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# The "No Comment" Rules: A Delicate Balance of Fundamental Rights

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## The "No Comment" Rules: A Delicate Balance of Fundamental Rights

The Chicago Council of Lawyers, an association of local attorneys, and seven members of the Chicago Bar brought an action on behalf of themselves and all lawyers who practice before the District Court for the Northern District of Illinois. The plaintiffs, seeking injunctive and declaratory relief, alleged that the District Court's Local Rule 1.07 and Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility[1] were unconstitutionally vague and overbroad. These rules are known collectively as the "no comment" rules, which prohibit the release of information by counsel "if there was a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice."[2] The named defendants,[3] together with the intervening defendants,[4] were granted motions to dismiss for failure to state a cause of action upon which relief could be granted. On appeal, the United States Court of Appeals for the Seventh Circuit, upon examination of the "no comment" rules to determine whether they deprive attorneys of their first amendment right of freedom of speech,[5] *held*, reversed and remanded: Only those comments that pose a serious and imminent threat of interference with the fair administration of justice can be constitutionally proscribed. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975).

Historically, the courts have been forced to balance the guarantee of a fair trial[6] against the rights of freedom of the press[7] and

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107. This disciplinary rule restricts an attorney's right to make extra judicial statements about litigation in which he is actively involved. The attorney is not precluded from commenting on basic facts surrounding the case such as the nature of the charge, place of arrest, or the name of the defendant. However, the attorney is restrained from commenting on facts or evidence which will be at issue during the trial. He is also precluded from commenting on the character or prior record of the accused, the identity or credibility of witnesses, and the guilt or innocence of the accused.

The purpose of this rule and Local Rule 1.07, which is virtually identical, is to limit prejudicial pretrial publicity in order to ensure a fair trial.

2. Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975).

3. All of the named defendants, who are the United States Attorney for the Northern District of Illinois, the Marshall for the District Courts and the Clerk of the District Court, were alleged to have participated in the enforcement of those rules. *Id.* at 247.

4. The intervening defendants were attorneys who regularly engage in criminal cases in the Northern District of Illinois. *Id.*

5. *Id.*

6. U.S. CONST. amend. VI.

7. U.S. CONST. amend. I; *see* REPORT OF THE COMMITTEE ON THE OPERATION OF A JURY

freedom of speech.[8] The right to free speech must be protected, but like other constitutional guarantees, it is not absolute.[9]

Traditionally, the canons of ethics have emphasized the importance of fair trials, focusing not on the rights of attorneys, but rather upon their duties.[10] Judicial treatment of the free speech—fair trial conflict has likewise emphasized the fair trial. "[The] courts either ignored the first amendment question, quickly brushed it aside, or employed a double standard in denying lawyers first amendment protections."[11] Not until *In re Sawyer*[12] did the Supreme Court refuse to accept the traditional notion that an attorney's free speech must yield to judicial regulations.

As a prelude to the discussion in *Chicago Council of Lawyers*, the court sketched the importance of the attorney's right to free speech.[13] Recognizing that lawyers are ably suited and situated to identify and articulate areas of public concern, the court noted that society derives a general benefit from "lawyers involved in investigations or trials [who] are often in a position to act as a check on the government by exposing abuses or urging action."[14] Nevertheless

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SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391, 394 (1968) [hereinafter referred to as the Kaufman Committee Report]. The problem of publicity in the administration of criminal justice dates as far back as Aaron Burr's trial before Chief Justice Marshall in 1809. The defense counsel urged that the jurors had been prejudiced against Colonel Burr by inflammatory articles carried in the Alexandria Exposition. *See also* Bridges v. California, 314 U.S. 252, 270 n.16 (1941). The Court cited the statement of Thomas Jefferson wherein he referred to the putrid state to which the press had declined. " 'It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost.' "

8. U.S. CONST. amend. I.

9. The Supreme Court has developed numerous theories defining the circumstances and manner in which first amendment freedoms may constitutionally be regulated. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (doctrine of vagueness); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (doctrine of overbreadth); Thomas v. Collins, 323 U.S. 516, 529-30 (1945) (validity of statutes limiting first amendment freedoms).

Potential liability for libel and slander also sets limits on first amendment guarantees.

10. Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922, 924 (1974).

11. *Id.* at 925 (footnotes omitted).

12. 360 U.S. 622 (1959). Sawyer, defense counsel in a criminal conspiracy action, made public statements while the trial was pending, in which she criticized the court. She was charged with and convicted of making statements that reflected adversely upon the district judge's fairness and integrity. The Supreme Court reviewed the Ninth Circuit's affirmation and reversed the decision stating that "a lawyer may criticize the law-enforcement agencies of the Government, and the prosecution, even to the extent of suggesting wrongdoing on their part. . . ." *Id.* at 632.

13. 522 F.2d at 250; *see* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 595, 598-99 (1971).

