considered in the light of the constitutional guarantees," could not be punished under the common law offense in question. 310 U.S. at 311.

128. 413 U.S. at 614. The Court referred to its decision in United States v. Harriss, 374 U.S. 612 (1954). *See id.* at 614-15. In *Harriss*, the Court rejected a facial overbreadth challenge of §§ 305, 307, and 308 of the Federal Regulation of Lobbying Act, 60 Stat. 839 (1946) (codified in 2 U.S.C. §§ 261-270 (1976)), which controlled financing of congressional lobbying activity. The Court, although doubting that the Act posed any possible chill on speech, observed, "[t]he hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." 374 U.S. at 326.

129. 413 U.S. 601 (1973). In *Broadrick* the Court rejected a vagueness and overbreadth challenge by three state employees to Oklahoma's merit system act. The statute restricted the political activities of civil servants in a manner similar to the Hatch Act's regulation of federal employees. *See id.* at 603-04 & n.1. *See also* United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), the companion case to *Broadrick*, where the Court upheld § 9(a) of the Hatch Act, 5 U.S.C. §§ 7321 to 7327 (1976) which prohibits federal employees from taking an active part in political managment or political campaigns. 413 U.S. at 551. Writing for the majority, Justice White stated that "weighty countervailing policies" have from time to time caused the Court to overcome its reluctance to adjudicate cases in which a statute is challenged on the basis of merely possible unconstitutional applications or when constitutional rights are asserted "vicariously." 413 U.S. at 611-12.

Facial overbreadth analysis should be distinguished from an "as applied" inquiry, in which the court asks whether the activities of the challenger regulated by the contested statute are protected by the first amendment. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1133 (9th ed. 1975). Overbreadth, in contrast, is not concerned with whether the challenger's speech is protected; rather, the statute is invalidated because it might be applied to protected speech. *Id.* Such claims of facial overbreadth have been entertained where the challenged statute purported to regulate "only spoken words," burdened innocent associations, regulated more than merely the time, place, and manner of expressive conduct, or granted unrestricted discretionary power to public officials to regulate such conduct. *See* 413 U.S. at 612-13.

The *Broadrick* court also rejected the employees' "vagueness" challenge. *Id.* at 608-09. A statute is void for vagueness if "men of common knowledge must necessarily guess at its meaning." Conally v. General Constr. Co., 269 U.S. 385, 391 (1926). If a statute "fails to give adequate warning of what activities it proscribes or fails to set 'explicit standards' for those who must apply it" it will be deemed invalid. Broadrick v. Oklahoma, 413 U.S. at 607. "Vagueness is a constitu-

Court's overbreadth decisions create a continuum that has at one end "pure speech" and at the other non-expressive conduct.[130] The function of facial overbreadth adjudication:

> attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.[131]

Justice White noted that a point is reached when the possibility of a statute's unconstitutional effect does not justify its invalidation provided that such proscription of conduct is otherwise valid.[132]

Justice White's solution to the problem of improper invalidation of minimally overbroad statutes was to enunciate a substantiality requirement.[133] A statute's overbreadth must be "real" and "substantial," "judged in relation to the statute's plainly legitimate sweep."[134] That is, if on the whole a statutory scheme will, with a reasonable degree of certainty, chill protected expression it will be invalidated.[135] Since in the facial overbreadth context the deterrent effect of a statute upon expression is, in the most favorable light, a prediction, the substantiality requirement lends accuracy to this prediction.[136]

If the statute is aimed at regulating conduct, even expressive conduct that might otherwise be validly proscribed,[137] it must be demon-

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tional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision, and a vague law need not reach activity protected by the first amendment." L. TRIBE, *supra* note 29, at 718.

In Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), the attorney no-comment rules were held impermissibly vague. *Id.* at 249. The court found that the "reasonable likelihood" standard did not further the constitutional objectives of "clearness, precision, and narrowness" in the framing of statutes. *Id.* Under this "amorphous" standard, the lawyer is unable to predict accurately the lawfulness of intended comments. *See id.* Such indefiniteness produces an unnecessary "chill" on the exercise of what might otherwise be protected expression. *See id.* Thus, a trivial or totally innocuous statement could conceivably be constrained as posing a likely threat to a fair trial. *But see* Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1157 (E.D. Va. 1976), which rejected attacks on the no-comment rules based on vagueness and overbreadth.

130. *Id.* at 616; *Burger Court Overbreadth, supra* note 121, at 542. *See also Overbreadth Doctrine, supra* note 121, at 918.

131. 413 U.S. at 615.

132. *See id.*

133. *See id.*

134. *Id.* It is claimed that the substantiality test for overbreadth introduces an interest-balancing approach into the analysis. *See* L. TRIBE, *supra* note 29, § 12-25, at 713; *Burger Court Overbreadth, supra* note 121, at 540. Thus, "[a] law is substantially overbroad if the harmfulness of the chilling effect it produces is greater than or at least substantial in relation to, the legitimate interest which the state is entitled to view as promoted by the law's central thrust." *Id.* at 540-41. Such balancing would seem inappropriate, however, in light of the Court's express rejection of balancing in finding a statute fatally overbroad in United States v. Robel, 389 U.S. 258, 268 n.20 (1967).

135. 413 U.S. at 616 n.14.

136. *See id.* at 615. *But see id.* at 630-31 (Brennan, J., dissenting) (majority failed to define what is meant by "substantial overbreadth").

137. *Id.* at 615. In light of *Broadrick's* requirement that the alleged overbreadth be real, as

strated that any impingement upon protected speech is genuine and meaningful in order to sustain a charge of overbreadth. Minimal intrusions upon the freedom of speech that occur in the pursuit of valid state objectives are constitutionally tolerable.[138] However, where the sole impact of a statute is to regulate pure speech, it is overbroad.

The present edition of the no-comment rules are at the "pure speech" end of the continuum referred to in *Broadrick*;[139] they are rules "directed at particular messages or their communicative effects."[140] The substantiality standard of *Broadrick* would thus appear inapplicable to the attorney comment issue. This view is supported by the most significant decision pertaining to the no-comment rules, *Chicago Council of Lawyers v. Bauer*,[141] which, in finding the rules overbroad, made no reference to *Broadrick* or its substantiality requirement.[142]

Chicago Council of Lawyers and the Serious and Imminent Threat Standard

In *Chicago Council of Lawyers*, the Seventh Circuit sustained an overbreadth challenge to the present edition of the ABA no-comment rules.[143] The court initially recognized the duty to keep its processes free of prejudicial influences,[144] a duty made clear by the Supreme Court in *Sheppard*.[145] If attorney comment seriously threatens the integrity of the judicial process, a court may take necessary steps to avoid such a threat.[146] This does not mean, however, that attorney speech is subject to a standard that does not provide the greatest protection to free speech feasible under the circumstances.[147] " '[T]he limitation of first amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.' "[148]

The court found the reasonable likelihood standard to be constitu-

well as substantial, it is arguable that the Court is improperly introducing an "as applied" approach into issues of facial overbreadth. Furthermore, the Court's formulation of this standard has been criticized for placing "a mounting burden on the individual to show that the apparent inhibition of protected expression is in fact highly probable and socially significant." L. TRIBE, *supra* note 29, § 12-25, at 714. *See* Broadrick v. Oklahoma, 413 U.S. at 630 (Brennan, J., dissenting).

