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COMMENT

ABA Code of Professional Responsibility: Void for Vagueness?

Professional groups have traditionally attempted to regulate their members through codes of conduct. Such codes share the general purposes of incorporating the highest ideals of the profession, of encouraging members to strive toward the attainment of those ideals, and of presenting to the public, which the professional group serves, the calling's most favorable image. Some codes of conduct may go no further than this, and thus are formulated in the broadest of terms, emphasizing public service, honesty, integrity, and other lofty traits as the guiding lights of members' professional careers. Other organized professions may seek to regulate their members' conduct in a more particularized fashion. Rather than merely exhorting colleagues to conduct themselves at all times as "honorable men," or some other equally vague precept, and leaving it to each individual to work out the "honorable" solution to each professional dilemma, these groups collectively attempt to make the hard choices in advance, setting them out in codes of conduct characterized by narrowly framed rules that all members are expected to obey. To ensure professional conformity and obedience, the rules must be backed by penalties, with exclusion from the profession typically the ultimate disciplinary sanction.

The Code of Professional Responsibility of the American Bar Association, adopted in 1969, functions as a particularized rather than an exhortative code of conduct. Though the ethical considerations of the Code are framed as general principles of conduct and are said to be only "aspirational" in character, the disciplinary rules (rules) are "mandatory," and prescribe the minimum level of conduct with which an attorney must comply in his relationships with clients, courts, and colleagues.[1] Failure to comply with any disciplinary rule may result in private or public reprimand, suspension, or disbarment of an attorney, with the particular punishment left to the discretion of the state bars and, ultimately, the courts.[2] Having seemingly made the choice to govern itself by specifically prescribing certain conduct for certain circumstances, the ABA nevertheless adopted various disciplinary rules that are written in such broad, general terms that they fail to prescribe any

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.
2. *See id.*

intelligible course of conduct.[3] While such generally expressed professional *goals*, if they are so recognized, can serve a useful "aspirational" function, when such goals must serve as *rules* of conduct whose violation invokes severe disciplinary sanctions, they can become a trap for the unwary practitioner. If the legal profession were perfectly homogeneous, so that there was general agreement on the meaning of such terms as "moral turpitude" or "fitness to practice law," there would be no danger that some attorneys would be punished for conduct that they did not recognize as unprofessional at the time they engaged in it. It seems obvious, however, that no such consensus exists, for if it did there would be no need for a formal code of conduct.[4]

This Comment will discuss the problem of vagueness in the Code in light of its perceived purpose and function as a code of professional conduct. The void-for-vagueness doctrine, as developed by the United States Supreme Court in passing on the constitutionality of statutes, will supply the framework for analysis of the Code's disciplinary rules. Though focusing on DR 1-102 and DR 7-107 as examples of some of the problems created by vague regulatory language, discussion of the rules will necessarily be in general terms. The conclusion is that, though courts may be reluctant to interfere in the legal profession's self-regulation to the extent of actually declaring its rules void for vagueness, such a finding could be supported in terms of the vagueness doctrine. The bar could be more protective of attorneys' rights, while still regulating their conduct for the benefit of the public, by eliminating or clarifying the vaguely worded rules.

I. The Development of the Void-for-Vagueness Doctrine in the United States Supreme Court

The void-for-vagueness doctrine has had such broad, and often

3. DR 1-102(A), which serves as a catchall for any type of misconduct not covered elsewhere in the Code, is a prime example of an unintelligible rule of conduct. The rule in its entirety provides:

DR 1-102 Misconduct.

(A) A lawyer shall not:
- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

4. *See generally* J. AUERBACH, UNEQUAL JUSTICE 40-73 (1976).

unsystematic, application in the United States Supreme Court that even to refer to it as a "doctrine" may attribute to it more coherence than it possesses. The leading authority on vagueness cases in the United States Supreme Court has suggested that

> the void-for-vagueness doctrine may be regarded less as a principle regulating the permissible relationship between written law and the potential offender than as a practical instrument mediating between . . . all of the organs of public coercion of a state and . . . the *institution* of federal protection of the individual's private interests.[5]

Though the application of the vagueness doctrine to invalidate a particular statute may frequently be inspired by practical concerns rather than compelled by an objective analytical test, several general principles may nevertheless be derived from the doctrine's development and use in the United States Supreme Court.

The vagueness doctrine encompasses two fundamental requirements of due process of law: that potential offenders receive adequate notice of prohibited conduct, and that enforcement of the laws be as uniform and nondiscriminatory as possible. Thus, in one of its earliest decisions voiding a criminal statute for vagueness,[6] the United States Supreme Court pronounced: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[7] Of later development than the adequate notice requirement,[8] the second principle of the vagueness doctrine guards against the uncontrolled discretion allowed law enforcement personnel when a statute is so vague that it fails to provide adequate guidelines for enforcement.[9] Without the indication of legislative intent supplied by a precisely worded statute, the

5. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960).

6. Connally v. General Constr. Co., 269 U.S. 385 (1926).

7. *Id.* at 391. The statute at issue in *Connally* was an Oklahoma law requiring that persons employed by the state be paid not less than the "current rate . . . in the locality" where the work was to be performed. *Id.* at 388. The Supreme Court held that it contained a "double uncertainty" in that "current rate of wages" did not denote a definite sum, and "locality" did not precisely define the area. *Id.* at 393-95.

8. For other decisions relying on the notice element in voiding a statute for vagueness, see Lanzetta v. New Jersey, 306 U.S. 451 (1939); Cline v. Frink Dairy Co., 274 U.S. 445 (1927); United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

9. The most notable recent decision stressing this factor is Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), in which a vagrancy statute was voided for vagueness. The Supreme Court found that the failure of the statute to provide standards to guide enforcement left "unfettered discretion" in the hands of the police and provided a pretext for the arrest of any person whose lifestyle they disapproved. *Id.* at 168.

danger of arbitrary and discriminatory enforcement by police officers, courts and juries may be considered great enough to offend due process.[10]

A third problem with vague laws arises when the law "abut[s] upon sensitive areas of basic First Amendment freedoms,"[11] and thereby "operates to inhibit the exercise of [those] freedoms."[12] Because of the danger that a law regulating expression may infringe constitutionally protected rights, higher standards of specificity are exacted of such laws than of others that do not affect speech.[13] Thus, the basic requirements of fair notice and adequate guidelines must be strictly observed in this area.[14] In addition, standing requirements tend to be somewhat relaxed when regulations of expression are involved, and one whose conduct falls clearly within that prohibited by an otherwise vague statute may still raise the issue of vagueness when the first amendment freedoms of others are endangered.[15]

The vagueness doctrine has not been limited to criminal statutes in its application. Civil statutes, because they may provide a basis for the deprivation of liberty or property, are also subject to due process standards, including that of clarity.[16] The "process" that is "due" in any

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10. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 575 (1974) (Massachusetts statute punishing "[w]hoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States" void because its "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections"); Herndon v. Lowry, 301 U.S. 242, 263 (1937) (statute, making "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state" constitute an attempt to incite insurrection, impermissibly licenses jury to create own standard in each case).

11. Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

12. Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961).

13. Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); Smith v. Goguen, 415 U.S. 566, 573 (1974); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682 (1968).

14. *See, e.g.*, Hynes v. Mayor of Oradell, 425 U.S. 610, 611, 621-22 (1976) (ordinance requiring that advance notice be given to local police by "[a]ny person desiring to canvass, solicit or call from house to house . . . for a recognized charitable cause . . . or . . . political campaign or cause" held void for vagueness); Smith v. Goguen, 415 U.S. 566, 575 (1974) (statute authorizing punishment by fine or imprisonment, or both, of anyone who "publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States" invalidated as inherently vague); Interstate Circuit, Inc., v. Dallas, 390 U.S. 676 (1968) (classification scheme for motion pictures held unconstitutionally vague); Winters v. New York, 333 U.S. 507 (1948) (statute prohibiting printing and distribution of any publication principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime, void on its face).

15. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 577-78 (1974); Gooding v. Wilson, 405 U.S. 518, 520-21 (1972). In the first amendment freedoms of expression area the vagueness problem is virtually indistinguishable from the related constitutional doctrine of overbreadth, under which laws regulating expressive activity may be read to reach too far and prohibit expression protected by the first amendment, and are therefore constitutionally defective. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 871-75 (1970).

16. In one of the earliest decisions employing the vagueness doctrine, A.B. Small Co. v.

particular adjudication, however, depends upon the significance of the interest at stake and the corresponding severity of the potential sanction.[17] Expressed in terms of the vagueness doctrine, the degree of clarity and specificity required of laws will increase as the potential sanctions for their violation increase in severity. Because the loss of personal liberty is generally considered to be more serious than a loss of property, the requirements of sufficient notice and adequate guidelines will be stricter upon statutes enforced by criminal rather than civil sanctions. The United States Supreme Court has recognized this principle,[18] and, predictably, has invalidated far fewer civil than criminal statutes on vagueness grounds.[19] The inevitable imprecision of written language must be tolerated to some extent, but highly valued interests such as personal liberty or liberty of expression may be limited only in the clearest possible terms.

Though it is virtually impossible to articulate a vagueness "test" for different types of statutes in absolute terms, a "sliding scale" may be visualized, upon which statutes regulating expression would be at the top in terms of precision required, followed by those enforced by criminal sanctions. Civil statutes enforced only by a taking of property would rest below criminal statutes on the scale. Property interests, however, may be of varying importance; the loss of a job or profession, for example, will generally be a more serious deprivation than the payment of a sum of money. Employment or professional regulations, therefore, should rest below criminal statutes, but above ordinary civil statutes, in the hierarchy of vagueness analysis. Because the Code fits within this general class of regulations, it will be helpful to examine the body of

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American Sugar Ref. Co., 267 U.S. 233 (1925), the Food Control Act, whose limitation to a reasonable profit for necessaries had previously been held unconstitutionally vague as the basis for a criminal prosecution in United States v. Cohen Grocery Co., 255 U.S. 81 (1921), was also invalidated as a defense to a contract action for the price of sugar. Defendant's attempt to distinguish *Cohen* and other vagueness decisions as involving criminal penalties was rejected, the Supreme Court asserting, "It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." 267 U.S. at 239. And in Giaccio v. Pennsylvania, 382 U.S. 399 (1966), the United States Supreme Court invalidated a state statute providing for the payment of court costs by an acquitted misdemeanor defendant upon the recommendation of the jury because the statute was so vague that it lacked any standards for its application. Whether labeled "penal" or "civil," the Court held, the statute gave the state a procedure for depriving an acquitted defendant of liberty and property, both of which were protected against state deprivation without due process standards. *Id.* at 402.

17. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

18. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting); Winters v. New York, 333 U.S. 507, 515 (1948).

19. *See* Amsterdam, *supra* note 5, at 69 n.16.

law with respect to vagueness in such regulations in other contexts, in order to place the Code accurately on the sliding scale.

II. Application of Void-for-Vagueness Doctrine to Employment and Professional Regulations

Because it is now generally recognized that public employees with a legitimate expectation of continued employment have a "property" and a "liberty" interest in their employment, and that such employment cannot be terminated by the state without the procedural safeguards required by due process of law,[20] it follows that an employee may not be dismissed or disciplined for infringement of an employment regulation that suffers from one or more of the defects of vagueness. In *Baggett v. Bullit*,[21] for example, teachers were required to take an oath that they would not engage in, or aid and abet, "subversive activity," because a Washington statute provided that no "subversive person" could be a state employee.[22] The United States Supreme Court held that the statute and the oath were unconstitutionally vague; even construing the statute in its most favorable light, the Court ruled, it could not be said that the oath provided an ascertainable standard of conduct or did not require more than the state could command under the first and fourteenth amendments.[23] The *Baggett* decision, however, is a rare instance of actual invalidation of an employee regulation on vagueness grounds, and may be attributed to the fact that the oath clearly infringed rights protected by the first amendment.[24] In several decisions since *Baggett*, courts have been more lenient in their treatment of vague language in employment regulations.[25] Several factors seem to contribute to this attitude. First, it is recognized that when the conduct of a large and varied group of employees, such as civil servants, is sought to be regulated according to a common standard, it is simply not practical for the government to spell out all prohibited conduct in detail.[26] In *Meehan v. Macy*,[27] for example, the United States

20. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

21. 377 U.S. 360 (1964).

22. *Id.* at 362.

23. *Id.* at 372.

24. *See* notes 11-15 and accompanying text *supra*. *See also* Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967); Speiser v. Randall, 357 U.S. 513, 526 (1958).

25. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974); Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968).

26. Arnett v. Kennedy, 416 U.S. 134, 159 (1974); Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973); Waters v. Peterson, 495 F.2d 91, 99 (D.C. Cir. 1973); Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968).

27. 392 F.2d 822 (D.C. Cir. 1968).

Court of Appeals for the District of Columbia Circuit commented, "[E]ven the most conscientious of codes that define prohibited conduct of employees includes 'catchall' clauses prohibiting employee 'misconduct,' 'immorality' or 'conduct unbecoming.' "[28] Second, generalities in employment regulations are tolerated because they are not enforced by criminal sanctions.[29] The gravity of the punishment involved (for example, reprimand, suspension or dismissal), however, may affect the degree of specificity required in the regulation.[30] Third, vague rules may gain more definite content through "longstanding employment relationships,"[31] previous warnings,[32] or a procedure by which an employee may get an authoritative ruling on the legality of a proposed course of conduct.[33] These corrective factors ensure that notice is provided and thus may lend validity to an otherwise vague regulation.

