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Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation

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NOTES

A CONSTITUTIONAL ASSESSMENT OF COURT RULES RESTRICTING LAWYER COMMENT ON PENDING LITIGATION

In *Sheppard v. Maxwell,*[1] the Supreme Court reversed a murder conviction because the trial judge had failed to protect the defendant from massive prejudicial publicity.[2] Alarmed by the increase in prejudicial news comment, the Court sternly warned that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[3] This 1966 decision inspired Disciplinary Rule 7-107 (DR 7-107) of the American Bar Association's Code of Professional Responsibility.[4] The rule severely restricts a lawyer's right to comment when participating in a criminal investigation, a criminal action, a civil action, an administrative proceeding, a juvenile disciplinary proceeding, or a professional disciplinary proceeding.[5]

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[1] 384 U.S. 333 (1966).

[2] In *Sheppard,* the numerous prejudicial newspaper, radio, and television stories and editorials, some quoting police officers and prosecuting attorneys, and the reporters, photographers and cameramen swarming around the courtroom affected the trial atmosphere. *See also* Estes v. Texas, 381 U.S. 532 (1965) (presence of television cameras recording trial proceedings over defendant's objections found to violate due process).

[3] 384 U.S. at 363.

[4] *See* ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 96 (1968); ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT 44 n.85 (1978). The Warren Commission, commenting on the events surrounding the apprehension and death of Lee Harvey Oswald, stated, "The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial." REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 99 (Associated Press 1964). This statement also provided inspiration for DR 7-107. *See* ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 19, 19 n.1 (1968). *See also Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue,* 45 F.R.D. 391 (1969).

[5] DR 7-107 states:

DR 7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

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

DR 7-107 has been challenged on first amendment grounds in two declaratory judgment actions. The Court of Appeals for

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
  (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
  (2) The possibility of a plea of guilty to the offense charged or to 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 test or the refusal or failure of the accused to submit to examinations or tests.
  (5) The identity, testimony, or credibility of a prospective witness.
  (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:
  (1) The name, age, residence, occupation, and family status of the accused.
  (2) If the accused has not been apprehended, any information 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.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

the Seventh Circuit, in *Chicago Council of Lawyers v. Bauer,*[6] and the Court of Appeals for the Fourth Circuit, in *Hirschkop v. Snead,*[7] held that the rule did not constitute a prior restraint on speech and therefore was not presumptively invalid.[8] Neverthe-

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

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT 37-38 (1978). DR 7-107 replaced Canon 20, Newspaper Discussion of Pending Litigation, which stated:

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

ABA CANONS OF PROFESSIONAL ETHICS No. 20.

[6] 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

[7] 594 F.2d 356 (4th Cir. 1979).

[8] 594 F.2d at 368-69; 522 F.2d at 248-49.

less, the *Bauer* Court held that the rule was unconstitutional,[9] and the *Hirschkop* Court held that it was constitutional only as applied to criminal jury trials.[10]

DR 7-107 prohibits lawyer comment that is reasonably likely to prejudice the administration of justice.[11] The Rule rests on two assumptions. First, it assumes that prohibiting lawyer comment that is reasonably likely to prejudice the administration of justice is desirable. Second, it assumes that this prohibition does not deprive lawyers of their free speech rights under the first and fourteenth amendments. In short, it assumes that "reasonable likelihood of prejudice" is the standard that correctly defines the type of lawyer comment that the law may properly prohibit. This is the assumption that *Bauer* attacks[12] and *Hirschkop* defends.[13] The *Bauer* Court held that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed,"[14] and, therefore, that the scope of DR 7-107 is unconstitutionally broad.[15] The *Bauer* Court rejected the reasonable likelihood of prejudice standard in favor of the "serious and imminent threat to fairness" standard. The *Hirschkop* Court, on the other hand, found *Bauer's* serious and imminent threat to fairness standard inadequate to guarantee fairness. The *Hirschkop* Court held, therefore, that it is both constitutionally permissible and desirable to prohibit lawyer comment that is reasonably likely to prejudice the administration of justice.[16]

The courts in *Bauer* and *Hirschkop* attempt to make conclusive arguments supporting their own standards.[17] But both courts'

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[9] 522 F.2d at 251. In *Bauer* the court reviewed Local Rule 1.07 of the District Court for the Northern District of Illinois, which was "substantially the same [as DR 7-107] except that there is no counterpart to Rule 1.07(a) which is a general introductory section indicating that lawyers should make no public statements which would have a 'reasonable likelihood' of interference with a fair trial or prejudice." *Id.* at 252 n.9. For the text of Local Rule 1.07, see *id.* at 261-63.