138. *See* 413 U.S. at 615.
139. *See id.* at 612-13, 615-16.
140. *See* L. TRIBE, *supra* note 29, § 12-35, at 714.
141. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).
142. *See id.* at 249-52.
143. *Id.* at 249.
144. *See id.* at 248.
145. *See* Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966).
146. *See* 522 F.2d at 248.
147. *Id.* at 249.
148. *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

tionally impermissible and replaced it with "a narrower and more restrictive standard."[149] Relying on a standard it had formulated earlier in a case dealing with attorney gag orders,[150] the court stated that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."[151]

The plain meaning of the reasonable likelihood test gives an indication of the rules' overbreadth. The scope of this standard is so broad that an attorney's speech would be chilled even in the exercise of legitimate expression.[152] For example, an attorney may wish to make an extra-judicial comment concerning a proceeding that would probably not pose a serious threat of interfering with the administration of justice.[153] An attorney may be deterred from making such a comment under the reasonable likelihood test because it might reasonably interfere with a fair trial, and thereby subject the attorney to discipline.[154]

The damage inflicted by the no-comment rules is not limited to the attorney's freedom of speech. The court in *Chicago Council of Lawyers* emphasized the important public information function served by attorney comment,[155] a function hampered by the reasonable likelihood test.[156] The attorney involved in pending litigation can be "a crucial source of information and opinion"[157] regarding significant public issues.[158] In addition, the inarticulate or indigent defendant may have great need for a lawyer to speak in his stead.[159] The court succinctly described the problematical nature of the rules in this type of a situation:

> 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.[160]

Yet, an attorney can utter only bland statements to ensure avoidance of the rules' proscriptions,[161] thus sacrificing the public benefit provided

149. *Id.*
150. *See* Chase v. Robson, 435 F.2d 1059, 1061-62 (7th Cir. 1970), *reaffirmed in In re* Oliver, 452 F.2d 111, 114-15 (7th Cir. 1971).
151. 522 F.2d at 249.
152. *See id.* at 251.
153. *See* Conk, *'Dombrowski' Suit Filed: Black Lawyers Support Hinds* and Hickey, *Disbarment Trial Set for Jerry Paul*, in Guild Notes, Apr. 1978, at 11, col. 1.
154. *See* 522 F.2d at 249.
155. *See id.* at 250. See text & notes 77-86 *supra.*
156. *See* 522 F.2d at 250.
157. *Id.*
158. *Id.*
159. *See* authorities cited in note 153 *supra.*
160. 522 F.2d at 250.
161. *See id.*

by full-bodied comment.[162] The substantial impact that the reasonable likelihood standard imposes on these various individual and public interests led to the court's conclusion that the test was unconstitutionally overbroad.[163]

The court also found constitutionally infirm the absolute prohibitions on discussion of certain subjects contained in the no-comment rules.[164] The Seventh Circuit was concerned that under "such a blanket prohibition . . . even a trivial, totally innocuous statement could be a violation."[165] Thus, a defense lawyer's passing remark that he believed in his client's innocence or doubted the strength of the opposition's case would subject him to possible sanction.[166] Certainly this would be an unjust result if the circumstances of the particular trial in no way pointed to the possibility of prejudice resulting from these comments. Such unconstitutional "overkill" is underscored by the fact that only eight percent of criminal cases are tried by a jury and only a small number of these cases are of the type that would produce prejudicial public comment.[167]

The *Chicago Council of Lawyers* court did not condemn the use of presumptive rules entirely; rather, it found permissible "rules which would declare that comment concerning certain matters will presumptively be deemed a serious and imminent threat to the fair administration of justice so as to justify a prohibition against them."[168] Such a presumption could be rebutted by one charged with violation of the rule.[169]

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162. *See id.*

163. *See id.* at 249-50. The Supreme Court has repeatedly emphasized that a statute will not be totally invalidated if it can be restricively construed or partially invalidated. *See, e.g.*, Ward v. Illinois, 431 U.S. 767, 771-73 (1977); Erznoznik v. Jacksonville, 422 U.S. 205, 217 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 60-61 (1976).