Similarly, courts have found regulation of certain closely knit, specialized groups suitable for special consideration. In *Parker v. Levy*,[34] the unique character of military society and the "longstanding customs and usages of the services"[35] were held to give meaning to the "seemingly imprecise" standards of articles 133 and 134 of the Military Code of Justice.[36] Reversing the United States Court of Appeals for the Third Circuit, which had held the two articles void for vagueness,[37] the Supreme Court noted several factors that tended to narrow the articles' broad language. First, all military personnel were instructed on the

28. *Id.* at 835.

29. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 159 (1974); Waters v. Peterson, 495 F.2d 91, 100 (D.C. Cir. 1973).

30. *See, e.g.*, Waters v. Peterson, 495 F.2d 91, 100 (D.C. Cir. 1973). *But see* Bence v. Breier, 501 F.2d 1185, 1189 n.2 (7th Cir. 1974).

31. Arnett v. Kennedy, 416 U.S. 134, 160 (1974).

32. *See, e.g.*, Goldwasser v. Brown, 417 F.2d 1169, 1171 (D.C. Cir. 1969).

33. *See, e.g.*, Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

34. 417 U.S. 733 (1974).

35. *Id.* at 746-47.

36. Article 133 of the Military Code, 10 U.S.C. § 933 (1976), prohibits "conduct unbecoming an officer and a gentleman," while article 134, *id.* § 934, condemns "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Defendant, a physician and captain serving two years active duty, was convicted under both articles for making statements to recruits that United States involvement in Viet Nam was wrong, that black soldiers had no reason to go, and that the Special Forces were liars, thieves, and killers of peasants, women and children. He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and three years hard labor. 417 U.S. at 738.

37. 478 F.2d 772 (3d Cir. 1973), *rev'd*, 417 U.S. 733 (1974). *See also* Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973), *rev'd*, 418 U.S. 676 (1974) (also holding the two articles of the Military Code void for vagueness). *Avrech* was reversed by the United States Supreme Court on the authority of its *Parker* decision.

contents of the Military Code, and a complete text would be made available on request to anyone on active duty.[38] Second, the United States Court of Military Appeals had construed both articles, supplying specific examples of the conduct covered, and partially narrowing their broad scope.[39] Though it recognized that vague areas remained in the articles' language despite these narrowing constructions, the Court held that the needed definiteness could be supplied by "less formalized custom and usage" of traditional military society.[40] Because of the special nature of the military, the Court further concluded that the proper standard of review for a vagueness challenge to the Military Code of Justice was the standard applied to criminal statutes regulating economic affairs, rather than that traditionally applied to statutes regulating first amendment freedoms of expression in civilian life.[41] Because defendant should clearly have been on notice that his particular conduct was within the range of that prohibited by articles 133 and 134, the *Parker* Court reasoned, the articles could not be deemed vague as applied to him; furthermore, because the distinctive character of the military community required a different application of first amendment doctrines, defendant lacked standing to challenge the facial validity of the articles.[42]

It is uncertain whether this watered-down vagueness analysis, tailored to the military context, might also be applied to regulations governing other professional groups that are less specialized than the military, but more cohesive than government civil servants. A police department regulation virtually identical to the Military Code's articles 133 and 134 was held unconstitutionally vague by the United States Court of Appeals for the Seventh Circuit in *Bence v. Breier*,[43] but the United States Supreme Court has not ruled on the question. The *Bence*

38. 417 U.S. at 751-52.

39. *Id.* at 752.

40. *Id.* at 754.

41. *Id.* at 756. It is apparently the overriding need for obedience and discipline in the military that justifies the reduced protection of constitutional rights among the armed forces. *Id.* at 758-59.

42. Though relying primarily on the military context of the regulation, the *Parker* Court also noted its reluctance in other contexts to strike down a statute on its face when there was a broad range of conduct to which it could be constitutionally applied. *Id.* at 757-61.

43. 501 F.2d 1185 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975). Policemen Bence and Hanneman were reprimanded under rule 44, section 8 of the department's rules and regulations, which authorized dismissal or other punishment for "[c]onduct unbecoming a member and detrimental to the service." Their offense consisted of sending a letter to the city's chief labor negotiator, in which they made incorrect allegations on matters of departmental compensation. *Id.* at 1186-87.

court contrasted these departmental rules with the employee regulations in *Waters v. Peterson*[44] and *Arnett v. Kennedy*,[45] which were found not capable of being made more specific because they were intended to govern "myriad . . . federal employees performing widely disparate tasks."[46] The police regulations, in contrast, were formulated "to apply to an essentially homogeneous group of employees performing essentially similar job functions,"[47] and could thus be more precisely worded. Indeed, as the court of appeals noted, "the Chief of Police was able to specifically identify thirty other grounds for termination or punishment, each of which would presumably also be unbecoming conduct."[48] On the other hand, the court reasoned that a police department was not sufficiently specialized and differentiated from the rest of society to justify the lenient standard of specificity held applicable in the military context in *Parker*; nor was there a similar history and tradition to give the same content to the words "conduct unbecoming" that the *Parker* Court had gleaned from military tradition and precedent.[49] Concluding that the separate nature of military society had been the decisive factor in *Parker*, the *Bence* court distinguished *Parker* on that basis and, applying the traditionally strict test of vagueness in the area of rules affecting first amendment freedoms, invalidated the police department regulation.[50]

In summary, though employment or professional regulations generally should rest below criminal statutes, but above ordinary civil statutes, in the hierarchy of vagueness analysis, the specificity required of them will also be affected by whether they curtail freedom of speech, whether they are enforced by reprimand or dismissal, and the breadth of the range of conduct that they must regulate. Additionally, the regulations of certain specialized professions may warrant different consideration because their members have taken on special responsibilities requiring curtailment of their liberty and because their differentiation from society and particular traditions lend a specificity to their rules

44. 495 F.2d 91 (D.C. Cir. 1973).
45. 416 U.S. 134 (1974).
46. *Id.* at 159; *see* text accompanying notes 26-28 *supra*.
47. 501 F.2d at 1190.
48. *Id.* at 1189.
49. *Id.* at 1191-92.
50. *Id.* at 1190-91. *See also* Gasparinetti v. Kerr, 568 F.2d 311 (3d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) (police regulations limiting discussion and criticism of superiors or other members held void on overbreadth grounds). *But see* Kannisto v. City & County of San Francisco, 541 F.2d 841 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (police regulation prohibiting "unofficerlike conduct" which "tends to subvert the good order, efficiency or discipline of the Department" not vague as applied to this petitioner).

that would not otherwise exist. While the Military Code of Justice has been placed within this category, police regulations generally have not. With these generalizations in mind, a consideration of the proper position of the lawyer's Code of Professional Responsibility in the hierarchy of the vagueness doctrine can be undertaken.