[10] 594 F.2d at 374.

[11] DR 7-107 (D), (E), (G)(5), (H).

[12] *See* 522 F.2d at 248-50.

[13] *See* 594 F.2d at 362.

[14] 522 F.2d at 249.

[15] *Id.*

[16] 594 F.2d at 370.

[17] Both courts also criticized specific provisions of DR 7-107. First, the *Bauer* court argued that DR 7-107(A), which prohibits comment during a criminal investigation, is unconstitutional because the phrase "participating in or associated with the investigation" is ambiguous and overbroad as applied to nonprosecutors, and because the possibility of prejudice to the government's case is too remote at the investigative stage. 522 F.2d at 252-53. Second, the court ruled that the prohibition of comment relating to "matters that

arguments are unpersuasive because there is no constitutionally significant difference between the reasonable likelihood of prejudice standard and the serious and imminent threat standard.[18]

are reasonably likely to interfere with a fair trial" (DR 7-107(D), (G)(5)) is unconstitutionally vague. *Id.* at 255-56, 259. Third, the court noted that the prohibition relating to comments on the merits of a case (DR 7-107(B)(6), (G)(4)) must be qualified so that "merits" only includes factual and not legal or social issues. 522 F.2d at 255, 259. Fourth, the *Bauer* court argued that properly drawn restrictions should apply to criminal bench trials as well as criminal jury trials. This is necessary to insulate the judge from improper prejudicial material that would reach him only by way of extrajudicial comment and to prevent the appearance that the judge's decision is based upon improper evidence. *Id.* at 256-57. Fifth, the Bauer court argued that the restrictions imposed during a civil action by DR 7-107(G) are too onerous because of the length of civil trials, the important public issues often involved, and the lawyers' unique opportunity to be an informed, articulate, and accurate source of information and opinion. *Id.* at 257-58. Finally, the court argued that DR 7-107(E), which restricts comment during the sentencing stage, is unconstitutionally broad, reasoning that it is unlikely that any factual matter that could not be presented in court at the sentencing stage would be communicated to the judge by way of extrajudicial comment. *Id.* at 257.

The court in *Hirschkop* agreed that the prohibition against comment relating to matters that are reasonably likely to interfere with the fairness of a proceeding (DR 7-107(D), (H)(5)) is unconstitutionally vague when used as a specific rule (although not too vague when used as a broad constitutional standard). 594 F.2d at 371, 374. The *Hirschkop* court did not agree that the *Bauer* court's gloss on "merits" in DR 7-107(B)(6) and DR 7-107(G)(4) is necessary, since the qualification is implicit in the rule. 594 F.2d at 370. The *Hirschkop* court agreed that the restrictions on comment at the sentencing stage (DR 7-107(E)) are unconstitutionally broad. *Id.* at 372. The *Hirschkop* court also held that the restrictions imposed by DR 7-107(B), (D), and (F) are unconstitutionally broad as applied to bench proceedings because judges are not as vulnerable as jurors to prejudice by extrajudicial comment, and because a judge must be free to consider potentially prejudicial information as he separates the wheat from the chaff during the course of an ordinary bench trial. 594 F.2d at 371-72. The court in *Hirschkop* agreed with *Bauer* that the restrictions on comment during civil actions, as well as during administrative proceedings (DR 7-107(G), (H)), are unconstitutional because there is no evidence that lawyers' comments prejudice such proceedings and because less onerous alternatives are available to assure confidentiality in proper cases. *Id.* at 373-74.

The American Bar Association Commission on Evaluation of Professional Standards is rewriting the Code of Professional Responsibility. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY § 3.8 (Discussion Draft, Jan. 30, 1980) is a tentative response to the courts' critiques of DR 7-107. Adopting the *Bauer* standard, and rejecting *Hirschkop,* § 3.8(a)(2)(vi) incorporates the serious and imminent threat standard and does not distinguish between criminal jury trials and criminal bench trials. Contrary to both *Bauer* and *Hirschkop,* § 3.8 does not distinguish between criminal and civil trials as such. Rather, it distinguishes between criminal trials, civil jury trials and civil bench trials, and applies the restrictions to the former two only. *See id.* § 3.8(a)(2). Section 3.8 neither clarifies "involved in the investigation" nor limits restrictions on comments during the investigative stage to prosecutors. Similarly, it does not include a gloss on "merits" (*see id.* § 3.8(a)(2)(iv)). Contrary to both *Bauer* and *Hirschkop,* § 3.8(a) imposes restrictions during the sentencing stage. Also, § 3.8(a)(2)(vi) prohibits comments relating to "any other matter that similarly creates a serious and imminent risk of prejudicing an impartial trial." This prohibition is vulnerable to the courts' vagueness objection to DR 7-107(D),(E),(G)(5), and (H)(5).