DR 7-107 was intended as an accomodation of the conflicting interests of the freedom of expression and the fair administration of justice. If the rules do not properly reconcile these interests the attempt at accomodation has failed. Partial invalidation cannot salvage the rules because the reasonable likelihood standard, which is both the accomodating factor and the rule's flaw, forms the substance of the rule that would be the target of invalidation. Thus, "partial" invalidation would produce the same result as that necessitated by a finding of facial overbreadth—complete invalidation. Furthermore, to give this standard a more restrictive interpretation would be to substitute an entirely new meaning neither intended by its designers nor justified by the plain meaning of the rule's language. There is no alternative but to conclude that the attorney no-comment rules are facially overbroad and should be totally invalidated.

164. *See* 522 F.2d at 251. For a list of the subjects, see note 9 *supra.*

165. 522 F.2d at 251.

166. *See* DR 7-107(B)(6).

167. REARDON REPORT, *supra* note 19, at 22.

168. 522 F.2d at 251. In fact, the court suggested that use of properly drafted categorical restrictions of attorney comment were beneficial. *See id.* The court, however, found that "proscribed comment relating to civil litigation . . . would be constitutionally impermissible if deemed presumptively prohibited." *Id.* at 258. *See* DR 7-107(G).

169. 522 F.2d at 251.

The Proposed ABA No-Comment Rules

The ABA considered the arguments presented in *Chicago Council of Lawyers* persuasive. In August of 1978, the House of Delegates adopted by voice vote the final report of the Standing Committee on Association Standards for Criminal Justice.[170] The report substantially amends the present edition of the no-comment rules, the most notable change being the switch to a standard for measuring attorney comment similar to that espoused in *Chicago Council of Lawyers*: "A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication if such dissemination would pose a clear and present danger to the fairness of the trial."[171] The scope of this edition is the same as that of the present one with regard to stages of the criminal proceeding,[172] and the rule applies to both bench and jury trials.[173]

In the view of the report, use of the clear and present danger test better accomodates the attorney's freedom of speech and the accused's right to a fair trial.[174] The new standard eliminates many of the vagueness problems associated with the reasonable likelihood test.[175] The lawyer can predict with greater accuracy what comment might be deemed impermissible. Furthermore, the present edition's overbreadth is cured because the new standard excises a much narrower and better-defined area of speech from constitutional protection.[176] Although the scope of the rules' proscriptions are narrowed by the more restrictive standard, the goal of preventing interference with a fair trial remains intact.[177] Comment presenting such a danger could be prohibited and subjected to sanction. The new standard creates a closer connection between the state's goals and the means used to achieve them; the for-

170. Letter from Deborah van Peski, Staff Assistant, ABA Department of Public Relations and Information, to Michael Scheurich, September 1978 (copy on file at the Arizona Law Review).

171. GOODWIN REPORT, *supra* note 27, at 1, Standard 8-1.1. See Appendix pp. 83-84 *infra*. With regard to its use of the clear and present danger standard, as opposed to the *Chicago Council of Lawyers* standard, the report remarked:

> As a first amendment formulation, however, the serious and imminent threat standard is substantively indistinguishable from clear and present danger, [*sic*] Indeed, the serious and imminent threat language appears to have been used first in *Bridges v. California*. The Court's purpose there was to articulate the "working principle" on which the clear and present danger standard was based. Thus, the serious and imminent threat terminology was and is a part of the judicial gloss on the clear and present danger test and is not distinct from it. In view of the apparent choice between equivalents, the clear and present danger language has been retained in this standard.

Id. at 3-4 (footnote omitted).