14. 522 F.2d at 250.

the court recognized that certain proscriptions on speech can and must be constitutionally invoked.[15]

Where pretrial publicity creates a conflict between the rights to a fair trial and freedom of speech, the court has a duty to ensure fair trials—"the most fundamental of all freedoms."[16] The very word "trial" connotes decisions on the evidence properly advanced in open court. It is the undistilled evidence which reaches the trier of fact that must be limited, and this, by necessity, has prompted various solutions.[17]

The courts, in attempting to prevent prejudicial comments from reaching the jurors, have employed extensive voir dire, change of venue, cautioning the jury, sequestration, continuances and appeals.[18] The modern trend is to reverse convictions where pretrial publicity has interfered with a fair trial.[19]

This trend is exemplified by *Sheppard v. Maxwell*,[20] where pretrial publicity deprived the defendant of a fair trial. The Supreme Court directed the judiciary to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[21] To implement this mandate, the Committee on the Operation of the Jury System, Judicial Conference of the United States (The Kaufman Committee), drew up guidelines to implement the Court's directions in *Sheppard*. The results were designed to redefine the attorney's right to comment publicly on pending litigation. The guidelines were adopted by the American Bar Association[22] and the District Court of Illinois.[23] It is these standards which proscribe attorney comment which is "reasonably likely to threaten the fair administration of justice" that the plaintiffs in

15. *Id.* at 251; *see* Fong, *Fair Trial - Free Press*, 61 WOMEN LAWYERS J. 13 (1975). A person's freedom and life weight more heavily than the right of the public to be informed.

16. 522 F.2d at 248, *citing* Estes v. Texas, 381 U.S. 532, 540 (1965).

17. Bridges v. California, 314 U.S. 252, 271 (1941).

18. *See* Fong, *supra* note 15; Gelb, *Fair Trials and Free Speech*, 31 GEO. WASH. L. REV. 608, 611 (1962-63); Kaufman Committee Report, *supra* note 7; Will, *Free Press v. Fair Trial*, 12 DEPAUL L. REV. 197, 209 n.39 (1962-64).

19. Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

20. 384 U.S. 333 (1966).

21. *Id.* at 363. The Court reversed and remanded a murder conviction after a finding that massive publicity about the trial was so pervasive as to deny petitioner a fair trial.

22. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107, *cited at* 522 F.2d at 263-64 (Appendix B); *see* notes 1, 7 *supra*.

23. U.S. DIST. CT. N.D. ILL. CRIM. R. 1.07, *cited at* 522 F.2d at 261-63 (Appendix A); *see* note 7 *supra*.

*Chicago Council of Lawyers* challenged.

In rejecting the "reasonable likelihood standard" of the Kaufman Committee Report, the *Chicago Council of Lawyers* court held Local Rule 1.07 and Disciplinary Rule 7-107 to be constitutionally infirm.[24] Guided by the spirit of *Grayned v. City of Rockford*,[25] the court held that the stricter standard of a serious and imminent threat to the administration of justice, which was adopted in *Chase v. Robson*,[26] and reaffirmed in *In re Oliver*,[27] must be the standard for any prohibition of free speech.[28]

Having adopted the "serious and imminent threat" test, the court scrutinized the disciplinary rules as they related to criminal proceedings. The rules generally established a presumption against comment only so long as the "serious and imminent" standard was applied. The court realized that this presumption was, in itself, a serious limitation of free speech and examined each rule individually.[29]

The prohibition on extrajudicial comments by "a lawyer in or associated with the investigation" was to apply only to prosecutors rather than to all attorneys.[30]

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24. 522 F.2d at 251. Prior to scrutiny of these rules, the court determined that the rules were not prior restraints of speech and therefore would not be reviewed with a heavy presumption against their validity. *Id.* at 248-49.

25. 408 U.S. 104 (1972). The Court in *Grayned* warned that, "[w]here a vague statute 'abut[s] upon sensitive areas of First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Id.* at 109.

26. 435 F.2d 1059 (7th Cir. 1970). The court in *Chase* ordered a blanket prohibition on all extrajudicial comments on the case. It was held

> that before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is "a serious and imminent threat to the administration of justice."

*Id.* at 106 *citing* Craig v. Harney, 331 U.S. 367, 373 (1947).

27. 452 F.2d 111, 114-15 (7th Cir. 1971). This was an appeal on a final judgment in a disciplinary proceeding in which the attorney, Oliver, was found to have violated a district court policy statement prohibiting extrajudicial comment by an attorney in the course of litigation. The United States Court of Appeals for the Seventh Circuit held that there was no basis in the record upon which it could be determined "that Oliver's conduct was a serious and imminent threat to the administration of justice as required by *Chase*." *Id.* at 115.

28. 522 F.2d 242.

29. *Id.* at 252-57. The rules pertaining to criminal trials were examined at four stages: 1) comments made during the investigation; 2) from the time of arrest or filing of charges to the commencement of the trial; 3) during the selection of the jury or during trial; and 4) during the period immediately after trial and before sentencing.