[18] This Note attempts the difficult task of proving a negative proposition. One method of sustaining the thesis that there is no constitutionally significant difference between the two standards, is to show that *Bauer* and *Hirschkop* have failed to demonstrate that any such

To properly apply either standard, courts must exercise judgment by weighing numerous relevant factors. Courts, therefore, should candidly adopt a balancing approach.

I

THE COMPETING STANDARDS

When choosing between the serious and imminent threat standard and the reasonable likelihood standard, courts and commentators have assumed that the two standards differ significantly.[19] Courts have been forced to analyze the question in the abstract because there is no history of application that distinguishes the two standards.[20] In the abstract,[21] however, there is

difference exists. Additionally, the Note shows that the semantic differences between the two standards are not constitutionally significant. The Note concentrates on the arguments and contributions of *Bauer, Hirschkop,* and United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969) because these cases provide the most thorough treatment of the standards issue since it was first raised in Bridges v. California, 314 U.S. 252 (1941). For other cases dealing with court imposed sanctions for speech that threatened the fairness of judicial processes, see Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (reversing the conviction of a newspaper owner who violated Virginia statute that prohibited divulging information regarding proceedings of the Virginia Judicial Inquiry and Review Commission); Pennekamp v. Florida, 328 U.S. 331 (1966) (reversing contempt convictions of newspaper publisher and associate editor); Wood v. Georgia, 370 U.S. 375 (1962) (applying clear and present danger standard to reverse contempt conviction of sheriff for comments on pending grand jury investigation); Craig v. Harney, 331 U.S. 367 (1947) (applying serious and imminent threat standard to reverse contempt convictions of publisher, editorial writer, and news reporter); *In re* Oliver, 452 F.2d 111 (7th Cir. 1971) (serious and imminent threat standard used to invalidate district court policy prohibiting all extrajudicial comment by counsel in all pending cases); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (serious and imminent threat standard used to invalidate court order prohibiting defendants and their attorneys from making any public statements in relation to pending criminal case). For a collection of pre-*Bridges* cases, see Annot., 159 A.L.R. 1379 (1945).

[19] *See, e.g.,* 51 CHI.-KENT L. REV. 597 (1974); 10 SUFFOLK U.L. REV. 654 (1976); 30 SW. L.J. 507 (1976); 54 TEX. L. REV. 1158 (1976); 30 U. MIAMI L. REV. 459 (1976); 22 WAYNE L. REV. 1233 (1976).

[20] The court in Bridges v. California, 314 U.S. 252 (1941), which rejected the reasonable likelihood standard in favor of the clear and present danger standard, indicated that neither standard was satisfied in that case. *Id.* at 273. In Pennekamp v. Florida, 328 U.S. 331 (1966), the Court stated that "[i]t was . . . recognized that [the clear and present danger] formula, as would any other, inevitably had the vice of uncertainty . . . but it was expected that . . . from the formula's repeated application by the courts, standards of permissible conduct would emerge." *Id.* at 334. *Compare* United States v. Garcia, 456 F. Supp. 1354 (D.P.R. 1978) (rejecting the reasonable likelihood standard and incorporating the serious and imminent threat standard in restrictive order) *with* People v. Dupree, 88 Misc. 2d 780, 388 N.Y.S.2d 203 (Sup. Ct. 1976) (reasonable likelihood, not serious and imminent threat, held proper standard for restriction of lawyer comment).

[21] The two standards must be examined in tbe abstract. *Bauer* and *Hirschkop* are the only cases that bave assessed the constitutionality of DR 7-107 and both were declaratory judgment actions.

no constitutionally significant difference between the two standards.

A. *The Serious and Imminent Threat Standard*

The Seventh Circuit in *Bauer*[22] and the dissent in *Hirschkop*,[23] offered five comprehensive arguments for the serious and imminent threat standard. For these arguments to succeed, they must show a constitutionally significant difference between the serious and imminent threat standard and the reasonable likelihood of prejudice standard. A close analysis, however, shows that they do not.