III. APPLICATION OF VOID-FOR-VAGUENESS DOCTRINE TO THE CODE OF PROFESSIONAL RESPONSIBILITY

With the recognition that public employees have a protectible property interest in their jobs, an attorney's license to practice may also be viewed as a type of "new property" of which she cannot be divested without due process of law.[51] The Code of Professional Responsibility, because it governs an attorney's practice and can be the basis for suspension or removal of her license, must therefore be sufficiently specific in its terms to satisfy the due process requirements expressed in the vagueness doctrine. Additionally, because the sanctions authorized by the Code may be severe and stigmatizing, they may have the effect of depriving an attorney of her liberty to practice the profession she has chosen and qualified for.[52] In order to evaluate the strength of these property and liberty interests and the extent of their potential deprivation under the Code, and thereby to determine the degree of specificity that should be required of the rules, further consideration must be given to the nature of attorney disciplinary proceedings, the possible sanctions imposed for violations of the rules, and the character of the legal profession itself.

State courts had generally assumed disciplinary proceedings to be civil actions[53] until two United States Supreme Court cases in the late 1960's forced a recognition that in at least some respects they are in the nature of criminal proceedings.[54] In *Spevack v. Klein*,[55] the Supreme

51. *See* Willner v. Committee on Character, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Charlton v. FTC, 543 F.2d 903, 906 (D.C. Cir. 1976); *In re* Ming, 469 F.2d 1352, 1355 (7th Cir. 1972). *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

52. The Supreme Court has never precisely defined "liberty," but it has frequently stated that the term encompasses more than mere freedom from physical restraint. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). More recently, the Court indicated that a person's liberty is infringed when charges are made against him that "might seriously damage his standing and associations in his community," or endanger his "good name, reputation, honor, or integrity." Board of Regents v. Roth, 408 U.S. 564, 572-74 (1972).

53. *See, e.g.*, Sheiner v. Florida, 82 So. 2d 657 (Fla. 1955); *In re* Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940); *In re* Rouss, 221 N.Y. 81, 116 N.E. 782, *cert. denied*, 246 U.S. 661 (1917).

54. *In re* Ruffalo, 390 U.S. 544 (1968); Spevack v. Klein, 385 U.S. 511 (1967).

55. 385 U.S. 511 (1967).

Court overruled an earlier decision[56] and held that the fifth amendment privilege against self-incrimination is available to lawyers in disbarment proceedings. Justice Douglas, writing for the Court, reaffirmed the holding of *Malloy v. Hogan*[57] that the self-incrimination clause is applicable to the states through the fourteenth amendment, and added that "it extends its protection to lawyers as well as other individuals, and . . . it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."[58] Referring to the language in *Malloy* that the state may not impose a penalty[59] for invocation of the privilege, Justice Douglas further stated that "penalty" did not refer only to fine or imprisonment, but to "any sanction which makes assertion of the Fifth Amendment privilege 'costly.' "[60] The threat of disbarment, with the consequent loss of professional standing and livelihood was not only costly, the *Spevak* Court concluded, but represented as powerful a form of compulsion as the use of the legal process against one accused of a crime.[61]

Though the Supreme Court never explicitly stated in *Spevack* that disbarment was a criminal penalty, given the language of the fifth amendment[62] and the Court's broad definition of "penalty," the conclusion seemed inescapable. The next year, in considering another disbarment appeal in *In re Ruffalo*,[63] the Court hardly resolved the uncertainty when it dubbed disbarment trials "adversary proceedings of a quasi-criminal nature."[64] Attorney Ruffalo had been brought before the Ohio State Bar Association's Board of Commissioners on Grievances and Discipline on charges of soliciting clients in Federal Employers' Liability Act cases. He testified that he had hired an employee of the railroad company not to solicit clients among its employees, but only to investigate cases for him.[65] The Board subsequently added the hiring of one of the railroad's employees to investigate the

56. Cohen v. Hurley, 366 U.S. 117 (1961).
57. 378 U.S. 1 (1964).
58. 385 U.S. at 514.
59. 378 U.S. at 8.
60. 385 U.S. at 515.
61. *Id.* at 516.
62. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.
63. 390 U.S. 544 (1968).
64. *Id.* at 551.
65. *Id.* at 546.

company as a charge against Ruffalo, and he was disbarred for that offense; the only evidence offered in the proceeding was the testimony of Ruffalo and of the investigator.[66] The Court reversed Ruffalo's federal disbarment on the ground that he had been denied procedural due process in that he had had no notice of the precise nature of the charges before the proceedings began.[67] In holding the attorney entitled to procedural due process, the *Ruffalo* Court noted, "[D]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer."[68] Thus, though the Court never defined the term "quasi-criminal,"[69] it clearly indicated that it considered the gravity of the disbarment sanction sufficient to warrant substantial due process protection in any proceeding in which this sanction might be invoked.

State and lower federal courts have generally resisted the notion that disciplinary proceedings are actually criminal in nature.[70] This is a predictable reaction since to conclude otherwise would require significant changes in those proceedings, such as the assumption of a greater burden of proof by the state.[71] Though recognizing that the potentially drastic consequences to an attorney require that disciplinary proceedings fully comply with due process,[72] courts also point to the special function of such proceedings as inquiries into the fitness of officers of the court to continue to serve in a position of public trust.[73]

66. *Id.* at 546-47. Ruffalo was disbarred from the federal district court in Ohio following his state disbarment. Only the federal disbarment was before the Court on this appeal.

67. *Id.* at 552.

68. *Id.* at 550 (citing Spevack v. Klein, 385 U.S. 511, 515 (1967); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866)).

69. The *Ruffalo* Court cited *In re* Gault, 387 U.S. 1 (1967), as support for its use of the term "quasi-criminal." 390 U.S. at 551. *Gault* held that juvenile cases, though they had been traditionally labeled civil rather than criminal proceedings, must be vested with many of the procedural safeguards required in adult criminal trials, because the possible sanctions in juvenile court could be as severe as those in criminal court. 387 U.S. at 30, 49-50. In later decisions the Supreme Court held that the standard of proof required for juveniles accused of a crime is "beyond a reasonable doubt," *In re* Winship, 397 U.S. 358, 368 (1970), but also that there is no constitutional right to a jury trial in juvenile court, McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

70. *See, e.g., In re* Ming, 469 F.2d 1352, 1353 (7th Cir. 1972); *In re* Echeles, 430 F.2d 347, 349 (7th Cir. 1970); Mildner v. Gulotta, 405 F. Supp. 182, 191 (E.D.N.Y. 1975), *aff'd,* 425 U.S. 901 (1976); Javits v. Stevens, 382 F. Supp. 131, 138 (S.D.N.Y. 1974); Black v. State Bar, 7 Cal. 3d 676, 687, 499 P.2d 968, 974, 103 Cal. Rptr. 288, 294 (1972); *In re* Schwarz, 51 Ill. 2d 334, 282 N.E.2d 689, *cert. denied,* 409 U.S. 1047 (1972); Howell v. State, 559 S.W.2d 432, 435-36 (Tex. Ct. App. 1977).