172. See discussion at note 6 *supra*.

173. GOODWIN REPORT, *supra* note 27, at 2. See discussion at note 37 *supra*.

174. GOODWIN REPORT, *supra* note 27, at 4.

175. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

176. *See id.*

177. *See* GOODWIN REPORT, *supra* note 27, at 2-3.

mer would be effectively served without unduly burdening the freedom of expression.[178]

The revised rules do not follow the teaching of *Chicago Council of Lawyers* with regard to the use of presumptive restrictions of certain categories of speech.[179] The present edition of the no-comment rules allows blanket prohibitions and *Chicago Council of Lawyers* validated this approach contingent upon inclusion of the stricter constitutional standard.[180] The revised rules, on the other hand, advocate evaluation of the specific utterance and its surrounding circumstances.[181] "The underlying assumption is that case-by-case adjudication under the clear and present danger test will lead to a sounder balance of first and sixth amendment values than the categorical approach taken in the first edition."[182] Although the suggested revisions contain categories of questionable attorney speech,[183] they are meant to "define the boundaries within which the clear and present danger test applies."[184] This approach serves to forewarn the attorney of the types of comment that might be improper. The report also rejects the *Chicago Council of Lawyers* allocation to the attorney of the burden of proof on this question.[185] "Consistency with the presumption of first amendment protection for extrajudicial statements by trial attorneys mandates this [new] allocation. It would be anomalous to espouse this presumption and then require the attorney to prove an extremely difficult negative: the absence of a clear and present danger."[186]

The revised edition of the no-comment rules accords with the desires of the Supreme Court expressed in *Sheppard v. Maxwell*.[187] There the court asserted that one method of maintaining an orderly system of justice was regulation of collusion between participating counsel and the press.[188] Envisioned was a lawyer attempting to win cases by trial in the mass-media.[189] Considerations beyond those involving the freedom of speech must be taken into account where at-

178. *See* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 64 (clear and present danger standard requires a close link between goals permitted of the government and the challenged methods used in pursuit of these goals).

179. See text & notes 164-69 *supra*.

180. 522 F.2d at 251.

181. *See* GOODWIN REPORT, *supra* note 27, at 4.

182. *Id.* (footnote omitted).

183. *See id.* at Standard 8-1.1(b). See Appendix, pp. 83-84 *infra*.

184. GOODWIN REPORT, *supra* note 27, at 4.

185. *See id.* at 4 n.29. See discussion at note 169 *supra*.

186. GOODWIN REPORT, *supra* note 27, at 4 (footnotes omitted).

187. 384 U.S. 333 (1966). *But see* Warren & Abell, *supra* note 60, at 73, stating that there is no theoretical justification in the cases for restriction of the speech of attorneys and other persons during pending litigation.

188. 384 U.S. at 363.

189. *See id.*; REARDON REPORT, *supra* note 19, at 80.

torney expression is directed at influencing the trial's outcome.[190] The Court and the ABA are most concerned with conscious efforts on the part of attorneys to affect the outcome of a trial by the use of prejudicial publicity. It would seem that the serious and imminent threat standard more closely comprehends the existence of actual intent than the reasonable likelihood standard while granting broader scope to the freedom of expression.

The *Chicago Council of Lawyers* rule—the source of the proposed no-comment rule—has been demeaned as a simple-minded formula that does not account for all the factors involved in the attorney comment controversy.[191] This attack may be launched against the reasonable likelihood test as well. Both are attempts to erect guideposts to judicial decision-making. The stricter standard, however, is a "formula" more consonant with the strictures imposed by the first amendment, and is quite capable of accounting for factors unique to attorney comment.[192]

Although abandoment of the reasonable likelihood standard is advocated in an ABA report dealing with criminal justice standards there is no apparent reason for not extending the change to the non-criminal context. Considering the potential length of civil litigation, the impact the present rules can have on free speech is significant.[193] In addition, certain civil actions may be intended solely to fulfill the informational function of the first amendment.[194] As in criminal proceedings, the clear and present danger standard adequately protects the interest in the fair adjudication of civil lawsuits while extending a broad scope of