First, the proponents of the serious and imminent threat standard argue that in *Bridges v. California*[24] the Supreme Court rejected the reasonable likelihood standard in favor of the clear and present danger standard.[25] They argue that the Court recently reaffirmed this rejection in *Landmark Communications, Inc. v. Virginia.*[26] This argument, however, misconstrues *Landmark.* Although *Landmark* quotes *Bridges* with approval,[27] it rejects the mechanical application of the clear and present danger test, and emphatically states that clear and present danger is not a "technical legal doctrine" or a "formula for adjudicating cases."[28] In fact, *Landmark* holds that, when properly applied, "clear and present danger" is not a standard, but, rather, a balancing test.[29] Far from endorsing *Bridges, Landmark* damns it with faint praise.

The *Bauer* Court next argued that its standard is more consistent with the precepts of clarity and precision announced by the Supreme Court.[30] But neither standard is inherently clear and

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[22] *See* 522 F.2d at 242.

[23] *See* 594 F.2d at 378-81 (Winter, J., and Butzner, J., concurring in part and dissenting in part).

[24] 314 U.S. 252, 263, 273 (1941) (clear and present danger standard used to reverse contempt convictions of newspaper editors and union leader).

[25] In this context, courts treat the serious and imminent threat standard as the application of the clear and present danger standard. *See* 594 F.2d at 379.

[26] 435 U.S. 829, 845 (1978) (reversing conviction of a newspaper owner who violated Virginia statute that prohibited divulging information regarding the proceedings of the Virginia Judicial Inquiry and Review Commission).

[27] *Id.*

[28] *Id.* at 842 (*quoting* Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (concurring opinion, Frankfurter, J.)).

[29] *Id.* at 842-43.

[30] *See* 522 F.2d at 249 (*citing* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("an enactment is void for vagueness if its prohibitions are not clearly defined. . . . [W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . . [L]aws must provide explicit standards for those who apply them. ')).

precise.[31] Without a history of application to lawyer comment—and neither standard has such a history—these standards give little notice of precisely what they prohibit; a history of application would cure this defect equally for either standard. The proponents may be arguing that because situations at each extreme can be distinguished more easily than situations in the middle, the more stringent standard, the serious and imminent threat standard, is clearer and more precise. This is a nonsequitur. The problem is not in distinguishing one extreme from the other, but in distinguishing borderline cases. Each standard has borders and each standard fails to distinguish its borderline cases.

Third, the *Bauer* Court argued that the serious and imminent threat standard is more consistent with the constitutional requirement of narrowness, because the "limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[32] This argument rests upon two dubious assumptions. It assumes that the reasonable likelihood of prejudice standard is inherently more restrictive than the serious and imminent threat standard. There is, however, no reason why a likelihood of prejudice that makes it reasonable to restrict speech could be less than serious and imminent. Furthermore, even if the reasonable likelihood of prejudice standard is more restrictive of free speech, the argument assumes that the standard restricts speech more than is necessary to ensure fairness. This assumption begs the question and is far from obviously true. Thus, this argument fails.

Fourth, the dissenters in *Hirschkop* argued that the reasonable likelihood of prejudice standard was designed to retrospectively gauge infringements of due process for the purpose of remedial action.[33] According to them, at the time of publication, speech may create a reasonable likelihood of an unfair trial but the same speech may not be prejudicial at the time of trial. Therefore, they argue, the reasonable likelihood test would deter some ultimately harmless speech and is not adaptable to prospective use. This argument erroneously assumes that the problem is caused by the standard rather than by the difference between a prospective and

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[31] *Cf.* 30 Sw. L.J. 507, 512 (1976) ("The [*Bauer*] court never discussed or cited pervasive authority for its holding that 'reasonable likelihood' is less clearly defined than is 'serious and imminent.'").

[32] 522 F.2d at 249 (*quoting* Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

[33] 594 F.2d at 380 (Winter, J., and Butzner, J., concurring in part and dissenting in part).

retrospective view. The significance of an event is always clearer in retrospect.

Finally, the proponents argue that a lawyer can only speculate about whether his comments might be judged retrospectively to have created a reasonable likelihood of prejudice because of unforeseen contingencies.[34] Therefore, they argue, a lawyer will restrict his speech to what is unquestionably safe. But because "[f]ree speech may not be so inhibited,"[35] the proponents argue that the reasonable likelihood standard is unconstitutional. This argument ignores the fact that either standard will be applied prospectively by the lawyer and retrospectively by the court. Consequently, this argument fails to support the adoption of the serious and imminent threat standard.

B. *The Reasonable Likelihood of Prejudice Standard*

The Fourth Circuit in *Hirschkop*, and the Tenth Circuit in *United States v. Tijerina*,[36] offered thorough arguments for the reasonable likelihood of prejudice standard. For these arguments to succeed, they must show a constitutionally significant difference between the reasonable likelihood of prejudice standard and the serious and imminent threat standard. Counter-arguments, however, demonstrate that these arguments are also unpersuasive.