71. The present standard of proof in disciplinary cases is "by a preponderance of the evidence." Charlton v. FTC, 543 F.2d 903, 906-07 (D.C. Cir. 1976); Committee on Legal Ethics v. Graziani, 200 S.E.2d 353, 355 (W. Va. 1973), *cert. denied,* 416 U.S. 995 (1974).

72. *See, e.g., In re* Bithoney, 487 F.2d 319, 323 (1st Cir. 1973); Erdmann v. Stevens, 458 F.2d 1205, 1210 (2d Cir. 1972); Mildner v. Gulotta, 405 F. Supp. 182, 192 (E.D.N.Y. 1975), *aff'd,* 425 U.S. 901 (1976).

73. *See, e.g., In re* Echeles, 430 F.2d 347 (7th Cir. 1970); Mildner v. Gulotta, 405 F. Supp.

The implication is that the public must be protected from unethical lawyers, and that this effort will be thwarted if erring attorneys must be afforded the full panoply of criminal due process. One answer to this argument is that the public in general will also receive the benefit of procedures tending to protect all members of the bar from removal without just cause; another, of course, is that the choice was made in the Constitution to afford the individual faced with severe penalties fair treatment even though such treatment involves a risk to society that a guilty person may go unpenalized.

Assuming for the moment that the vagueness standard for criminal statutes marks the upper limit of the Code's position on the scale, one may first consider the *minimum* level of specificity that the Code should be required to meet. Employment regulations in general, as concluded above, would be placed below criminal statutes but above other civil statutes in the hierarchy of vagueness analysis. The lawyers' Code, however, should arguably receive stricter scrutiny for vagueness than the regulations of other groups such as public employees. Attorneys must spend considerable time and money in order to become qualified for a license to practice law. The loss of that license[74] is usually, therefore, a greater deprivation of property than that suffered by a public employee who is dismissed from a job. The public employee, moreover, may often be able to find new employment that requires the same or similar skills, whereas the disbarred attorney is forbidden to use, anywhere in the state, the very skills he spent such time and energy acquiring. The former has lost a job, while the latter has been deprived of his profession.[75] Furthermore, disbarment, or even the lesser sanctions of suspension and reprimand, is by its nature a public penalty, marking the lawyer who suffers it a betrayer of public trust. The loss of reputation and public opprobrium attached to the punishment of attorneys for ethical violations thus infringe their liberty and bring these

182, 191-92 (E.D.N.Y. 1975); State v. Turner, 217 Kan. 574, 579, 538 P.2d 966, 973-74 (1975) (per curiam).

74. Disbarment is, of course, the stiffest of several possible penalties against an attorney once disciplinary action is begun by a state bar. Violations of the disciplinary rules may also result in suspension of an attorney's license to practice law for a specified period of time, or in issuance of a public or private reprimand or a letter of caution. Though the actual penalty imposed on an attorney would be a factor in a claim by that individual that the rule he was accused of violating was unconstitutionally vague, a vagueness standard for the Code must reflect that disbarment is a possible punishment for violation of any disciplinary rule.

75. Deprivation of a profession has been recognized to be a more serious property loss than that of a job. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895-96 (1961).

sanctions closer to the character of criminal penalties than are the range of sanctions normally invoked against public employees.

The foregoing analysis suggests that in terms of vagueness the Code should be closer to the top of the scale, approaching the specificity required of criminal statutes, than are other employment regulations. Rather than attempting to define the appropriate vagueness test by debating whether disciplinary proceedings should be labeled civil or criminal, it will be helpful to consider the substantive content of the term "quasi-criminal," used by the Supreme Court to characterize such proceedings. Given that the Court did not go so far as to conclude that all the due process safeguards of criminal trials should be transplanted to disciplinary proceedings, a reasonable interpretation of the term "quasi-criminal" in this context is that because the possible sanction against the individual attorney is grave, some of the procedural safeguards required in ordinary criminal trials will be carried over to disciplinary proceedings, unless the protection thereby gained for the individual is not significant enough to offset the resulting social and administrative costs. In terms of the vagueness test, the disciplinary rules of the Code should be required to meet the same strict standard of specificity as are criminal statutes if the added protection for the attorney and the accompanying benefit to the public outweigh the social cost resulting from the imposition of the strict standard.

Obviously, the clearly defined boundary between ethical and unethical conduct that would be required under a strict test for vagueness would be of great benefit to attorneys. Because most states hold that it is incumbent on every attorney to know the disciplinary rules,[76] and the punishment for imperfect knowledge is severe, an attorney needs to have clear notice of what conduct is forbidden. And to the extent that receiving clear notice of what conduct is deemed unethical will discourage attorneys from engaging in that conduct, the public will likewise receive a benefit from precise rules. On the other hand, requiring the Code to be precisely worded would not add the administrative costs that would be occasioned by the addition of other components of criminal proceedings, such as jury trials and the requirement of proof beyond a reasonable doubt, to disciplinary proceedings.

Furthermore, vaguely worded rules may invite state bar associations, or factions thereof, to weed out attorneys who are unorthodox or politically unpopular by current standards. This has happened in the

76. *See, e.g.*, State v. Alvey, 215 Kan. 460, 524 P.2d 747 (1974).

past, during periods of political dissension and backlash in the bar, and vague requirements such as proof of "good moral character" or lack of "moral turpitude" have provided the vehicle.[77] The presence of standardless rules such as DR 1-102[78] leaves open the possibility that it could occur again.

