Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107: *Hirschkop v. Snead*

I. INTRODUCTION

Disciplinary Rule 7-107 (DR 7-107) of the American Bar Association's (ABA) Code of Professional Responsibility restricts attorneys' extrajudicial comments about cases with which they are associated.[1] The ABA Code, which consists of canons, ethical considerations, and disciplin-

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 7-107 [hereinafter cited as DR 7-107]:

(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 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.

(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 the 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 tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

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

(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 extrajudicial 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.

ary rules, is a model for jurisdictions to adopt if desired. When the rules are adopted in a jurisdiction, a lawyer's conduct cannot fall below the standard set by the rules without the lawyer being subject to disciplinary action. Most jurisdictions have adopted DR 7-107, and in those jurisdictions it has the binding effect of law.[2]

Adoption of the rules by the Supreme Court of Virginia[3] rendered attorneys practicing in that state subject to the trial publicity restrictions of DR 7-107. From 1965 to 1975, Philip J. Hirschkop, an attorney involved in many "unpopular" civil liberties and civil rights cases, was the subject of half of the complaints filed with the Virginia State Bar Association charging violations of DR 7-107. One complaint was filed after he told the press that he was representing an indicted prison official because the official was "a good guy." In settling Hirschkop's suit against it for discriminatory application of the rule, the State Bar agreed the complaints against him were meritless. Still, Hirschkop brought suit to challenge the constitutionality of DR 7-107.[4]

(E) After the completion of the 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.

(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.

2. *See* note 27 *infra*.

3. *See* Hirschkop v. Snead, 594 F.2d 362 (4th Cir. 1979) (en banc).

4. 594 F.2d at 362. *See* text accompanying notes 62-66 *infra*.

The issue had been previously decided, by the Seventh Circuit Court of Appeals, on the complaint of a group of Chicago attorneys. In *Chicago Council of Lawyers v. Bauer*,[5] the Seventh Circuit held that the rule was unconstitutional, determining that a "serious and imminent threat" to a fair trial was necessary before attorneys' comments could be proscribed.

In *Hirschkop v. Snead*, however, the Fourth Circuit, sitting en banc, disagreed with the Seventh Circuit on several counts. Most notably, the Fourth Circuit held that the "reasonable likelihood" standard presently prescribed by the rule is constitutionally adequate.[6]

In the four years between these two decisions, a committee of the ABA (the Goodwin Committee) reviewed DR 7-107 and recommended that several substantial changes be made to the rules. Later, in the draft of the new model rules, issued after the *Hirschkop* decision, the Kutak Commission included some of the changes recommended by the Goodwin Committee.[7] As a result of the two court of appeals decisions and the ABA's recommended changes, the constitutionality of the present ABA rule is uncertain.

This Case Comment will examine the development of DR 7-107, critically analyze the basis of the Fourth Circuit's decision in *Hirschkop v. Snead*, and discuss the present and future status of DR 7-107 and the ABA's recommended changes to the rule.

II. HISTORY OF DR 7-107

A. *The Birth and Development of Disciplinary Rule 7-107*

The conflict between the first amendment's protection of free speech[8] and the sixth amendment's protection of a fair trial[9] is nearly as old as our nation.[10] The general concern of the courts in this conflict has been to prevent prejudicial comments from reaching jurors.[11] Over the years, courts have employed various measures in an effort to prevent such

5. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

6. Hirschkop v. Snead, 594 F.2d 362, 362 (4th Cir. 1979) (en banc).

7. *See* text accompanying note 43 *infra*.

8. U.S. CONST. amend. I reads, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

9. U.S. CONST. amend VI reads, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

10. *See* Cooper, *No Comment Rules: A Delicate Balance of Fundamental Rights*, 30 MIAMI L. REV. 459, 460 n.7 (1976) [hereinafter cited as Cooper] in which the author notes:

> 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 press, and that cannot be limited without being lost.'"

11. In Patterson v. Colorado, 205 U.S. 454, 462 (1907), the Court noted: "[T]he conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influences."

prejudice: change of venue, sequestration, appeals, cautions to the jury, and extensive voir dire.[12]

In the 1960's, courts developed the trend of reversing convictions on appeal whenever it was determined that a fair trial had been prevented due to prejudicial publicity.[13] In the 1966 *Sheppard v. Maxwell* decision,[14] however, the Supreme Court, reversing the conviction of Dr. Sam Sheppard for the murder of his wife because prejudicial publicity had denied him his right to a fair trial, recognized that reversals did not effectively combat the prejudicial publicity problem. The Court laid down the following mandate:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the *trial courts must take strong measures* to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.
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> . . . But we must remember that *reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.* Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.[15]

The Supreme Court's directive in *Sheppard v. Maxwell* has been implemented in two ways.[16] Some courts have relied upon specific pretrial orders to restrict comment by participants in pending litigation,[17] on a case-by-case basis. Using a different approach, the ABA and many courts have adopted "no comment" rules that restrict the release of specific information by attorneys involved in pending litigation. These "no-comment" rules have evolved from the findings of several studies conducted in efforts to satisfy the *Sheppard* mandate. The scope and results of these studies will now be considered.

The concern with attorney comment as it relates to the free press-fair trial issue is not new. Canon 20 of the ABA Canons of Professional Ethics

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12. Cooper, *supra* note 10, at 461.

13. Sheppard v. Maxwell, 384 U.S. 333 (1966) (prejudicial and inflammatory publicity denied defendant fair trial and due process); Estes v. Texas, 381 U.S. 532 (1965) (televising criminal proceedings held to be inherently prejudicial); Rideau v. Louisiana, 373 U.S. 723 (1963) (venue not changed when an interview in which defendant confessed to the crime had been televised repeatedly); Irvin v. Dowd, 366 U.S. 717 (1961) (trial court failed to grant a second change of venue when confronted with inflammatory and prejudicial publicity).

14. 384 U.S. 333 (1966).

15. *Id.* at 362-63 (emphasis added).

16. *See* Note, 10 GA. L. REV. 289, 295 (1975).

17. *See, e.g.*, Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).

has long recommended that attorneys "avoid" *ex parte* statements.[18] It was not until 1968, however, that the Reardon Report, following the *Sheppard* mandate, recommended that specific disciplinary rules be adopted by the ABA and the courts.[19] Spurred by the Warren Commission's urging that efforts be made to balance the fair trial and free press considerations,[20] the ABA's Advisory Committee on Fair Trial and Free Press (the Reardon Committee) had been formed prior to the *Sheppard* decision to study the problems. After considering the issues in light of the decision in *Sheppard*, the Reardon Committee recommended standards aimed at preventing prejudicial publicity in criminal proceedings.[21] Recognizing that the prosecution or defense attorney who releases information to the news media about the defendant and the trial is one of the chief sources of prejudicial publicity in a criminal case,[22] the Reardon Report recommended prohibiting release by counsel of information or opinions in connection with pending criminal litigation if there is a "reasonable likelihood" that such comment might interfere with a fair trial or otherwise prejudice the due administration of justice.[23]

The Judicial Conference of the United States also examined the free press-fair trial issue following the *Sheppard* decision. The Judicial Conference assigned to its Committee on the Operation of the Jury System (the Kaufman Committee) the task of studying "the necessity of promulgating guidlines [sic] or taking other corrective action to shield federal juries from prejudicial publicity in light of the Supreme Court's

18. ABA CANONS OF PROFESSIONAL ETHICS No. 20 [hereinafter cited as CANON 20] provides:

> 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.

As early as 1915, Judge Orrin N. Carter of the Supreme Court of Illinois wrote:

> [I]t is fitting to call attention to publications in the newspapers by counsel as to pending litigation. The canons of ethics are right in saying that such publications may interfere with a fair trial of the case, and prejudice with due administration of justice. The difficulty of selecting an unprejudiced jury is only found in this country in cases that have attracted great public attention. The troubles in this regard should not be accentuated by members of the legal profession.

O. CARTER, ETHICS OF THE LEGAL PROFESSION 71 (1915).

19. ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft 1968) [hereinafter cited as REARDON REPORT].

20. *Id.* at 19. THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 242 (1964) [the Warren Commission] found that a fair and impartial trial would not have been possible for Lee Harvey Oswald due to the massive amount of publicity.

21. REARDON REPORT, *supra* note 19, at 1. *See also* Scheurich, *The Attorney "No Comment" Rules and the First Amendment*, 21 ARIZ. L. REV. 61, 63 (1979).