First, the majority in *Tijerina* argued that the Supreme Court has placed fair trial rights in a preferred position to free speech rights,[37] and that the atmosphere of a fair trial must be preserved at all costs.[38] The *Tijerina* court argued that because the reasonable likelihood standard protects fairness more than the serious and imminent threat standard, it is preferable. The Supreme Court undercut the premise of this argument when it declared that neither right has priority.[39] Furthermore, the argument

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[34] *Id.*

[35] *Id.* (*quoting* Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

[36] 412 F.2d 661 (10th Cir.) (reasonable likelihood of prejudice standard used to affirm contempt convictions of defendants for violating order forbidding extrajudicial discussion of case), *cert. denied*, 396 U.S. 990 (1969).

[37] *See* Estes v. Texas, 381 U.S. 532, 540 (1965) ("We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.").

[38] *See* 412 F.2d at 667.

[39] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976) (invalidating court orders restraining newspapers from publishing material potentially prejudicial to murder trial) ("The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the

would be unsound even if its premise were true. Even if fair trial rights were preferred to free speech rights, this would not mean that courts should never risk the loss of an increment of fairness in order to gain an increment of free speech. The preference would only mean that at a certain point, where the risk has a certain degree of probability and the threatened loss has a certain degree of probability and gravity, courts should no longer risk the loss of fairness to gain an increment of freedom. Mere preference does not tell us where this point should be, and therefore does not tell us which standard is better.

The *Hirschkop* court also argued that the clear and present danger standard has proved "inadequate to protect judicial processes from the kind of extraneous influences which impaired their fairness . . ."[40] But although courts proceeding under the clear and present danger standard have sometimes failed to protect adequately the fairness of their processes, this shows the courts' bad judgment, not the inadequacy of the standard. " 'It is a question of proximity and degree . . .' [and the rule] 'can be applied correctly only by the exercise of good judgment.' "[41]

Third, the court argued that because lawyers are officers of the court, with a special duty "to protect the judicial process from those extraneous influences which impair its fairness,"[42] it is constitutionally permissible to subject an attorney's speech to the more restrictive reasonable likelihood standard. Judges Winter and Butzner, partially dissenting in *Hirschkop,* effectively rebutted this argument. They maintained that lawyers' status, their access to information about pending litigation, and the interest their comments arouse are only evidentiary factors for determining whether their comments about pending cases should be proscribed.[43] "But their profession, unique as it may be, does not justify measuring their first amendment rights of freedom of

other. . . . [I]t is not for us to rewrite the Constitution by undertaking what they declined to do.").

[40] 594 F.2d at 365.

[41] Bridges v. California, 314 U.S. 252, 296 (dissenting opinion, Frankfurter, J.) (*quoting* Schenck v. United States, 249 U.S. 47, 57 (1919); Schaefer v. United States, 251 U.S. 466, 483 (1920)).

[42] 594 F.2d at 366.

[43] *See* 594 F.2d at 381 (Winter, J., and Butzner, J., concurring in part and dissenting in part); *accord, In re* Halkin, 598 F.2d 176, 187 (D.C. Cir. 1979) ("[A]ttorneys and parties retain their First Amendment rights even as participants in the judicial process."). *Contra,* Florida *ex rel.* Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904, 910-11 (Fla. 1976); People v. Dupree, 88 Misc. 2d 780, 787, 388 N.Y.S.2d 203, 208 (Sup. Ct. 1976) (asserting less stringent standards for restricting attorneys' first amendment rights).

speech by standards less protective than those accorded other persons."[44] The privilege of practicing law does not justify imposing conditions on lawyers' first amendment rights.[45]

Fourth, the court in *Hirschkop* argued that courts should have the power to prohibit speech by an attorney if it threatens the integrity of the court's process "without extended controversy over the immediacy and gravity of the threatened harm in the particular case."[46] The Fourth Circuit argued that the serious and imminent threat standard invites such extended controversy, but that the reasonable likelihood standard is more easily satisfied, and, therefore, is preferable. The Supreme Court has noted, however, that courts must examine the gravity and probability of the threat in each particular case.[47] The *Bauer* court correctly observed that specific restrictions on lawyer comment may only establish a rebuttable presumption of a punishable threat to the fair administration of justice.[48] "One charged with violating such a rule would of course have the opportunity to prove that his statement was not one that posed such a . . . threat, but the burden would be upon him."[49]

Fifth, the proponents argue that because some clearly culpable conduct, presenting only a potential for prejudice, satisfies the reasonable likelihood standard but not the serious and imminent threat standard,[50] the former is preferable. But how can the con-

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[44] 594 F.2d at 381 (Winter, J., and Butzner, J., concurring in part and dissenting in part).