190. Wood v. Georgia, 370 U.S. 375, 390 (1962).

191. Cole & Spak, *supra* note 24, at 353.

192. One factor is the fear that because the public normally accepts the statements of an attorney as a source of reliable information, extrajudicial comment will have a particularly strong potential to prejudice a judicial proceeding. *See* Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1147 (E.D. Va. 1976); Cole & Spak, *supra* note 24, at 383. *Cf.* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (lawyers should be granted as much free speech as possible because a lawyer participating in pending litigation is considered a credible source of information). However, the prejudicial propensity of attorney comment has not been empirically substantiated by the authorities that use it as justification for the reasonable likelihood standard. Research has failed to clearly establish the prejudicial effect on jurors of extensive publicity. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact of Jurors of News Coverage?*, 28 STAN. L. REV. 515, 528 (1977); Warren & Abell, *supra* note 60, at 90. As the *Goodwin Report* observed, "in the vast majority of criminal cases, extrajudicial statements by trial attorneys have no impact at all." GOODWIN REPORT, *supra* note 27, at 4. This is because few cases go to a jury and most jury trials do not become news items. L. TRIBE, *supra* note 29, § 12-11, at 630. Moreover, it cannot be presumed that exposure to possibly prejudicial information will render a juror incapable of rendering an impartial verdict. *Id.* Failure to recognize these realities is "the central weakness" of the present edition of the no-comment rules. GOODWIN REPORT, *supra* note 27, at 4.

193. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

194. *See id.*

protection to an attorney's public comment.[195]

Conclusion

The present ABA no-comment rules are the product of an attempt to stem the tide of reversals created by undue trial publicity. In what appears to have been an overly vigorous effort to protect the right to a fair trial, the participating attorneys' freedom of expression has been unnecessarily impinged.

The constitutional infirmity inherent in the present edition of the rules necessitates abandonment of the reasonable likelihood standard in favor of one that is more speech protective. Failure to do so will result in a sacrifice of the public benefits that flow from attorney comment. Clearly, the government has a strong interest in preserving the integrity of its judicial process. But this interest is more than adquately served by the stricter "clear and present danger" or "serious and imminent threat" standard. This standard removes the unconstitutional "chill" inflicted by the reasonable likelihood standard and grants the attorney greater scope with regard to permissible utterances. A standard striking so just a balance should not be ignored.

APPENDIX

Standard 8-1.1 Extrajudicial statements by attorneys

(a) A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication if such dissemination would pose a clear and present danger to the fairness of the trial.

(b) Subject to paragraph (a), from the commencement of the investigation of a criminal matter until the completion of trial or disposition without trial, a lawyer may be subject to disciplinary action with respect to extrajudicial statements concerning the following matters:

(i) the prior criminal record (including arrests, indictments, or other charges of crime), the character or reputation of the accused, or any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case;

195. Notably, the court in *Chicago Council of Lawyers* recommended full first amendment protection for attorney comment made during ongoing civil litigation. The court observed,

> [t]his vague provision [the reasonable likelihood standard] could not stand even with the substitution of what we have declared to be the correct standard. Its chilling effect is obvious . . . . We do recognize the great benefits derived from allowing uninhibited comment by knowledgeable attorneys involved in civil litigation. This is the same type of recognition embodied in the First Amendment.

522 F.2d at 259.

(ii) the existence or contents of statement given by the accused, or the refusal or failure of the accused to make any statement;

(iii) the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test;

(iv) the identity, testimony, or credibility of prospective witnesses;

(v) the possibility of a plea of guilty to the offense charged, or other disposition; and

(vi) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(c) It shall be appropriate for the lawyer, in the discharge of official or professional obligations, to announce the accused's name, age, residence, occupation, family status, and, if the accused has not been apprehended, any further information necessary to aid in the accused's apprehension or to warn the public of any dangers that may exist; to announce the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; to announce the identity of the victim if the release of that information is not otherwise prohibited by law; to announce, at the time of seizure, a description of any physical evidence (other than a confession, admission, or statment); to announce the nature, substance, or text of the charge, including a brief description of the offense charged; to quote or refer without comment to public records of the court in the case; to announce the scheduling or result of any stage in the judicial process; to request assistance in obtaining evidence; and to announce without further comment that the accused denies the charges.

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