Arbitrary enforcement can be expected if, for example, there is no consensus on what types of conduct are included in the phrase "prejudicial to the administration of justice." The lack of consensus on the meaning of this phrase is illustrated in *Howell v. State*,[79] in which an attorney, during a hearing on a previous citation for contempt, became a witness for himself on his motion for a continuance. He testified that he had asked four different attorneys to represent him on the charge, but each had refused because of the fear of possible prejudice in future appearances before the judge involved. When ordered to name the four attorneys, Howell refused, and his refusal became the basis for a charge of violating DR 1-102(A)(5), for which he was tried before a jury.[80] The jury found that Howell had refused to answer the question from the court, but also found that this refusal did not constitute conduct prejudicial to the administration of justice.[81] The judge, however, set aside the jury's second finding and held that the issue was a question for the court;[82] finding Howell guilty, the court ordered him publicly reprimanded. The Texas Court of Appeals affirmed.[83]

This disagreement on the meaning of "prejudicial to the administration of justice" might have occurred because the jury were laymen and failed to appreciate the legal meaning of the term. The court, however, rejected a vagueness challenge to the rule by referring to its common everyday meaning.[84] Of course, there is no indication that the use of DR 1-102 in *Howell* was motivated by personal or political reasons,

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77. *See* Konigsberg v. State Bar, 353 U.S. 252, 262-63 (1957); Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966); Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L.L. REV. 301, 312-14 (1970); Comment, *The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings: Whatever Happened to Spevack*, 23 VILL. L.J. 127, 135-36 (1977).

78. *Quoted in* note 3 *supra*.

79. 559 S.W.2d 432 (Tex. Ct. App. 1977).

80. *Id.* at 433-34. Howell was also cited for contempt for his refusal to answer. The misconduct charge by the bar seems excessive because he was acting as a witness at the time, and because the information sought by the court was not really relevant to the merits of his case or essential for purposes of his motion for a continuance.

81. *Id.* at 434.

82. *Id.*

83. *Id.* at 438.

84. *Id.* at 435-36.

but it illustrates the ease with which the rule could be employed when such motivations exist.[85]

In one sense, however, a Code consisting only of narrowly drawn rules might be considered contrary to the public interest. When prohibited conduct is narrowly defined, there is a greater likelihood that some types of conduct generally thought to be undesirable when engaged in by attorneys will not be covered by the proscription, either because such conduct was not foreseen by the drafters, or because it is very close to the forbidden zone, but not within it. Thus, it could be argued that like the regulations governing the conduct of civil servants,[86] the disciplinary rules cannot feasibly be made specific because they must govern too broad a range of conduct or too disparate a group.

Yet attorneys as a professional group would probably be considered more homogeneous than the civil servants in *Arnett v. Kennedy*[87] and *Waters v. Peterson*,[88] in which broadly worded regulations were upheld.[89] Additionally, the civil service regulations sought to set out a common standard of job protection for employees performing a variety of tasks,[90] while the Code's disciplinary rules are intended to define prohibited conduct and are backed by penal sanctions.[91] Thus, though it would not be an easy task for the bar to draft a Code consisting only of precisely drawn rules, it does not appear that the task is made impossible by the nature of the legal profession. And in view of the serious penal sanctions backing the present rules, the bar can reasonably be expected to make the extra effort needed to achieve clarity. As the court noted of the police regulations in *Bence*, that the bar was able to formulate forty other, more specific grounds for reprimand or disbarment in the Code, each of which would also presumably constitute

85. Arbitrary use of DR 1-102 is facilitated by the practice of allowing bar associations to try an attorney on various factual charges of misconduct, and name the various disciplinary rules violated only upon pronouncement of a guilty verdict. *See, e.g.*, Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974); State v. Alvey, 215 Kan. 460, 524 P.2d 747 (1974).

86. *See* notes 26-28 and accompanying text *supra*.

87. 416 U.S. 134 (1973).

88. 495 F.2d 91 (D.C. Cir. 1973).

89. Although attorneys do engage in widely varying forms of practice and frequently work in nonlegal areas, they all must attain a law degree and their work will generally involve legal problems. A civil servant, on the other hand, may be anyone from the lowest-level clerk to the highest bureaucrat, and the tasks involved range from typing to complex scientific analysis.

90. Arnett v. Kennedy, 416 U.S. at 159.

91. *See* notes 54-69 and accompanying text *supra*. In justifying their decisions, the courts in both *Arnett* and *Waters*, in contrast, noted that the civil service regulations were not intended to define criminal conduct. *See* 416 U.S. at 159; 495 F.2d at 99.

"conduct prejudicial to the administration of justice," indicates that the regulation of the legal profession could be effected through more precise language than that employed in DR 1-102.[92]

Furthermore, the mere possibility of arbitrary and discriminatory enforcement has been an important factor in Supreme Court decisions voiding criminal statutes for vagueness,[93] indicating that the Court considers that danger important enough to outweigh the countervailing risk that precise statutes will not cover all undesirable conduct. Thus one may conclude that the disciplinary rules, in view of the purpose they are intended to serve, could fairly be held to the exacting standard of specificity required of criminal statutes, and that applying such a standard should not, on the whole, be contrary to the public interest.

One final consideration in this discussion of the degree of specificity to be required of the Code must be whether the legal profession is sufficiently cohesive and differentiated from society by its own history and traditions to give content to seemingly imprecise professional rules and to justify the application of a more lenient standard of vagueness to those rules, along the lines of that applied to the Military Code in *Parker v. Levy.* This rationale has been adopted by some courts,[94] but for several reasons it appears misplaced. Though new lawyers have generally received instruction on the ABA Code in law school in the same manner that new recruits in the military have been versed on the Military Code, it is less likely in the legal context than in the military context that the interpretations of those respective codes will be uniform. Moreover, the myriad interpretations of the ABA Code by various state and federal courts cannot carry the same authority as the years of narrowing construction of the Code of Military Justice by the

92. For examples of the use of DR 1-102 to cover a variety of sins, see State v. Martindale, 215 Kan. 667, 527 P.2d 703 (1974) (per curiam), in which an attorney was indefinitely suspended by the state bar for violations of DR 1-102(A)(5) and DR 7-109(B) (prohibiting the secretion of witnesses). The Kansas Supreme Court found that attorney Martindale's actions (he met the state's witnesses by chance outside the courtroom and, not knowing they were under subpoena, advised them that they did not have to testify; he then neglected to inform the court that they had been there) did not amount to a violation of DR 7-109(B), but was conduct prejudicial to the administration of justice under DR 1-102(A)(5), because the attorney's silence misled the court. The court reduced the indefinite suspension to a public censure. *Id.* at 673, 527 P.2d at 707. And in State Bar v. Semaan, 508 S.W.2d 429 (Tex. Ct. App. 1974), the Texas Bar found an attorney had violated DR 1-102(A)(5) by criticizing a judge, on the basis of his qualifications, in a letter to a newspaper. The bar ordered a formal reprimand; the state court reversed it on appeal and found no violation of the Code. *Id.* at 434.

93. *See* notes 9 & 10 and accompanying text *supra.*

94. *See, e.g., In re* Bithoney, 486 F.2d 319, 324 (1st Cir. 1973); *In re* Keiler, 380 A.2d 119, 126 (D.C. Ct. App. 1977); State v. Nelson, 210 Kan. 637, 640, 504 P.2d 211, 214 (1972) (per curiam).