[45] *See also* Elrod v. Burns, 427 U.S. 347, 361 (1976) (plurality opinion) (dismissal of county employee held to violate first amendment) ("The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly."); Sherbert v. Verner, 374 U.S. 398, 405 (1963) (denial of unemployment benefits held to violate first amendment) ("[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms").

[46] 594 F.2d at 368.

[47]
> Whenever the fundamental rights of free speech . . . are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978) (*quoting* Whitney v. California, 274 U.S. 357, 378-79 (1927) (concurring opinion, Brandeis, J.)).

[48] *See* 522 F.2d at 251; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978).

[49] 522 F.2d at 251.

[50] *See* 594 F.2d at 368. The *Hirschkop* court discussed the example of a prosecutor who publicly announces that he has obtained a full confession from the defendant. If the confession is later held to be inadmissible, the prosecutor's announcement has gravely

duct be *clearly* culpable if it presents a only *potential* for prejudice? Presumably the potential for prejudice is sufficient to make it clear that restrictions ought to be imposed. But if it is *clear* that restrictions ought to be imposed, what reason is there to suppose that the serious and imminent threat standard would not also warrant the imposition of restrictions? The argument gives none, and, therefore, simply begs the question.

Sixth, the *Hirschkop* court argued that determining whether a comment creates a reasonable likelihood of prejudice requires less speculation than determining whether it creates a serious and imminent threat.[51] Therefore, they argue, the serious and imminent threat standard involves more uncertainties, and its prohibitions are less clear and definite. Both standards, however, require courts to calculate the probability of the threatened harm. Because such a calculation involves anticipating subsequent events, problems of uncertainty plague both standards.

The *Hirschkop* court also noted the statement in *Sheppard* that a judge should take remedial action " 'where there is a reasonable likelihood that prejudicial news' would prevent a fair trial . . . ."[52] The *Hirschkop* court argued that the rules for avoiding harm should apply the same standards as rules for remedial action, and, therefore, that *Sheppard* implicitly approved the reasonable likelihood standard for rules restricting lawyer comment. The problem with this argument is that restrictions of speech differ radically from remedial techniques. Restrictions of speech impinge upon constitutional liberties, while remedial techniques, such as postponement of the trial to allow public attention to subside, sequestration of jurors or declaration of a mistrial, do not. The standards need not be the same for each.

Finally, the *Hirschkop* court argued that rules governing lawyer comment would be "meaningless if sanctions could be im-

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threatened the integrity of the trial. This potential for prejudice, according to the court, is enough to satisfy the reasonable likelihood standard. But the defendant may decide not to contest the admissibility of the confession or he may contest it and lose. Because of these possibilities, the court reasoned that the serious and imminent threat standard may not be satisfied. *Id.* Significantly, the *Hirschkop* court admitted that if the serious and imminent threat standard is satisfied in this situation, "the present debate may be only a matter of semantics, not a matter of constitutional doctrine." *Id.* at 368 n.13. This example, and the court's uncertainty about whether the standard is satisfied, show that the imposition of restrictions requires the weighing of all the relevant factors, not the mechanical application of broad constitutional standards. They also show that the proper application of each standard requires this same balancing, so that in practice, the difference between the standards is not of consitutional dimension. The standards are pragmatically equivalent.

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

[52] 594 F.2d at 369 (*quoting* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)).

posed only when the lawyer's published speech creates unremediable prejudice."[53] To have meaning, they argue, the rule must prevent the lawyer's creation of a reasonable likelihood of prejudice. They conclude, therefore, that the reasonable likelihood standard is adequate to protect fairness and the serious and imminent threat standard is not. The flaw in this argument is apparent; "imminent" does not mean "unremediable." There is no reason to think that the serious and imminent threat standard would warrant restrictions only when irremediable prejudice had already been created.

II

THE SEMANTIC DIFFERENCES

One last way to test the thesis that there are no constitutionally significant differences between the standards is to examine the semantic differences between those standards. The courts did not distinguish them in this way, but they simply assumed that the standards are significantly different. Perhaps they based this assumption on semantics.