22. REARDON REPORT, *supra* note 19, at 76-77. The Reardon Committee also concluded, at this point, that Canon 20 is too general and has never been enforced; thus, the Committee looked to specific rules both to clarify the standards of conduct and to provide a means of enforcement for such standards.

23. *Id.* at 84-85. *See also* Hicks, Chicago Council of Lawyers v. Bauer: *Gag Rules—The First Amendment vs. the Sixth*, 30 S.W.L.J. 507, 509 (1976).

recent decision in *Sheppard v. Maxwell.*"[24] The Kaufman Committee recommended, in substance, the adoption of the Reardon Committee's proposed rules,[25] opining that "each United States District Court has the power and the duty to control the release of prejudicial information by attorneys who are members of the bar of that court" and recommending "action by local rule to restrict the release of such information on penalty of disciplinary action."[26]

The guidelines drawn by the Reardon Committee and approved by the Kaufman Committee were adopted by the ABA and, subsequently, by many courts[27] as the substantial portion of DR 7-107.[28]

B. *Pre*-Hirschkop *Constitutional Challenge to DR 7-107 in* Chicago Council of Lawyers v. Bauer

The first challenge to DR 7-107, by an association of local lawyers in 1975, was decided by the Seventh Circuit Court of Appeals in *Chicago Council of Lawyers v. Bauer.*[29] Finding the "reasonable likelihood" standard overbroad and thus constitutionally infirm, the Seventh Circuit held that a "narrower and more restrictive" standard should apply.[30] The court determined that the standard formulated in *Chase v. Robson*[31] and reaffirmed by *In Re Oliver*,[32] two Seventh Circuit decisions, should apply, stating that "[o]nly those comments that pose a 'serious and imminent

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24. REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS—FAIR TRIAL" ISSUE, 45 F.R.D. 391, 392 (1968) [hereinafter cited as KAUFMAN REPORT].

25. *Id.* at 407:

> The Committee is recommending the adoption in substance of the proposed Canon as it appears in Section 1.1 of the Proposed Final Draft of the Reardon Report. In the interest of establishing a uniform standard of conduct for attorneys in criminal cases in both the state and the federal courts throughout the country, the Committee feels that there is merit in adopting in substance the formulation proposed to be included in the American Bar Association's Code of Professional Responsibility.

26. *Id.* at 401.

27. G. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 19 (1978): "The . . . [disciplinary rules] consist of imperatives formulated in the form of administrative regulations and were designed for adoption by appropriate legal authority with the binding effect of the law. The Code indeed has been so adopted, sometimes with amendments, in most of the states."

Specifically, DR 7-107 was adopted by the Supreme Court of Virginia and was challenged in *Hirschkop*. Rule 1.07 of the Northern District Court of Illinois' Local Criminal Rules, challenged in *Bauer*, also implemented the "reasonable likelihood" standard.

28. Reardon, *The Fair Trial-Free Press Standards*, 54 A.B.A.J. 343 (1968).

29. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

30. *Id.* at 249.

31. 435 F.2d 1059 (7th Cir. 1970). In *Chase*, the Seventh Circuit found a gag order issued by the District Court for the Northern District of Illinois to be unconstitutional, holding that "[B]efore 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 1061, *citing* Craig v. Harney, 331 U.S. 367 (1947).

32. 452 F.2d 111 (7th Cir. 1971). In *Oliver*, the court rejected as unconstitutional a policy adopted by the district court that contained a blanket prohibition against all extrajudicial comment by counsel in all pending cases.

threat' of interference with the fair administration of justice can be constitutionally proscribed."[33]

The court thus decided that the "serious and imminent threat" standard must be an element of any prohibition.[34] It further determined that specific disciplinary rules incorporating that standard would still be necessary to avoid vagueness,[35] but placed the burden of proof on the defendant. The court reasoned:

> We think that it is proper to formulate rules which would declare that comment concerning certain matters will presumptively be deemed a serious and imminent threat to the fair administration of justice so as to justify a prohibition against them. 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 serious and imminent threat, but the burden would be upon him.[36]

Examining the specific provisions of DR 7-107 in this light, the court found two provisions of the rule that would not be constitutional even if the serious and imminent threat standard were incorporated. First, DR 7-107(A),[37] which proscribes comments relative to criminal matters during the investigative stages before arrest or indictment, cannot be constitutionally applied to defense attorneys under the *Chicago Council of Lawyers* decision. The Seventh Circuit determined that, because great discretion is lodged in the prosecutor during the investigatory state, attorneys representing those parties subject to investigation should be able to inform the public of the existence of such proceedings—the political process being an important check on the prosecutor's abuse of his discretion.[38] Second, DR 7-107(G),[39] which applies no-comment rules to attorneys involved in civil actions, was found "constitutionally impermissible if deemed presumptively prohibited." The court based this determination on the distinction drawn between civil and criminal litigation: the greater value placed on impartiality in criminal than in civil proceedings, the usually greater length of civil trials, the broader discovery allowed by the civil rules, and the nature of civil trials being such that important social issues may be involved.[40]

The plaintiffs in *Chicago Council of Lawyers* also contended that the

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33. 522 F.2d at 249.

34. *Id.* at 251.

35. *Id.* at 250.

36. *Id.* at 251.

37. *See* note 1 *supra.*

38. 522 F.2d at 253. The court found DR 7-107 (A) to be "too vague in terms of its application to attorneys other than those involved on behalf of the Government" and "too broad for the benefit that may be derived."

39. *See* note 1 *supra.*

40. 522 F.2d at 258. The social benefit of allowing "uninhibited comment by knowledgeable attorneys involved in civil litigation" was stressed by the court. *Id.* at 259.

restrictions should not apply to cases in which the jury is sequestered or the bench is the trier of fact. The Seventh Circuit rejected these arguments, reasoning that an unedited newspaper or broadcast might reach a sequestered jury[41] and that "judges are human" and may be influenced by inadmissible outside information.[42]

Thus, the Seventh Circuit rejected the "reasonable likelihood" standard, approved the presumptive use of categories of restrictions on attorneys' comments so long as the "serious and imminent threat" standard is incorporated, rejected the presumption as it applies to defense attorneys in the investigative stage and to civil proceedings, and approved the application of a revised no-comment rule to criminal trials tried by the bench or by a sequestered jury.

C. *The Post-*Chicago Council of Lawyers *and Pre-*Hirschkop *Proposed Revision of DR 7-107 by the ABA's Goodwin Committee*

In response to the Seventh Circuit's decision in *Chicago Council of Lawyers* and the commentary that ensued, the ABA's Standing Committee on Association Standards for Criminal Justice assigned to a Task Force on Fair Trial and Free Press the job of re-evaluating the attorney comment standards.[43] This Task Force (the Goodwin Committee) recommended substantial amendment to the present no-comment rules dealing with criminal proceedings, primarily by replacing the "reasonable likelihood" standard with the "clear and present danger" standard: "A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication if such dissemination would pose *a clear and present danger to the fairness of the trial.*"[44] Classifying extrajudicial public comment about criminal proceedings as "pure speech," the Committee determined that such comment "enjoys the strongest possible presumption of first amendment protection."[45] As a result, the Committee concluded that, to be constitutional, sanctions on public comment by attorneys must pass the four-step analysis reaffirmed in 1978 by the United States Supreme Court in *Landmark Communications, Inc. v. Virginia*:[46]

> (1) Does the restriction advance a legitimate governmental interest? (2) Does the public comment pose an extremely serious threat to the governmental interest sought to be protected? (3) Does that threat appear likely to occur imminently? (4) Is the restriction on public comment necessary to secure the protection or advancement of the governmental interest in jeopardy?[47]

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41. *Id.* at 256.

42. *Id.* at 256-257, *citing* Cox v. Louisiana, 379 U.S. 559 (1965).

43. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 1 (2d Tent. Draft 1978) [hereinafter cited as GOODWIN REPORT].

44. *Id.* at 1 (emphasis added).

45. *Id.* at 2.

46. 435 U.S. 829, 845 (1978).