United States Court of Military Appeals. Although the word "prejudicial" in the phrase "conduct prejudicial"—the legal counterpart of the military's "conduct unbecoming"—may be found in frequent use throughout the legal system, this is hardly proof for the proposition that all attorneys would agree on the parameters of the conduct it defines, though they might well agree that certain types of conduct *would* fall within it.[95]

Aside from such core areas of agreement, however, the legal profession is simply not as homogeneous, traditional and specialized in function as the military, whose unique character and customs were found to give a uniform content to the Military Code. Justice White has said that an attorney should not be disbarred under an unspecific standard if responsible attorneys would differ in appraising the propriety of the conduct cited.[96] Because responsible attorneys will inevitably differ over the meaning of "prejudice," "fitness" and "moral turpitude," and the conduct they define, the traditions of the legal profession are not adequate to fill in the gaps in those vague standards.[97]

Moreover, the Military Code provision was upheld under a diluted standard of vagueness review because the special responsibilities of servicemen in defense of the country, and the overriding need for discipline and obedience in the armed forces justify more limited constitutional rights for servicemen than for civilians.[98] Though lawyers also have special responsibilities to the public as officers of the court, those responsibilities are not thought sufficient to warrant a similar restriction of their rights; the Supreme Court has on several occasions affirmed that lawyers must be guaranteed the same constitutional rights as laymen.[99]

Thus there appears to be no compelling reason why the lawyers' Code should not be required to meet the same exacting standard of specificity as that required of criminal statutes. Because the scrutiny of statutory language must of necessity be tailored to the purpose and function of the particular statute under review, however, it appears to

95. *See, e.g.*, Office of Disciplinary Counsel v. Campbell, 463 Pa. 472, 482, 345 A.2d 616, 621-22 (1975) (DR 1-102)(A)(5) and (6) are "arguably vague," but clearly applied to petitioner's conduct, which included fraudulent receipt of money for supposed illegal destruction of evidence).

96. *In re* Ruffalo, 390 U.S. at 555-56 (White, J., concurring).

97. On the growing stratification and lack of homogeneity in the legal profession in the twentieth century, see J. AUERBACH, *supra* note 4, at 40-73.

98. Parker v. Levy, 417 U.S. at 758-59.

99. *See, e.g.*, Spevack v. Klein, 385 U.S. at 516. *See also* Garrity v. New Jersey, 385 U.S. 493, 500 (1966).

be impossible to define that standard in absolute terms (at least, the Supreme Court has not done so). But in practical terms, application of this standard means that if a statute or rule contains key words that are incapable of precise definition, this flaw will not be excused on grounds such as the mildness of its sanctions or the particular defendant's knowledge that his conduct came within the prohibition. Under such a standard, several of the disciplinary rules, notably DR 1-102, should be found unconstitutionally vague.[100] Furthermore, some of the rules clearly affect first amendment rights of lawyers, and thus should be subjected to the strictest standard of vagueness analysis.[101] Some of the provisions of DR 7-107, concerning trial publicity, provide a good example of the vagueness problems in this area of the Code, because they directly control speech and have been a frequent source of litigation.

In the area of trial publicity, the first amendment rights of attorneys to comment on cases presently in litigation may conflict with the sixth amendment right of an accused to a fair trial before an impartial tribunal. Attorneys and courts generally agree that when this confrontation occurs, the attorney's right to speak must give way, to the extent necessary to protect the right to a fair trial.[102] Rules restricting speech, however, must be drawn as narrowly as possible in order to avoid greater constraints on speech than the necessary minimum.[103]

DR 7-107(D), (G) and (H) limit an attorney's extra-judicial remarks during the trial of a criminal, civil, or administrative matter by forbidding, at the minimum, comment on any matter "reasonably likely to interfere with a fair trial" of the action; DR 7-107(E) employs the same standard to limit comments prior to the imposition of sentence in a criminal proceeding.[104] The United States Court of Appeals

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100. DR 1-102 presents the most obvious vagueness problem of all the rules because it appears intended to function as a catchall for any offenses not covered by the other rules. DR 7-107 will be discussed as the best example of vagueness in a rule affecting sensitive first amendment rights. Some of the more specific rules, however, also contain key words without precise meaning, making it difficult to determine exactly when the line between lawful and prohibited conduct is crossed. Examples of such rules include DR 5-105(A) ("A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be *adversely affected* by the acceptance of the proffered employment . . . ."); DR 6-101(A)(3) ("A lawyer shall not: . . . *Neglect* a legal matter entrusted to him"); DR 9-101(B) ("A lawyer shall not accept private employment in a matter in which he had *substantial responsibility* while he was a public employee.") (emphasis added).

101. *See* notes 13-15 and accompanying text *supra*.

102. *See, e.g.*, 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, 1143 (E.D. Va. 1976), *aff'd in part, rev'd in part sub nom.* Hirschkop v. Snead, No. 76-2016 (4th Cir. Mar. 2, 1979).

103. Procunier v. Martinez, 416 U.S. 396, 413-14 (1974).

104. DR 7-107, Trial Publicity, provides in pertinent part:

for the Seventh Circuit held, in *Chicago Council of Lawyers v. Bauer*,[105] that this standard made the rule unconstitutionally vague and overbroad; the next year, a federal district court upheld the same rule against a vagueness challenge.[106] The *Bauer* court considered that, to pass constitutional muster, the rules must each incorporate the standard of "serious and imminent threat" of interference with a fair trial or the fair administration of justice as the threshold of prohibited speech.[107] This narrower formulation would put the lawyer on stricter notice of what was forbidden, and would eliminate the overbreadth

(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 extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

. . . .

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extra-judicial 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:

. . . .

(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:

. . . .

(5) Any other matter reasonably likely to interfere with a fair hearing.

105. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *See generally* Note, *Professional Responsibility—Trial Publicity—Speech Restrictions Must Be Narrowly Drawn*, 54 TEX. L. REV. 1158 (1976).

106. Hirschkop v. Virginia State Bar, 421 F. Supp. 1137 (E.D. Va. 1976), *aff'd in part, rev'd in part sub nom.* Hirschkop v. Snead, No. 76-2016 (4th Cir. Mar. 2, 1979). The United States Court of Appeals for the Fourth Circuit upheld the specific limitations on statements by lawyers made prior to trial or disposition without trial of a criminal matter found in DR 7-107(B) and (C) with the "reasonable likelihood of interference with a fair trial" standard as an implied qualifier. Hirschkop v. Snead, No. 76-2016, slip op. at 9-27 (4th Cir. Mar. 2, 1979), *aff'g in part, rev'g in part* Hirschkop v. Virginia State Bar, 421 F. Supp. 1137 (E.D. Va. 1976). The court further held, however, that the restrictions on speech during bench trials, sentencing proceedings, disciplinary and juvenile proceedings, and civil trials were overbroad, and it concluded that the catchall proscription on statements about "other matters that are reasonably likely to interfere with a fair trial" in DR 7-107(D)-(H) was unconstitutionally vague. Slip op. at 33-37.