Three possible differences, based on language, exist between the standards. First, under the serious and imminent threat standard, it must be "clear" that the speech will be prejudicial before a court may impose restrictions. Under the reasonable likelihood standard, however, the likelihood of prejudice need only be "reasonable." Second, the serious and imminent threat standard requires "serious" interference with fairness to justify the restriction of speech, while the reasonable likelihood standard does not distinguish degrees of interference with fairness; any reasonably likely degree of prejudice is enough to warrant restrictions. Third, under the serious and imminent threat standard, the threat must be "imminent." As long as other methods of avoiding prejudice are available, the threat is not "imminent." The reasonable likelihood standard lacks such an imminence requirement.

These distinctions are flawed. The standards are properly understood only in relation to the question each is designed to answer: when does the interest in the fairness of judicial processes warrant restriction of speech?[54] One standard answers: when the

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[53] 594 F.2d at 370.

[54] *See* Bridges v. California, 314 U.S. 252, 296 (1941) (dissenting opinion, Frankfurter, J.) ("[T]he phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented.").

likelihood of prejudice is such that it is reasonable to restrict speech in order to protect fairness. The other standard answers: when the threat to fairness posed by speech is serious and imminent. The former tells neither how grave the interference with fairness must be to constitute prejudice, nor how likely the prejudice must be for the imposition of restrictions to be reasonable. Similarly, the latter tells neither how grave the threat must be to be serious, nor how probable it must be to be imminent. "No definition could give an answer"[55] because it involves a question of proximity and degree and each standard can be applied correctly only by the exercise of good judgment.[56] Therefore, "[u]nder any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."[57] In other words, the differences between the two standards are not of constitutional dimension.[58]

Each of the three attempts to distinguish the standards fails. The first gratuitously assumes that, according to the reasonable likelihood of prejudice standard, it is reasonable to impose restrictions on speech even if it is less than "clear" that the speech will be prejudicial. The second gratuitously assumes that any degree of interference with fairness, no matter how trivial, constitutes "prejudice" within the meaning of the reasonable likelihood standard. The third gratuitously assumes that, according to the reasonable likelihood of prejudice standard, it is reasonable to impose restrictions even though less onerous methods of avoiding prejudice are available. On its face, the reasonable likelihood of prejudice standard carries none of these implications, and, therefore, these attempts to distinguish the standards fail.

III

BALANCING APPROACH

Courts should recognize that there is no constitutionally significant difference between the two standards, and should focus on the real issue at hand—the need "to make [their] own inquiry into the imminence and magnitude of the danger said to flow

[55] Pennekamp v. Florida, 328 U.S. 331, 348 (1966).
[56] *See* Bridges v. California, 314 U.S. at 252 (dissenting opinion, Frankfurter, J.).
[57] Pennekamp v. Florida, 328 U.S. at 336.
[58] *See* Bridges v. California, 314 U.S. at 295 (dissenting opinion, Frankfurter, J.).

from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression."[59] Three reasons support a balancing approach. First, fair trial rights have no priority over free speech rights.[60] Second, in *Landmark Communications, Inc. v. Virginia*[61] and *Nebraska Press Association v. Stuart,*[62] the Supreme Court endorsed a balancing approach to determine when the interest in the fairness of judicial processes warrants restricting the freedom of speech.[63] Third, whether proceeding under the reasonable likelihood of prejudice standard or the serious and imminent threat standard, courts already have been using a balancing approach.[64] It would be far less confusing to trial judges and lawyers if the courts and the Code of Professional Responsibility candidly acknowledged this.

The courts have already made considerable progress in identifying the factors to be considered under a balancing approach.[65] These include: (1) the availability of less onerous alternatives;[66] (2) the length of the proceeding, and, therefore, of the

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[59] Landmark Communications, Inc. v. Virginia, 435 U.S. at 843.

[60] *See* note 39 and accompanying text, *supra.*

[61] 435 U.S. at 842-43.

[62] 427 U.S. at 562.

[63] *Cf.* 30 Sw. L.J. 507, 508 (1976) (citing Dennis v. United States, 341 U.S. 494 (1951), as inaugurating this approach).