47. GOODWIN REPORT, *supra* note 43, at 3. In *Landmark Communications*, the Supreme Court reaffirmed earlier decisions that applied the clear and present danger test to the use of the contempt

The Goodwin Committee, comparing the standard promulgated in their proposed amended rules and that promulgated by the court in *Chicago Council of Lawyers*, found:

> As a first amendment formulation . . . the serious and imminent threat standard is substantively indistinguishable from clear and present danger. Indeed, the serious and imminent threat language appears to have been used first in *Bridges v. California*. . . . The Court's purpose there was to articulate the "working principle" on which the clear and present danger standard was based. Thus, the serious and imminent threat terminology was and is a part of the judicial gloss on the clear and present danger test and is not distinct from it. In view of the apparent choice between equivalents, the clear and present danger language has been retained in this standard.[48]

Although the proposed rules follow *Chicago Council of Lawyers* by adopting a stricter standard, they do not embrace the use of presumptive restrictions embodied in that case and the original rule. The original rule sets out a scheme of statements that were prohibited per se.[49] In *Chicago Council of Lawyers*, the Seventh Circuit held that per se prohibitions were permissible only if they incorporated the serious and imminent threat test.[50] The Goodwin Committee, however, abandoned the scheme of per se prohibitions in favor of case-by-case adjudication under the clear and present danger" restriction, "permitting disciplinary action against the comment[51] that are designed to further limit the scope of the "clear and present danger" restriction, " permitting disciplinary action against the attorney only when an extrajudicial statement meets the requirements of clear and present danger and, in addition, relates to one of the six enumerated categories of information about a criminal matter."[52] This modification is explained by the Committee as "the major departure from the first edition":

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power to punish out-of-court comments. *See, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946): Bridges v. California, 314 U.S. 252 (1941).

48. GOODWIN REPORT, *supra* note 43, at 3 (citation omitted).

49. *See* note 1 *supra*.

50. *See* text accompanying note 36 *supra*.

51. Paragraph (b) of Standard 8-1.1 of the Goodwin Report reads:

> (b) Subject to paragraph (a) [if such dissemination would pose a clear and present danger to the fairness of the trial], from the commencement of the investigation of a criminal matter until the completion of trial or disposition without trial, a lawyer may be subject to disciplinary action with respect to extrajudicial statements concerning the following matters:
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> (i) the prior criminal record (including arrests, indictments, or other charges of crime), the character or reputation of the accused, or any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case;
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> (ii) the existence or contents of [a] statement given by the accused, or the refusal or failure of the accused to make any statement;
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> (iii) the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test;
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> (iv) the identity, testimony, or credibility of prospective witnesses;
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> (v) the possibility of a plea of guilty to the offense charged, or other disposition; and
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> (vi) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

GOODWIN REPORT, *supra* note 43, at 1.

52. *Id.* at 4.

> This change reflects the judgment that, while such statements might undermine trial fairness, it is by no means inevitable. Indeed, in the vast majority of criminal cases, extrajudicial statements by trial attorneys have no impact at all. The failure to take full account of this consideration is the central weakness of the first edition.[53]

By defining the "boundaries within which the clear and present danger test applies," the Committee felt that the problems of overbreadth and vagueness would be eliminated.[54] In addition to the use of presumptions, the Report also clearly rejects the holding in *Chicago Council of Lawyers* that the burden of proof would be on the attorney charged with a violation: "[t]here is no apparent justification for this allocation, which runs counter to the general practice of placing the burden of proof on the party charging a violation to establish each element of the claim."[55]

These proposed revised rules retain the scope of the original rules, which apply from the beginning of a criminal investigation through the sentencing; however, a single standard governs the entire period in these rules, as opposed to the application of separate standards to the various phases by the original rules. Also, the Goodwin Committee recommended that the rules continue to apply to both jury and bench trials, recognizing, however, that

> [a] strong argument can be made for limiting the application of [the proposed rule] to jury trial cases. The jury is far more vulnerable to the effects of prejudicial publicity than the trial judge, who by training and experience is equipped to rule solely on the basis of legally relevant and admissible evidence.[56]

The Goodwin Committee also rejected the *Chicago Council of Lawyers* distinction between defense and prosecution attorneys as "impractical," recommending that the rules continue to apply to both.[57]

The House of Delegates of the ABA adopted the final report of the Goodwin Committee in August of 1978 by voice vote.[58] That was the status of the proposed changes at the time of the *Hirschkop* decision.[59] When *Hirschkop*[60] reached the Fourth Circuit Court of Appeals in March of 1979,[61] the court was faced with a rule that had its roots in the long-

53. *Id.*

54. *Id.*

55. *Id.* at 4 n.29.

56. *Id.* at 2 n.3.

57. *Id.* at 2 & n.4.

58. Scheurich, *supra* note 21, at 80.

59. Since that time, on January 30, 1980, the ABA's Commission on Evaluation of Professional Standards (the Kutak Commission) released the Discussion Draft of the Model Rules of Professional Conduct, which agrees on several points with the Goodwin Report. Because the draft was released after the *Hirschkop* decision, however, it will be examined in this Comment following the discussion and analysis of *Hirschkop*. MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980) [hereinafter cited as KUTAK REPORT].

60. 594 F.2d 356 (4th Cir. 1979) (en banc).

61. The case was argued before a panel of the Fourth Circuit on October 3, 1978, but the en banc decision was not handed down until March 2, 1979. 594 F.2d at 356.

standing fair trial-free press debate, a decision by another circuit court of appeals that found the rule unconstitutional, and a proposed revision of the rule by a Committee of the ABA, the very body that promulgated the original rule.

III. THE FOURTH CIRCUIT'S DECISION IN *Hirschkop v. Snead*

A. *The Facts and District Court Holding*

In 1974, Philip J. Hirschkop, a licensed Virginia attorney, brought suit against the Virginia State Bar in the United States District Court for the Eastern District of Virginia, Richmond Division.[62] Hirschkop, who had been involved in many civil rights and civil liberties cases, was the subject of eleven of the twenty-two complaints filed with the Virginia State Bar from 1965 to 1975 charging violations of DR 7-107.[63] In his original complaint, Hirschkop claimed that DR 7-107 was unconstitutional both on its face and in its application. Hirschkop alleged that the rule was unconstitutionally applied in a "discriminatory pattern of harassment against [Hirschkop] individually based upon the Bar's disapproval of the causes [he] espoused."[64] Hirschkop and the Bar reached a settlement, which was approved by the district court, of the claim regarding the rule's application. The Bar admitted that the complaints against Hirschkop "were meritless" and Hirschkop agreed to dismiss his claims against the State Bar.[65] As a result, the only issue presented at trial was the facial constitutionality of DR 7-107, and the only remaining defendants were the members of the Supreme Court of Virginia who adopted it.[66]

The district court found that the Supreme Court of Virginia had construed the rule as a general rule explained by specific examples, rather than as specific proscriptions. The court also found that, as a matter of logic, the rule applied only to prosecuting attorneys during the investigatory stage. Based on these findings, the district court determined, on July 30, 1976, that DR 7-107 is facially constitutional—that the rule is "a reasonable regulation as to time, manner and place which accordingly does not suffer from the infirmities of vagueness or overbreadth."[67] Following the district court's decision, Hirschkop brought his appeal to the Fourth Circuit Court of Appeals.

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62. Hirschkop v. Virginia State Bar, 421 F. Supp. 1137 (E.D. Va. 1976), *aff'd in part and rev'd in part sub nom.* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc).

63. 594 F.2d at 362.

64. Brief for Appellant at 2, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc).

65. 594 F.2d at 363.

66. 421 F. Supp. at 1140. The district court opinion was published as Hirschkop v. Virginia State Bar, although the claims against the State Bar were dismissed pursuant to settlement. The Fourth Circuit decision properly named the justices of the Virginia Supreme Court as defendants. It should be noted, however, that Mr. Chief Justice Snead retired on September 30, 1974, and was succeeded by Mr. Chief Justice I'Anson, also named as a defendant. Brief for Appellees at 3, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc).

67. 421 F. Supp. at 1156-57.