107. 522 F.2d at 249-50. *See also* Markfield v. Association of the Bar, 49 App. Div. 2d 516, 370 N.Y.S.2d 82 (1975) (incorporating "clear and present danger" standard into provisions of DR 7-107).

problem, though the rule would still suffer from vagueness without specific rules as examples of speech that would presumptively pose a "serious and imminent threat" to a fair trial or (in the pretrial stages covered in DR 7-107(A), (B) and (C)) the fair administration of justice.[108] Additionally, the *Bauer* court held that some of the specific provisions of DR 7-107 must be articulated more narrowly than at present.[109]

In contrast, the United States District Court for the Eastern District of Virginia concluded in *Hirschkop v. Virginia State Bar*[110] that the "reasonably likely" standard offered the least drastic, effective method of protecting an accused's right to a fair trial against prejudicial publicity.[111] The standard provided adequate notice, the court reasoned, when considered in the context of its applicability only to trial lawyers, who should know what statements would be reasonably likely to interfere with a fair trial.[112] Accepting defendant's assurance that the specific restrictions in DR 7-107(A), (B), (G) and (H) were to be read as incorporating the "reasonably likely" standard, the district court held that the rules were constitutional.[113]

The *Bauer* court's reasoning with regard to the language of DR 7-107 appears to reflect more accurately the concerns expressed in the doctrine of vagueness than that of the *Hirschkop* court. The *Bauer* court applied an exacting standard of specificity to the rule, which is appropriate in light of its encroachment on first amendment rights and the serious sanctions for its violation. The *Hirschkop* court, on the other hand, evaluated the rule in terms of the standard in *Civil Service Commission v. National Association of Letter Carriers*,[114] in which the United States Supreme Court upheld civil service regulations that were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."[115] This standard, however, is less exacting than

108. 522 F.2d at 250.

109. The court invalidated any presumption of a serious and imminent threat arising from a defense attorney's extra-judicial statements during the investigative stages of a criminal trial, *id.* at 253, held that the catchall "or other matters" language of 7-107(D) must be eliminated, *id.* at 256, and, finally, rejected any presumption of a serious and imminent threat arising from extra-judicial statements made during a civil proceeding, *id.* at 258.

110. 421 F. Supp. 1137 (E.D. Va. 1976), *aff'd in part, rev'd in part sub nom.* Hirschkop v. Snead, No. 76-2016 (4th Cir. Mar. 2, 1979). For a statement of the court of appeals' holding, see note 106 *supra.*

111. *Id.* at 1145-46.

112. *Id.* at 1148.

113. *Id.* at 1155.

114. 413 U.S. 548 (1973).

115. *Id.* at 579, *quoted with approval in* Hirschkop v. Virginia State Bar, 421 F. Supp. at 1148.

that which should be applied to rules that may be the basis for "quasi-criminal" disciplinary action against a lawyer.[116]

The *Hirschkop* court further relied on a presumption that the rule would apply only to experienced trial lawyers. In one of the more cogent statements of the idea that legal history and traditions supply the content for otherwise vague rules, the court opined: "The use and meaning of the word 'reasonable' is as familiar to a lawyer as is the meaning of the word 'faith' to a priest. Both are difficult to define but a lawyer knows what reasonable means just as a priest knows what faith means."[117] Since even a priest could hardly deny that "faith" means something different to each individual, this is actually a compelling statement of the case for replacing "reasonable" as the key word marking the boundary between permissible and punishable speech.

Not only does the present formulation fail to give adequate notice of forbidden conduct, because reasonable attorneys would disagree about what statements would be reasonably likely to interfere with a fair trial, but its vague terms invite arbitrary and discriminatory enforcement against controversial attorneys in this sensitive area. In fact, a pretrial settlement in the *Hirschkop* case itself included an acknowledgement by the Virginia State Bar that the grounds of the past charges against Hirschkop under DR 7-107 did not actually constitute violations, but appeared to have arisen in cases in which the complainants disagreed with the causes supported and espoused by the accused attorney.[118] Finally, the *Bauer* court properly considered the public interest to be a factor in its decision. It emphasized the public's right to know, and pointed to the usefulness of attorneys as informed, credible sources of information on pending litigation and as potential checks on government abuses.[119] As long as the accused's right to a fair trial receives full protection, which it would under a "serious and imminent threat" standard, it is in the public's interest to receive as much information as possible, from all sources, about the operation of the judicial system. Thus the public interest factor, in addition to the other considerations that should affect the analysis of vagueness in the Code, indicate that DR 7-107 should be subjected to the most exacting standard of specificity, and under that standard should be found unconstitutionally vague.

116. *See* notes 56-71 and accompanying text *supra.*

117. 421 F. Supp. at 1148.

118. *Id.* at 1140. As a result, the charges had been dropped, and on this acknowledgment, all parties defendant in the present suit were dropped except the Supreme Court of Virginia. The court then took jurisdiction of the declaratory judgment action alone.

119. 522 F.2d at 250.

IV. Conclusion

The ABA Code of Professional Responsibility, which is designed to regulate the legal profession by delineating approved and forbidden conduct, frequently does so in inappropriately broad terms. As a result, there is a significant possibility that attorneys may be disbarred or otherwise disciplined for actions they did not perceive to be unethical or violative of a disciplinary rule. The lack of precision in the rules also allows selective enforcement of their provisions if state bar committees are so inclined, and may result in curtailment of attorneys' first amendment rights to a greater extent than the necessary minimum. When these dangers are placed alongside the severity of possible sanctions for violations of the rules, the need for greater clarity is apparent. Though the public may require protection from unethical lawyers, this goal can be accomplished as effectively with precise rules as with vague ones. Thus, the fundamental policies of the void-for-vagueness doctrine as it has developed in the United States Supreme Court lead to the conclusion that some of the disciplinary rules of the Code should be declared unconstitutionally vague. The federal courts, however, are traditionally reluctant to interfere in this sphere, which is considered to be the prerogative of the states to control. Court decisions actually voiding the rules for vagueness are therefore unlikely unless wholesale violations of attorneys' constitutional rights begin to occur. The ABA should not wait for that unlikely eventuality, however, but should itself confront the problem by eliminating unnecessary vagueness from the Code.

Martha Elizabeth Johnston