30. 522 F.2d at 253. For a discussion of the need for the prosecution to speak publicly on trial issues see Younger, *Fair Trial, Free Press, and the Man in the Middle*, 56 A.B.A.J. 127, 129 (1970).

> The possibility of prejudice to the Government's case which has not even been presented by indictment or information is too remote in view of the countervailing interests to justify those restrictions on nonprosecution attorneys.[31]

In addition the plaintiffs contended that the limitation on comments should be lifted when the jury is sequestered, or when the trier of fact is the bench.[32] The court rejected the plaintiffs' argument, reasoning that an unedited newspaper might reach the jury-room, or perhaps the judge might decide to release the jury.[33] The court also recognized that judges are human and may also be affected by outside information.[34] The petitioners then proffered the argument that restrictions on speech after the trial and before sentencing were unconstitutional. The court agreed, stating that the judge has broad discretion and may look to almost any factor in determining an equitable sentence.[35]

The court also severely limited the prohibition on extrajudicial comment during civil trials. It reemphasized the need for lawyers to articulate the social issues that arise in these trials.[36] The rules, as written, would not even allow a litigating attorney to write a law review article concerning any aspect of the case. "An informed viewpoint would be removed from the public forum without justification."[37] The court held that the disciplinary rules relating to civil matters, individually and collectively, were unconstitutionally overbroad if they created a presumption against comment even after application of the "serious and imminent danger" limitation.[38]

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31. 522 F.2d at 253.

32. *Id.* at 256.

33. *Id.*

34. *Id.*; *accord*, Cox v. Louisiana, 379 U.S. 559, 565 (1965). *Contra*, Craig v. Harney, 331 U.S. 367, 376 (1946). "Judges are supposed to be men of fortitude, able to thrive in a hardy climate"; Pennekamp v. Florida, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring). "Weak characters ought not to be judges, . . . the press for society's sake may assume that they are not."

35. 522 F.2d at 257.

36. *Id.* at 257-59.

37. *Id.* at 259.

38. *Id.* at 258. The court, when it rejected the application of the guidelines to civil trials, stressed the difference between civil and criminal trials. A major concern of a criminal trial is that it be fair and speedy. The civil trial should also be fair and speedy, but it tends to have a different function. It places greater emphasis on the social changes effected. To inhibit an attorney's right to free speech for prolonged periods (some civil trials proceed for years) would be a burden on counsel and a detriment to society. The court, therefore, with respect to civil trials, chose to protect the attorney's right to free speech and closed by observing:

A basic tenet of our legal system is that laws should be drawn to give the people a warning as to what actions are impermissible. The court of appeals attempted to accomplish this goal. It has redefined the guidelines by which a lawyer may act and be judged. The decision has not granted the lawyer *carte blanche* to recklessly criticize a judicial proceeding, nor has it cast aside the right to a fair trial as the dissent suggests. On the contrary, it is implicit in the decision that a lawyer's comments are needed to guarantee a fair trial. A criminal trial can evoke the emotion of the public and produce massive coverage by the press. Comment by a defendant's attorney at the initial stage of the case may offset an inherent public presumption of guilt that accompanies an indictment.[39] Instead of having to remove himself from the case, which would deprive the defendant of counsel, or being forced to remain silent with the fear of disciplinary measures, the active attorney may criticize the court.

The court, in redefining the area of acceptable criticism by the attorney, has reassured the defendant of a fair trial. The litigating counsel, with the knowledge of his rights and duties, may now return to the role of the learned judicial critic.

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## The End of Fee Schedules: The Sherman Act Applies to Lawyers Also

Desiring to purchase a home in Fairfax County, Virginia, petitioners contacted a local lawyer concerning a title examination. The lawyer quoted them the fee suggested in the minimum fee schedule published by the respondent Fairfax County Bar Association (the "County Bar") and enforced by the respondent Virginia State Bar (the "State Bar").[1] In an attempt to find an attorney willing to

"[W]e do recognize the great benefits derived from allowing uninhibited comment by knowledgeable attorneys involved in civil litigation." *Id.* at 259.

39. 6 HARV. CIV. RIGHTS-CIV. LIAB. L. REV. 595, 599 (1971).

1. The State Bar had published reports condoning fee schedules and had issued two ethical opinions indicating that fee schedules could not be ignored. VIRGINIA STATE BAR, 1969 MINIMUM FEE SCHEDULE REPORT; VIRGINIA STATE BAR, 1962 MINIMUM FEE SCHEDULE REPORT; VIRGINIA STATE BAR COMM. ON LEGAL ETHICS, OPINIONS, No. 170 (1971); VIRGINIA STATE BAR COMM. ON LEGAL ETHICS, OPINIONS, No. 98 (1960). The reports "provided the impetus for the County Bar, on two occasions, to adopt minimum fee schedules." Goldfarb v. Virginia State Bar, 95 S. Ct. 2004, 2015 n.21 (1975).