B. *The Fourth Circuit's Holding and Reasoning*

The Fourth Circuit Court of Appeals, sitting en banc, affirmed in part and reversed in part the district court's decision. In addition to the court's per curiam opinion, Judge Phillips filed a concurring opinion, Judges Winter and Butzner filed an opinion in which they concurred in part and dissented in part, and Judge Widener filed a separate concurring and dissenting opinion.[68] The court of appeals held that a "reasonable likelihood" that the public comment would be prejudicial to the fair administration of justice was a more appropriate standard than the "serious and imminent threat" standard.[69] The court, however, limited its holding to criminal and juvenile jury trials, finding the rule unconstitutionally overbroad in its application to attorneys associated with bench trials,[70] civil litigation,[71] administrative hearings,[72] and disciplinary hearings.[73] Certain provisions of the rule were also found to be void for vagueness.[74]

1. *Application of the Reasonable Likelihood Standard*

In examining the standard required by the Constitution, the court determined that any qualification of the specific restrictions was necessary only "to take care of the unusual case in which, because of extraordinary circumstances, there is no likelihood of a prejudicial effect" from release of information whose dissemination is expressly prohibited by the rules.[75] The court directed its attention in this matter to DR 7-107(B), which enumerates specific items that may not be released by an attorney associated with a criminal matter between the stages of the filing of the complaint and the commencement of the trial.[76] The court approved each of these proscriptions as information the release of which would be so inherently prejudicial that it could be proscribed, with qualification. The court found that, although the prohibitions are not explicitly qualified by the reasonable likelihood standard, the Supreme Court of Virginia construed the prohibitions to be implicitly qualified. The court found it necessary to qualify the rule so that the specific proscriptions would not apply in the unusual cases in which the release of the specific information would not be likely to result in prejudice. As an example, the court noted that, should James Earle Ray escape from prison, it could not be said that the prosecutor's announcement that Ray had been serving a sentence for the

68. 594 F.2d at 357.
69. *Id.* at 362.
70. *Id.* at 371.
71. *Id.* at 373.
72. *Id.* at 374.
73. *Id.* at 372.
74. *Id.* at 370-71.
75. *Id.* at 368.
76. *See* note 1 *supra.*

murder of Dr. Martin Luther King would be likely to affect Ray's rights adversely.[77]

Regarding the standard imposed by that qualification, the court upheld the "reasonable likelihood of interference" criterion, finding that this test "divides the innocuous from the culpable, adds clarity to the rule and makes it more definite in application."[78] Several reasons were cited for approving this standard over the stricter tests espoused by the appellant and adopted by the Seventh Circuit in *Chicago Council of Lawyers*[79] and the Goodwin Committee.[80] First, the court felt that the rule, with the "reasonable likelihood of interference" qualification, very clearly and definitely informs lawyers of what information they may and may not make public. It was pointed out that the attorney who releases proscribed information knows he is threatening the defendant's right to a fair trial; therefore, the court felt that tribunals should be able to prohibit such action "without extended controversy over the immediacy and gravity of the threatened harm in the particular case."[81] Second, the court distinguished this case from cases, primarily contempt proceedings, in which the clear and present danger test has been applied. The court found this case to be "wholly incomparable," the contempt proceedings being invoked based upon the "vague and general standards" of courts' contempt power and the disciplinary sanctions being invoked based upon "explicit" rules.[82] The court's final justification for the retention of DR 7-107's standard was the language found in the *Sheppard* decision:

> In *Sheppard v. Maxwell* the Supreme Court stated that "where there is a reasonable likelihood the prejudicial news" would prevent a fair trial, the judge should take remedial action or grant a new trial. The statement was made with respect to the action the court should take to retrieve the situation after the harm is done, but the Court, in *Sheppard v. Maxwell*, also stated that the court must adopt rules and regulations which avoid the harm in the first place. If remedial action is required on the basis of a reasonable likelihood test, and it is, the rules for the avoidance of the harm must be considered under the same test. Implicitly if not explicitly, the Supreme Court must have approved the reasonable likelihood standard for the application of the preventive rules.[83]

Circuit Judges Winter and Butzner, in their concurring and dissenting opinion, disagreed with the court's approval of the reasonable likelihood standard. They recommended that all of DR 7-107 be declared unconstitutional: "To be constitutional, a disciplinary rule must limit its restraints on speech to statements that pose a clear and present danger to

77. 594 F.2d at 367-68.
78. *Id.* at 370.
79. *See* text accompanying note 33 *supra.*
80. *See* text accompanying note 44 *supra.*
81. 594 F.2d at 368.
82. *Id.* at 369.
83. *Id.* at 369-70.

the fairness of a criminal trial. Rule 7-107 does not satisfy that test."[84] These judges disagreed with the majority's conclusion that the reasonable likelihood standard was implicitly approved by the Supreme Court in *Sheppard*, opining that "it is unlikely that the Court implicitly approved a shift from the clear and present danger standard . . . to a reasonable likelihood standard . . . without even commenting on the subject."[85] Cases in which the Supreme Court developed and applied the clear and present danger standard were examined by the justices,[86] who pointed out that the validity of these cases was recently affirmed in *Landmark Communications, Inc. v. Virginia*.[87] The two judges also emphasized the prospective nature of the rule in distinguishing their result from the majority's construction of the language in *Sheppard*. They pointed out that when a court applies the reasonable likelihood test to determine whether the due process clause has been infringed, it views the evidence retrospectively. Because DR 7-107 operates prospectively, the dissenting judges observed:

> When a lawyer speaks about a pending case, he frequently does not know how the case will develop, how his remarks will be interpreted and reported, how much community interest will arise, or what steps the trial judge will take to avoid prejudice. Therefore, a lawyer can only speculate whether his comments might later be judged to have created a reasonable likelihood of prejudice because of contingencies that he might not foresee. Under these circumstances, the prudent course is to avoid all comment . . . . [L]awyers must restrict their speech "to that which is unquestionably safe." This sweeping proscription offends the first amendment.[88]

These judges added that their position was also supported by the ABA's proposed revision of DR 7-107, which "served as a prototype for Virginia's rule."[89]

2. *Limitation of the Rule's Application to Criminal Jury Trials*

The court's finding that DR 7-107 is constitutional as it stands was limited only to those provisions dealing with criminal trials. The portions of the rule applying to bench trials, civil actions, and disciplinary and administrative proceedings were rejected as unconstitutionally overbroad. Having decided early in the opinion that the first part of the two-step test formulated by the Supreme Court in *Procunier v. Martinez*[90] was satisfied because "courts have a substantial interest in assuring every person the

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84. *Id.* at 379.

85. *Id.* at 380.

86. *Id.* at 379-80. The court cited Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941); and Schenck v. United States, 249 U.S. 47 (1919).

87. 435 U.S. 829, 845 (1978).

88. 594 F.2d at 380, *quoting* Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

89. 594 F.2d at 381. *See* GOODWIN REPORT *supra* note 43.

90. 416 U.S. 396 (1974).

right to a fair trial," the court applied the second part of the test to determine whether the restrictions imposed by the rule are overbroad:[91] "Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[92]

a. *The Rule is Unnecessarily Overbroad as it Applies to Bench Trials*

The court found that DR 7-107's inclusion of bench trials is unconstitutionally overbroad under the *Martinez* test because "the gain to fair bench trials is minimal, and the restriction on first amendment rights is substantial."[93] To support this conclusion, the Fourth Circuit examined several factors. The court pointed out that reversals due to prejudicial publicity have historically occurred in jury trials and that no comments that a lawyer could make about a pending case had been disclosed that would "be more prejudicial than the information a judge must consider as he separates the wheat from the chaff during the course of an ordinary bench trial."[94] The court thus opined, "when it becomes apparent that the case is to be tried by a judge alone, we see no compelling reason for restricting lawyers' comments in order to assure a fair trial."[95]

Circuit Judge Widener agreed in his concurring and dissenting opinion with the majority's conclusion that DR 7-107 should not apply to bench trials; he did not agree, however, with the majority's reasoning in finding the rule invalid for overbreadth. Troubled by the fact that the same rule, DR 7-107(B), set aside for overbreadth as it applies to bench trials, was held valid earlier in the opinion as it applies to jury trials, Judge Widener concluded, "[t]he reason to invalidate the regulation . . . should be . . . that there is no reasonable likelihood of impairing the integrity of the trial, not that the regulation does more than do so."[96]

b. *The Rule is Unnecessarily Overbroad as it Applies to Civil Actions*

Disciplinary Rule 7-107(G), which restricts the comments of attorneys who are associated with civil actions,[97] was also determined to be unconstitutionally overbroad under the *Martinez* test because the restrictions of DR 7-107(G) on free speech "are not essential to fair civil trials."[98] Recognizing that civil litigants must also be assured the right to a

91. 594 F.2d at 363. It should be noted at this point that, in his concurring opinion, Judge Phillips agreed with both the court's reasoning and result. Judge Phillips felt, however, that an additional governmental interest should be emphasized: "The state has an interest independent of individuals' fair trial rights in protecting the integrity of certain essential judicial processes that are critical in the adversary system." *Id.* at 376.

92. *Id.* at 363, *quoting* Procunier v. Martinez, 416 U.S. 396, 413 (1974).

93. 594 F.2d at 372.

94. *Id.* at 371.

95. *Id.*

96. *Id.* at 383.