[64] In Bridges v. California, 324 U.S. 252, 263, 273 (1941) the court appeared to reject the reasonable likelihood of prejudice standard in favor of the clear and present danger standard. Justice Frankfurter wrote a strong dissent in *Bridges,* stating that the question of when to restrict speech in the interest of fairness is a question of proximity and degree which requires the exercise of good judgment rather than the mechanical application of shorthand phrases. 314 U.S. at 295-96 (dissenting opinion, Frankfurter, J.). Five years later, in Pennekamp v. Florida, 328 U.S. 331 (1966), the Court proceeded under the clear and present danger rubric, but added that the selection of a rubric "depends upon a choice of words," and that "[u]nder any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication." *Id.* at 336. Justice Frankfurter, this time concurring, wrote that " '[c]lear and present danger' was never used . . . to express a technical legal doctrine or to convey a formula for adjudicating cases." 328 U.S. at 353. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), quotes with approval Justice Frankfurter's *Pennekamp* concurrence and states that, properly applied, the test is a balancing test. *Id.* at 842-43.

[65] For an excellent discussion of these factors, see Chicago Council of Lawyers v. Bauer, 522 F.2d at 250.

[66] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. at 562-63; Hirschkop v. Snead, 594 F.2d at 373; Chicago Council of Lawyers v. Bauer, 522 F.2d at 249. Such alternatives might include: (a) change of venue; (b) postponement of the trial to allow public attention to subside; (c) thorough questioning of prospective jurors to screen out those with fixed opinions concerning guilt or innocence; (d) the use of emphatic and clear instructions concerning the duty of each juror to decide the issues only on evidence presented in court; and (e)

proposed restrictions;[67] (3) the involvement of important social or legal issues;[68] (4) the importance of the timeliness of comment;[69] (5) the gravity of the litigants' interests;[70] (6) the need for a check upon governmental discretion;[71] (7) the lawyers' unique opportunity to be an informed, articulate, and accurate source of information;[72] (8) the vulnerability of the decision maker to prejudicial comment;[73] (9) the vulnerability to prejudicial comment of the particular type or stage of proceeding involved;[74] (10) the influence of unrestricted comment on the public's opinion of the integrity of judicial process;[75] (11) the probable effectiveness of the restriction in insulating the decision maker from prejudicial comment;[76] and (12) the need or desirability of comment to counterbalance prejudice that already exists.[77]

Some commentators object to a balancing approach, arguing that it would create uncertainty about the extent of the first amendment guarantee to lawyers and would have a chilling effect on the exercise of free speech.[78] First, the approach would create no loss of certainty; courts are already balancing.[79] To candidly acknowledge this would increase certainty by eliminating confusion about the proper role of the courts. Second, the reasonable likelihood of prejudice standard and the serious and imminent threat standard are both too abstract to be helpful. Although a history of cases dealing with lawyer comment could cure the standards of this defect, such a history simply has not developed. And to the extent that the standards do provide some guidance, there is nothing to prevent a court that uses a balancing approach from

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sequestration of jurors to insulate them from trial publicity and to dissipate the impact of pretrial publicity. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. at 563-64. *See also* Sheppard v. Maxwell, 384 U.S. at 357-62.

[67] *See* Hirschkop v. Snead, 594 F.2d at 373; Chicago Council of Lawyers v. Bauer, 522 F.2d at 258.

[68] *See* 594 F.2d at 373; 522 F.2d at 258.

[69] *See* 594 F.2d at 373; 522 F.2d at 250.

[70] *See id.* at 257-58.

[71] *See* 51 CHI.-KENT L. REV. 597, 607 (1974).

[72] *See id.* at 250.

[73] *See* 594 F.2d at 371-72; 522 F.2d at 256-57.

[74] *See* 594 F.2d at 372-74.

[75] *See* 522 F.2d at 253, 256-57.

[76] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. at 562, 565; 594 F.2d at 370-72; 522 F.2d at 257.

[77] *See id.* at 250; 30 U. MIAMI L. REV. 459, 464 (1976).

[78] *See* 51 CHI.-KENT L. REV. 597, 607 (1974).

[79] *See* note 64 and accompanying text, *supra*.

taking advantage of this guidance.[80] Finally, a balancing approach is not completely rudderless; the factors used in balancing do provide some guidance.[81]

CONCLUSION

As *Bauer* and *Hirschkop* show, courts have evaluated the constitutionality of DR 7-107 by comparing the "reasonable likelihood of prejudice" standard with the "serious and imminent threat to fairness" standard. The differences between the two standards, however, are not constitutionally significant. Courts should candidly acknowledge that under either standard, a judge must balance numerous factors. By isolating these factors and focusing on their relative importance, rather than the artificial differences between the two standards, courts would bolster the integrity of the process and provide lawyers with meaningful guidance concerning the propriety of attorney comment.

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80 *See, e.g.,* Landmark Communications, Inc. v. Virginia, 435 U.S. at 842-43, 845 (using the clear and present danger test in a balancing approach).

81 *See* notes 65-77 and accompanying text, *supra.*