97. *See* note 1 *supra.*

98. 594 F.2d at 373.

fair trial, the court of appeals nevertheless pointed out several differences between criminal jury trials and civil trials—differences which led to their conclusion that the rule should not apply to civil cases. The court emphasized that civil cases are usually of greater length and often involve questions of public concern about which public debate can often be enlightened by timely attorney comment. The court also noted that the Reardon Committee made no recommendations concerning civil actions, the court had not been presented with any empirical data showing the need to restrict attorneys' comments to protect civil actions from prejudice, and no reversals due to prejudicial publicity were known to have been ordered in civil trials. Thus, the court based its conclusion on "[t]he dearth of evidence that lawyers' comments taint civil trials and the courts' ability to protect confidential information."[99]

Judge Widener concurred in the result that DR 7-107(G) should be struck down as it applies to civil bench trials. He took issue, however, with the majority's finding that the rule is overbroad, pointing out the similarities between it and the provisions validated by the court in DR 7-107(B). Judge Widener stated that the regulation should be invalidated because the civil bench trial does not need the rule's protection. He disagreed with the majority's decision that the rule should not apply to civil jury trials. Finding that "civil jury trials, like criminal, also deserve to be protected," Widener believed that "no empirical data is needed to show that if a criminal jury may be influenced a civil jury must similarly be, for they are the same men and women."[100]

c. *The Rule is Unnecessarily Overbroad as It Applies to Disciplinary and Administrative Proceedings*

The court of appeals found the rule overbroad in its application to disciplinary and administrative proceedings for many of the same reasons that it cited in finding the rule's provisions relating to bench trials and civil actions overbroad.

The comments of attorneys associated with professional and juvenile disciplinary proceedings are restricted by DR 7-107(F).[101] With respect to professional disciplinary proceedings, the court based its finding of unconstitutional overbreadth on the same reasoning that it proferred for finding the provisions relating to bench trials invalid. Implicit in this conclusion was the court's finding that professional disciplinary proceedings are rarely tried by juries.[102]

Applying that same reasoning to juvenile proceedings, the court held that when a juvenile is to be tried by a judge, there is "no justification for

99. *Id.*
100. *Id.* at 382.
101. *See* note 1 *supra.*
102. 594 F.2d at 372.

limiting lawyers' comments to insure fairness of the trial."[103] The court, however, concluded that the rule may be constitutionally applied to jury trials of juveniles, just as it may be applied to other criminal jury trials.[104]

Similarly, the court applied the reasoning it had earlier applied to civil actions to administrative proceedings, comments during which are limited by DR 7-107(H).[105] The court found that the state "has not proved that the limitations on first amendment rights found in Rule 7-107 are essential to insure the fairness of administrative hearings." Thus, the court held that DR 7-107(H) does not satisfy the *Martinez* test and is unconstitutionally overbroad. The court once again looked to the issues of public concern often involved in such proceedings, as well as the lack of evidence that any previous administrative decision had been set aside due to prejudicial publicity.[106]

As in the case of the application of the rules to criminal and civil bench trials, Judge Widener also agreed that DR 7-107(F) and DR 7-107(H) should be invalidated, but felt that such a result should be reached because there is no reasonable likelihood of impairing the integrity of the proceeding, not because those portions of the rule are overbroad.[107]

Thus, because the restrictions imposed by several of the provisions of DR 7-107 were found to be "greater than is necessary or essential" to the protection of an individual's right to a fair trial, the following provisions were held to be unconstitutionally overbroad: DR 7-107(B) as it applies to bench trials; DR 7-107(G), applying to civil actions; DR 7-107(F) as it applies to disciplinary proceedings and juvenile bench proceedings; and DR 7-107(H), applying to administrative proceedings. By process of elimination, the court approved only the constitutionality of DR 7-107(B) as it applies to criminal jury trials and DR 7-107(F) as it applies to juvenile jury proceedings.

3. *Certain Provisions of DR 7-107 are Void for Vagueness*

The court also found that certain provisions of DR 7-107 are unconstitutional because of vagueness. Vague rules are defined in the decision as rules that "offend the due process clause because they deny a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' "[108] The provisions of the rule declared to be void for vagueness were DR 7-107(D), (G) (5), (H) (5) and (E).

Disciplinary Rule 7-107(D) prohibits an attorney associated with a criminal trial from making any extrajudicial statements that relate to

103. *Id.* at 372-73.
104. *Id.* at 372.
105. *See* note 1 *supra.*
106. 594 F.2d at 373-74.
107. *Id.* at 383.
108. *Id.* at 370, *quoting* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

"other matters that are reasonably likely to interfere with a fair trial." This provision also applied to juvenile and disciplinary proceedings by DR 7-107(F). Similar restrictions are applied by DR 7-107(G) (5) and DR 7-107(H) (5) to civil and administrative actions, respectively.[109] This proscription was found to be vague in all its applications:

> This proscription is so imprecise that it can be a trap for the unwary. It fosters discipline on a subjective basis depending entirely on what statements the disciplinary authority believes reasonably endangers [sic] a fair trial. Thus neither the speaker nor the disciplinarian is instructed where to draw the line between what is permissible and what is forbidden.[110]

Another provision that was declared void for vagueness, for the same reasons, is DR 7-107(E), which prohibits an attorney from making any statement "reasonably likely to affect the imposition of sentence" during the period between the completion of the criminal trial and the imposition of the sentence. The court held "the broad proscription of statements that are 'reasonably likely to affect the imposition of sentence' is void for vagueness." However, the court also applied the *Martinez* test to the rule, reaching the same results it reached with regard to the application of the rule to jury and bench trials. It was found that limitations could be placed on attorneys' comments when a jury imposes the sentence, but could not be placed on comments when the sentence is imposed by a judge.[111]

Judge Widener also addressed the vagueness issue in his separate opinion. He concurred that these provisions, DR 7-107(D), (E), (G) (5), and (H) (5), were all invalid for vagueness. Widener did not agree, however, that DR 7-107(E) should apply even to criminal jury trials, stating that he would invalidate that portion of the rule in all cases on account of vagueness: "Assuming its applicability, however, in some instances, as the opinion of the court does, then it seems to me that if the rule is invalid on account of vagueness, as the opinion holds, it should simply be set aside."[112]

4. *Summary of the Fourth Circuit's Holding*

In summary, the court upheld the "reasonable likelihood" standard as a proper qualification of the specific rules. It held, however, that DR 7-107 is constitutional, with the qualifying standard, only as it applies to criminal and juvenile jury trials. The court rejected the rules applying to bench trials, civil actions, disciplinary proceedings, juvenile bench proceedings and administrative proceedings as overbroad. In addition, the provisions of the rule employing only the general "reasonably likely to interfere" criterion were found void for vagueness.

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109. *See* note 1 *supra.*

110. 594 F.2d at 371. *See also id.* at 373 for the court's application of this ruling to DR 7-107(G)(5) and *id.* at 374 for its application to DR 7-107(H)(5).

111. *Id.* at 372.

112. *Id.* at 383.

IV. THE STATUS OF DR 7-107 FOLLOWING THE DECISION IN *Hirschkop v. Snead*— A CRITICAL ANALYSIS OF THE FOURTH CIRCUIT'S HOLDING

As a result of *Hirschkop*, the many jurisdictions that have adopted DR 7-107 in the form recommended by the Reardon Committee are now confronted with a rule, different portions of which have been struck down as unconstitutional by two circuit courts of appeal. In addition, should the ABA adopt the proposed changes to this disciplinary rule, jurisdictions will also soon be faced with a decision whether to adopt the new rule. Thus, in light of the Seventh Circuit's decision in *Chicago Council of Lawyers* and the ABA's new proposed model rules, both of which conflict on some points with the Fourth Circuit's holding, it will be necessary for courts in the future, as they attempt to re-fashion their rules to comport with the requirements of the Constitution, to examine critically the holding in *Hirschkop* and the difficult questions it raises with regard to attorney no-comment rules.

The constitutionality of applying no-comment rules to attorneys appears to be firmly established.[113] The questions that must be answered in analyzing *Hirschkop* concern the scope and the application of those rules.

A. *What Standard, If Any, Should Qualify the Specific Prohibitions of Attorney No-Comment Rules?*

1. *May the Rules Impose Per Se or Presumptive Restrictions?*

A major point of conflict between authorities who have considered the question has been the constitutionality of per se or presumptive restrictions in the rules. The original rules designed by the Reardon Committee set out a scheme of statements that were prohibited per se.[114] The Seventh Circuit held that specific statements could be presumptively deemed a serious and imminent threat and shifted the burden of proving that the statement did not pose such a threat to the defendant-attorney.[115] The Goodwin Committee rejected the sole use of per se restrictions, favoring case-by-case adjudication under the clear and present danger test. A statement could be proscribed only when it posed such a danger *and* related to one of the enumerated restrictions.[116] In *Hirschkop*, the Fourth Circuit also found that the specific proscriptions had to be qualified to protect comments specifically prohibited by the rules, but made in those

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113. The Supreme Court's mandate in Sheppard v. Maxwell, 384 U.S. 333 (1966), indicating that courts have both the power and the responsibility to ensure a fair trial, has been extensively quoted and relied upon. *See, e.g.*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975); Hirschkop v. Snead, 594 F.2d 356, 365 (4th Cir. 1979) (en banc); *and* KAUFMAN REPORT, *supra* note 24, at 400.

114. *See* note 1 *supra*.

115. *See* text accompanying notes 34-36 *supra*.

116. GOODWIN REPORT, *supra* note 43, at 4.

unusual cases in which such comments would not be reasonably likely to interfere with a fair trial.[117]

The argument against the use of per se or presumptive restrictions is persuasive. Although the Fourth Circuit invalidated their use because of "unusual" cases, it was noted in the Reardon Report that the number of cases that may actually be prejudiced by attorney comment is relatively small. Juries try only about eight percent of all criminal cases, a small portion of which would be subject to prejudicial comments.[118]

In fact, there may very well be a number of cases in which an attorney's comment on one of the restricted areas would be highly unlikely to create prejudice; but, without a qualifying standard by which to judge such comments, they would be subject to disciplinary action under the rule's "blanket prohibition," as the Seventh Circuit noted in *Chicago Council of Lawyers*:

> We do not believe that there can be a blanket prohibition on certain areas of comment—a per se proscription—without any consideration of whether the particular statement posed a serious and imminent threat of interference with a fair trial. Yet these rules establish such a blanket prohibition whereby even a trivial, totally innocuous statement could be a violation. The First Amendment does not allow this broad a sweep.[119]

The per se prohibitions of the rule result in what one commentator has termed "unconstitutional 'overkill.' "[120]

The court's decision in *Hirschkop* against the use of per se proscriptions is, therefore, in agreement with these other persuasive authorities that have examined the issue. The specific prohibitions of the rules should be used as guidelines for case-by-case adjudication determining whether the comment comes within the specific proscription *and* violates the qualifying standard. Once this proposition is accepted by a court, the court must then consider the proper constitutional qualifying standard to be applied to the specific prohibited comments.

2. *What is the Proper Qualifying Standard?*

An examination of *Hirschkop* and the other authorities that have addressed this issue will not offer a clear-cut answer regarding the proper standard to be incorporated in a no-comment rule. The Reardon Committee and the Fourth Circuit in *Hirschkop* line up on the side of the "reasonable likelihood" test. The two dissenting judges in *Hirschkop*, the Seventh Circuit in *Chicago Council of Lawyers*, and the Goodwin Committee in their proposed new rules have determined that the Constitution requires a stricter standard—the "serious and imminent threat" or "clear and present danger" test.

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117. *See* text accompanying note 77 *supra*.

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

119. 522 F.2d at 251.

120. Scheurich, *supra* note 21, at 79.

A major difficulty with these decisions is that they have been decided in a theoretical context and still offer little guidance concerning what comments would actually be impermissible. Because the courts in these two cases were only determining the facial constitutionality of DR 7-107, these decisions offer no examples of comments that would actually violate the rule. It is still necessary, however, to formulate some standard against which attorneys may gauge their comments, even though the qualification cannot possibly provide an absolutely certain answer for every case.[121]

In establishing the proper standard, we are guided by the Supreme Court's holding in *Procunier v. Martinez*, "[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[122] This was the test employed by the court in *Hirschkop* for determining whether particular restrictions imposed by the rule were overbroad.[123]

The court's affirmation of the constitutionality of the reasonable likelihood test in *Hirschkop* appears to be based largely upon the Supreme Court's holding in *Sheppard* that remedial action should be taken whenever there is a reasonable likelihood that the trial will be prejudiced.[124] While relying on an "implicit" assumption garnered from dicta in that case, the Fourth Circuit also dismissed the long line of Supreme Court cases that have applied the clear and present danger test as "incomparable." This conclusion was based on the court's determination that those Supreme Court cases related to impositions of the contempt power on the basis of "vague and general standards," while *Hirschkop* dealt with "quite explicit" rules, employing a standard "[n]o heavier or stiffer . . . than . . . is needed."[125] Such a conclusion appears to be the result of circular reasoning. The court appears to assert the proposition that the rules—in which the reasonable likelihood test is implicit[126]—are explicit, thus the contempt cases are incomparable and the stricter standard does not have to be applied. This proposition seems to reduce to an assertion that a stricter standard does not have to be applied to rules that employ the reasonable likelihood test.

Whether or not the court's reasoning in dismissing the contempt cases is faulty, it does not seem that these cases are "incomparable" based on the distinction between the "explicitness" of the respective restrictions on speech. Like *Hirschkop*, the contempt cases concern the competing considerations of free speech and fair trial and the permissible limitation that may be placed upon one's first amendment freedoms to protect

121. *See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972), in which the Court observed: "Condemned to the use of words, we can never expect mathematical certainty from our language."

122. 416 U.S. 396, 413 (1974).

123. *See* text accompanying notes 90-92 *supra.*

124. *See* text accompanying note 83 *supra.*

125. 594 F.2d at 369.

126. *Id.* at 368.

another's fair trial freedoms. As the dissent in *Hirschkop* pointed out, if the words of *Sheppard* were meant to indicate the use of a different standard when these two interests clash in the attorney comment context, the Court certainly would have made that point clear.[127] Thus, when these competing considerations meet, whether in the context of disciplinary rules prohibiting certain comments or in the context of gag orders prohibiting certain comments, the Supreme Court's past handling of this issue must be examined.

One of the early contempt-by-publication cases is *Bridges v. California*.[128] In *Bridges*, the Supreme Court invalidated a restrictive order based upon the "reasonable tendency" to impede the fair administration of justice and applied the stricter "clear and present danger" test.[129] The Court has since decided, in *Pennekamp v. Florida*,[130] *Craig v. Harney*,[131] and *Wood v. Georgia*,[132] that the contempt power cannot punish speech unless it poses a clear and present danger to the fair administration of justice. These cases were recently reaffirmed in *Landmark Communications, Inc. v. Virginia*.[133]

It was on these decisions and their recent affirmation in *Landmark Communications* that the Goodwin Committee[134] and the dissenting judges in *Hirschkop*[135] based their decision to apply the "clear and present danger" standard. In view of the overbreadth test proferred in *Martinez*,[136] it appears that restricting comment that would be reasonably likely to interfere with a fair trial is overbroad, since it would include constitutionally protected speech in its proscription. The *Landmark Communications*, *Pennekamp*, *Craig*, and *Wood* decisions indicate that the Supreme Court has found that the stricter standard of a clear and present danger will adequately protect fair trial rights without unnecessarily infringing free speech.

B. *To What Proceedings Should Attorney No-Comment Rules Apply?*

In addition to determining whether to use per se proscriptions and what standard to use, it must be decided to what proceedings a court's no-comment rules should apply. In making this determination, it will be necessary for courts to examine carefully exactly what interests they are

127. *See* text accompanying note 85 *supra*.

128. 314 U.S. 252 (1941).

129. *Id.* at 273. *See also* Brief for Appellant at 73, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc).

130. 328 U.S. 331 (1946).

131. 331 U.S. 367 (1947).

132. 370 U.S. 375 (1962).

133. 435 U.S. 829 (1978).

134. *See* text accompanying note 47 *supra*.

135. *See* text accompanying note 87 *supra*.

136. *See* text accompanying notes 90-92 *supra*.

attempting to protect and what steps may be taken, within the bounds of the Constitution, to protect those interests.

1. *What Should Be the Scope of the Rules as They Apply to Criminal Trials?*

Most discussion, as well as most agreement, in this area has focused on the constitutionality of the general application of attorney no-comment rules to criminal cases, especially those tried by a jury. Criminal trials were the focus of the Reardon, Kaufman, and Goodwin Committees, other considerations being beyond the scope of their investigations.[137] A criminal defendant's right to a fair trial has been established as "the most fundamental of all freedoms"[138] and is clearly the interest sought to be protected by the rule as it applies to criminal trials.[139] The controversy within the criminal trial context has concerned the scope of such a rule.

In *Chicago Council of Lawyers*, the Seventh Circuit held that during the investigatory stage, the rules should only apply to prosecuting attorneys.[140] The Goodwin Report rejected this distinction as "impractical."[141] The Fourth Circuit did not address this issue in *Hirschkop*, although the district court had earlier determined that DR 7-107(A), regulating comment during the investigatory stage, applies only to prosecuting attorneys based on a "logical" reading of the provisions. The district court went on to conclude that the question of the application of the provision was really of "no constitutional consequence" because "there are no specific restrictions in DR 7-107(A)."[142] It is true that DR 7-107(A) does not specifically enumerate what comments are prohibited during the investigation of a criminal matter. On the contrary, it prohibits a wide range of comments by allowing only those comments that fit into the five permissible categories.[143] In effect, should DR 7-107(A) be applicable to only prosecuting attorneys or to both defense and prosecuting attorneys, it definitely prohibits a wide range of comment and should be further examined.

Both the Seventh Circuit and the appellant in *Hirschkop* pointed out that, as the rule now stands, it does not even allow a statement that the individual charged denies any wrongdoing. These two sources also stressed the need for a societal check on the exercise of the discretion lodged in

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137. *See* GOODWIN REPORT, *supra* note 43, at 5.

138. Estes v. Texas, 381 U.S. 532, 540 (1965).

139. *See* text accompanying notes 21-23 *supra*.

140. *See* text accompanying note 38 *supra*.

141. *See* text accompanying note 57 *supra*.

142. 421 F. Supp. at 1157. *See also* Brief for Appellees at 28 & 29, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc), which also persuasively opines that DR 7-107(A) applies only to prosecutors, noting that the language "Lawyer[s] participating in or associated with the investigation of a criminal matter" is "in stark contrast with the language of the other paragraphs, which refer to 'a lawyer *or law firm* associated with the prosecution *or defense*.' "

143. *See* note 1 *supra*.

prosecutors.[144] Thus, the public's need to know must be weighed against the protection of the defendant's right to a fair trial. It may be possible, in examining these competing considerations as related to the investigatory stage, to determine that the rule should apply only to prosecuting attorneys. It seems that such a result would accommodate both of these interests.

Another question relating to the scope of the rules as they apply to criminal trials has been raised by at least one commentator, although the courts have not addressed it. This issue relates to the type of criminal litigation in which the outcome of the trial is not of great personal consequence to the defendant but the issue itself is of great public concern. The famous trial of *Scopes v. State*[145] was cited as an example. It has been suggested that such trials should be subjected to the same analysis as civil trials.[146] It should be pointed out, however, that the interest sought to be protected must still be examined; thus, to adopt such reasoning, the court must be willing to forego protecting that defendant's fair trial rights.

2. *Should the Rule Apply to Bench Trials?*

One of the most difficult questions concerning the scope of the rules is whether they should apply to bench as well as to jury trials. The question arises in the context of both criminal and civil trials, assuming the applicability of the rules to both. In *Hirschkop*, the court found the rule to be overbroad in its application to bench trials.[147] The Goodwin Committee, acknowledging that a good argument could be made for the opposite result, nevertheless recommended that the rule continue to apply to bench trials.[148]

Several arguments can be made for applying no-comment rules to bench trials. It is often not known whether a trial will be decided by a judge or a jury until well after prejudicial statements may have been made, so protective rules may be required because of the possibility of a jury trial.[149] The Fourth Circuit, however, effectively addressed this argument by limiting its holding to "when it becomes apparent that the case is to be tried by a judge alone."[150] The argument relied upon by the Seventh Circuit in *Chicago Council of Lawyers*—that "judges are human"—is often made. Judges may be sensitive to public opinion when they depend upon election to office. Except for this additional factor, this argument does not carry

144. *See* text accompanying note 38 *supra* and Brief for Appellant at 84, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc).

145. 154 Tenn. 105, 289 S.W. 363 (1927). In *Scopes*, the issue was whether the state could prohibit the teaching of evolution in the classroom.

146. *See* Wallis, *Constitutional Law—First Amendment—Professional Ethics and Trial Publicity: What All the Talk is About*, 10 SUFFOLK L. REV. 654, 675 (1976).

147. *See* text accompanying notes 93-95 *supra*.

148. *See* text accompanying note 56 *supra*.

149. *See* Brief for Appellees at 30, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc).

150. 594 F.2d at 371.

much weight given the role judges must play in hearing evidence to determine its admissibility. A decision must be made whether this factor justifies restraints on an attorney's first amendment rights. Should a court determine that the rules should apply to civil trials, it would then have to consider these same questions as they relate to civil bench trials.

3. *Should the Rules Apply to Civil, Administrative and Disciplinary Proceedings?*

An important consideration in determining the constitutional scope of no-comment rules is the problem presented by civil trials and administrative proceedings. The sixth amendment guarantee applies only to criminal trials.[151] Apparently, the only justification for applying the rules to civil trials springs from the notion that civil litigants have a strong interest in the fair administration of justice and from the language in Justice Black's dissenting opinion in *Cox v. Louisiana*, which was quoted in *Sheppard*: "The very purpose of the court system [is] to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures."[152] Another justification might be found in Judge Phillips' concurring opinion in *Hirschkop*, emphasizing the state's interest in protecting the "integrity of its judicial processes."[153] It is doubtful, however, that any of these interests justify placing restrictions on attorney comment to the extent of DR 7-107(G).[154]

The unconstitutionality of applying these rules to civil trials is one of the few points of agreement between the Seventh[155] and the Fourth[156] Circuits in their respective decisions. Both courts emphasized the differences between civil and criminal trials, primarily the length and the public concern often involved in civil actions. The arguments of the courts are persuasive. Once again, but perhaps more crucially than in the prosecutorial investigations argument, the public's right to know is an important consideration. Hirschkop, in his brief, listed many types of cases in which the informed comment of an attorney involved in the case would be beneficial, if not vital, to the public health or safety: "environmental protection, . . . invasions of privacy by government agencies, . . . election and ballot cases, antitrust cases, consumer fraud cases, product liability cases and personal actions based on deprivations of civil rights, to name but a few."[157] It should be kept in mind, however, that the stakes are often very high in civil suits and public opinion may still be a prejudicial factor. Although the need to proscribe attorneys' speech in civil suits may

151. *See* note 9 *supra.*
152. Cox v. Louisiana, 379 U.S. 559, 583 (1967) (Black, J., dissenting).
153. *See* note 91 *supra.*
154. *See* note 1 *supra.*
155. *See* text accompanying note 40 *supra.*
156. *See* text accompanying notes 97-99 *supra.*
157. Brief for Appellant at 67, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc).

not be as great as in criminal cases, courts must still be mindful of the potential for prejudice.

The court in *Hirschkop* rejected application of no-comment rules to disciplinary proceedings except in juvenile proceedings before a jury. The Fourth Circuit's decision that the rules could not apply to professional disciplinary proceedings and juvenile proceedings before a judge was based on the same rationale applied to bench trials. This comparison is sound; thus, the same factors should be considered in determining the soundness of the court's decision. Because judges are called upon every day to hear, reject, and oblige themselves not to consider inadmissible evidence, we must consider them able to disregard publicity surrounding a case. In a like manner, the Fourth Circuit's holding that juvenile jury trials warrant the protection of the no-comment rule, likening such a proceeding to a criminal jury trial, is equally sound.[158]

V. THE ABA'S NEW PROPOSED TRIAL PUBLICITY RULE

The American Bar Association's Commission on Evaluation of Professional Standards (Katak Commission) released a Discussion Draft of the Model Rules of Professional Conduct on January 30, 1980.[159] The Kutak Commission, which plans to submit a final version of the rules to the ABA House of Delegates in February 1981, is circulating this draft to obtain comments and suggestions.[160]

Rule 3.8 of the Kutak Report, "Trial Publicity," recommends substantial changes to DR 7-107,[161] reflecting the Commission's consideration of *Hirschkop*, *Chicago Council of Lawyers*, and the Goodwin Report.[162]

A. *Qualification of the Specific Prohibitions*

Proposed Model Rule 3.8 incorporates the stricter standard of "a serious and imminent risk of prejudicing an impartial trial."[163] Thus, the Kutak Report evidences agreement with the standard prescribed by the Seventh Circuit in *Chicago Council of Lawyers*, the Goodwin Report, and the dissenting judges in *Hirschkop*.[164] Use of the stricter standard would be a great improvement over DR 7-107. It is consistent with the Supreme Court's determination, in contempt cases, that such a standard will adequately protect fair trial rights without unnecessarily infringing free speech.[165]

158. *See* text accompanying notes 102-06 *supra*.
159. KUTAK REPORT, *supra* note 59.
160. *Id.*
161. *Id.* at 77-79.
162. *Id.* at 80.
163. KUTAK REPORT, *supra* note 59, at 78.
164. *See* text accompanying notes 134 and 135 *supra*.
165. *See* text accompanying notes 128-36 *supra*.

It is not clear whether the standard in rule 3.8 is meant to qualify all specific proscriptions. Rule 3.8(a) lists specific extrajudicial statements that attorneys "shall not"[166] make. The "serious and imminent risk" standard is included at the end of the list, in 3.8(a) (2) (vi), which proscribes the release of "any other matter that similarly creates a serious and imminent risk of prejudicing an impartial trial."[167] The language "any other matter that similarly" suggests that the standard is meant to qualify the listed proscriptions so that an extrajudicial comment would violate the rule only if it fell within one of the specific proscriptions *and* created a "serious and imminent risk of prejudicing an impartial trial." This interpretation would be consistent with the authorities that have examined the original DR 7-107.[168] Interpreting rule 3.8 to disallow any of the listed comments, regardless of the threat they pose to the specific trial, would be inconsistent with the authorities discussed earlier that have considered the question. The language of the rule, however, does not clearly favor either interpretation. It could be read to apply the standard only to those comments that are not specifically proscribed. The Commission would be well-advised to indicate plainly its intention in the rule and in its comments.[169]

This same provision, 3.8(a) (2) (vi), poses a further constitutional problem, for it proscribes comments that are not specifically listed, but which create a "serious and imminent risk of prejudicing an impartial trial." In *Hirschkop*, the Fourth Circuit declared DR 7-107(D), (G) (5), (H) (5) and (E) void for vagueness. Like 3.8(a) (2) (vi), those provisions contain no specific proscription, prohibiting all comments that violate only the qualifying standard: "other matters that are reasonably likely to interfere with a fair trial." The Fourth Circuit's objection to these provisions was that "they deny a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' "[170]

Although the voided provisions of DR 7-107 are too vague to offer adequate notice of what is proscribed, that objection may not carry as much weight when rule 3.8 is tested under the "serious and imminent risk" standard. An attorney would more likely be able to know what comments might pose a "serious and imminent risk" than which of a broader class of comments might be "reasonably likely to interfere" with a fair trial. Thus, the vagueness risks of rule 3.8 are not so great as with DR 7-107, and rule 3.8 would likely survive such a constitutional challenge.

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166. In defining "shall not," the Commission notes: "Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These directly prescribe or limit the lawyer's conduct in performing professional functions." KUTAK REPORT, *supra* note 59, at 4.

167. *Id.* at 78.

168. *See* text accompanying notes 114-17 *supra.*

169. *See* text accompanying note 52 *supra.*

170. *See* text accompanying notes 108-11 *supra.*

B. *Scope of the Proposed Rule*

Proposed rule 3.8 applies to both criminal and civil litigation,[171] thereby departing from both the Fourth and the Seventh Circuits holding that DR 7-107 could not constitutionally apply to civil proceedings. Those opinions emphasized the lack of a constitutional justification for applying no-comment rules to civil trials and the need for informed public comment when issues of public concern are involved.[172] The Kutak Commission recognized the value of informed public discussion in its comments to rule 3.8, characterizing their rule as "a balance between protecting the right to a fair trial and safeguarding rights of expression":

> [T]here are vital societal interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a profound legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.[173]

Although the stakes in civil suits are not so high as in criminal trials, civil litigation can often have serious results. Also, because civil and criminal juries are composed of the same people, they are equally susceptible to prejudicial comment. As in some criminal trials, civil suits may concern issues about which members of the public should be informed to protect their health or safety. Proposed rule 3.8(b) allows an attorney to state "without elaboration," among other things, the offense or claim or defense involved, the general scope of an investigation, and a warning of danger when there is reason to believe that such danger exists.[174] The public thus could have access to information up to the point permitted by rule 3.8(b). In addition, the model rule proscribes other comment only when it creates a "serious and imminent risk of prejudicing an impartial trial."[175] Because less comment would be proscribed by the new rule than was prohibited by DR 7-107, an attorney would be able, under rule 3.8, to better inform the public when such a need exists without violating the rule.

Rule 3.8 also embraces, to some degree, the Fourth Circuit's distinction between bench and jury trials.[176] The only proscription that clearly applies to both bench and jury trials, whether civil or criminal, is 3.8(a) (1), prohibiting any extrajudicial statement that is "intended to induce the tribunal to determine the matter otherwise than in accordance with law."[177] Any attorney who, as an officer of the court, *intentionally*

171. KUTAK REPORT, *supra* note 59, at 77.
172. *See* text accompanying notes 155-57 *supra*.
173. KUTAK REPORT, *supra* note 59, at 79.
174. *Id.* at 78.
175. *See* text accompanying notes 167-69 *supra*.
176. *See* text accompanying notes 147-50 *supra*.
177. KUTAK REPORT, *supra* note 59, at 77.

attempts to undermine the integrity of our judicial system should be subject to disciplinary action. Questions may be raised, however, regarding the standard for and the burden of proving the attorney's intention to prejudice the tribunal, especially in the difficult case in which the comment also serves another purpose.

The remaining prohibitions of 3.8(a) (2) apply only to "a criminal case or a civil case triable to a jury."[178] Whether these prohibitions are intended to apply only to cases triable to a jury or to all criminal cases and only civil cases triable to a jury is not entirely clear. The latter interpretation, however, seems likely—were "triable to a jury" intended to modify both types of cases, the preferred phraseology would have been "a criminal or civil case triable to a jury." As discussed earlier,[179] determining whether these rules should apply to bench trials is a difficult question. The line drawn by the proposed rule is a desirable change. In eliminating civil bench trials from the scope of these prohibitions, the proposed rule reflects the view that judges must be able to ignore prejudicial information, just as they must not consider inadmissible evidence, when reaching a decision. Yet, by applying the prohibitions to criminal bench trials, the proposed rule reflects the view that "judges are human" and may be subject to political pressure and, given the high stakes involved in criminal matters, the rule may proscribe attorneys' comments in such cases on the chance that such a view may hold true.[180]

The final consideration with regard to the proposed rule is 3.8(c), which reads: "When evidence or information received in or relating to a proceeding is by law or order of a tribunal to be kept confidential, the lawyer shall not unlawfully disclose the evidence or information."[181] The comments state: "Paragraph (c) recognizes that special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation."[182] To state that an attorney may not make comments that violate the law or an order of the court may be stating the obvious. Rule 3.8(c) makes it plain, however, that an attorney may be subject to disciplinary action for such a violation.

In light of the authorities discussed above, if rule 3.8 does not allow the use of per se restrictions without the "serious and imminent risk" qualification, it reflects a desirable change in the attorney no-comment rule. Rule 3.8 offers stricter guidelines that should adequately protect trials from prejudice and make appropriate information available to the public. Therefore, it is more likely than DR 7-107 to pass constitutional scrutiny.

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178. *Id.* at 77.

179. *See* text accompanying notes 147-50 *supra.*

180. *See* text accompanying note 150 *supra.*

181. KUTAK REPORT, *supra* note 59, at 79.

182. *Id.* at 80.

VI. CONCLUSION

The Fourth Circuit Court of Appeals' holding in *Hirschkop v. Snead* adds more doubt to the constitutionality of several provisions of DR 7-107, an ABA disciplinary rule adopted in most jurisdictions and struck down, in part, by the few courts that have considered it. In light of these decisions and a new rule being proposed by the Kutak Commission, many courts will soon be confronted with the task of re-evaluating their present rule. The authorities that have examined DR 7-107 are not in agreement. Thus, the results may be varied, leading to greater confusion in this area. It is likely, however, that courts will be looking toward a rule that does not restrict attorneys' comments to the extent of the present version of DR 7-107. The decisions indicate that attorneys' extrajudicial comments may not be restricted to the extent they have in the past. The public's right to information, combined with a realistic analysis of an overzealous prior restriction, is resulting in a reduction in the gag rules needed to ensure fair trials. Thus, the proposed model rule has incorporated many of the changes discussed herein and, with some amendments, will provide an improved guideline in this area. Continued court opinions, however, will ultimately determine the conclusion to this topic.

Stephanie J. Baker