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ARTICLES

THE FREE PRESS-FAIR TRIAL CONFLICT—WHAT'S A LAWYER TO SAY?

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At different stages in his long legal career Oliver Wendell Holmes espoused a range of views on the First Amendment. At one point he wrote: "I . . . probably take the extremist view in favor of free speech;" at another he opined: "the 1st Amendment . . . cannot have been, and obviously was not, intended to give immunity for every possible use of language."[1] The conceptual tension reflected in those views is concretely demonstrated when the exercise of First Amendment rights comes up against a defendant's Sixth Amendment right to a fair trial. The Supreme Court, describing the right to a fair trial as "the most fundamental of all freedoms," has made clear that where there is an "irreconcilable conflict" between the two Amendments the Sixth is supreme.[2]

Conflict between the two Amendments often arises in the area of extra-judicial speech by attorneys. Although there is a Disciplinary Rule (7-107) that addresses this issue, some attorneys are either unaware of the Rule, or view it as anachronistic and/or unenforceable in this era of intense media interest in and exposure of well-known criminal trials (e.g., Claus von Bulow; Joel B. Steinberg).[3] Yet, at the same time, many within and outside the profession are expressing increased concern about trying cases in the press, the use of media consultants, and the like; such tactics are viewed as unseemly and unprofessional.[4] Courts, reluctant to enforce DR 7-

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1. O. W. Holmes, II Holmes-Pollock Letters 29 (1946); Frohwerk v. United States, 249 U.S. 204, 206 (1919). In the same year Justice Holmes made the latter observation, he also wrote his famous opinion in Schenck v. United States, 249 U.S. 47, 52 (1919)("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man for an injunction against uttering words that may have all the effect of force.").

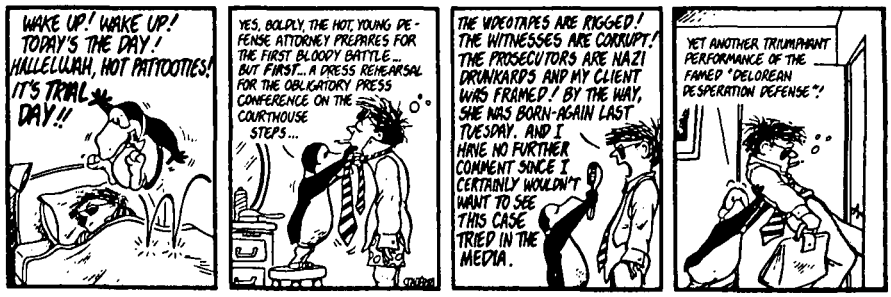
2. Estes v. Texas, 381 U.S. 532, 540 (1965); *accord* Shepard v. Maxwell, 384 U.S. 333 (1966).

3. Indeed, lawyers are taking crash courses on how to deal with the media. *See* P. Schwab, *Talking to the Press*, LITIGATION 26 (Vol. 12, No. 4, Summer 1986).

4. One of the most egregious public comments came when Joel B. Steinberg's principal defense lawyer predicted his client's conviction during the trial; that the lawyer was proved correct does not justify his extraordinary action. *See, e.g.*, N.Y. Times, Jan. 5, 1989, at B2, col. 1.

107,[5] are instead resorting to other methods of ensuring a fair trial, including: sealing documents, issuing gag orders, holding secret hearings and attempting to limit the access of the media to sensitive information.[6]

The current state of extra-judicial speech is well illustrated in the depicted cartoon from the popular Bloom County cartoon strip.[7]



In response to this situation the American Bar Association has proposed a different disciplinary rule in its Model Rules of Professional Conduct (Rule 3.6). Prominent bar associations have also issued reports on how to deal with the question, often with conflicting conclusions.[8] Perhaps this is an appropriate time to examine the free press-fair trial conflict, try to understand what is at stake and see what could improve the situation.

INTERESTS AT STAKE

There are innumerable Constitutional, governmental and societal interests involved in the free press-fair trial issue. Besides a defendant's Sixth Amendment right and a lawyer's First Amendment right, which have been already identified, they include:

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5. *See* N.Y.L.J., May 1, 1987, at 1, 2 (federal judges in charge of lawyer discipline committees in the Southern and Eastern Districts of New York were unaware of any lawyers sanctioned).

6. *See* Wall Street Journal, Apr. 24, 1989, at B5B (Federal Judge John M. Walker, in the criminal tax case against Leona and Harry Helmsley, entered an order barring attorneys, defendants and witnesses from discussing "the case, or any subject or aspect thereof, or decision relating thereto, with the press or media."); *see also* New York Times, Feb. 8, 1988, at B1, col. 2. Because of the increasingly widespread use of gag orders, the U.S. Attorney's office for the Southern District of New York has prepared a blanket memorandum to oppose their imposition, except in extreme circumstances. *See* R. Rosenwein, *Flurry of Gag Orders Worries 1st Amendment Experts*, Manhattan Lawyer 4, July 18, 1989.

7. Reprinted with permission of Berke Breathed and copyright Washington Post.

8. *Compare*, Report of the Ad Hoc Committee on Pretrial Publicity, Association of the Bar of the City of New York (1986) *with* Report of the Federal Bar Council Committee on Second Circuit Courts Concerning Extrajudicial Statements of Attorneys in Federal Criminal Cases, Federal Bar Council (1987).

(i) a defendant's Fifth Amendment right to due process of law;
(ii) the state's interest in even-handed justice;
(iii) the public's interest in having access to information about threats to its safety and steps taken by the criminal justice system to assure its security;
(iv) the judicial interest in a court's inherent power to oversee and control pending matters;
(v) the privacy interest of those who may be implicated in some way (including the victim and his or her family); and
(vi) the media's interest in informing the public.

These are all significant interests, and they frame how each person, institution or interest group analyzes the issue(s) of whether and how much of an attorney's extra-judicial speech jeopardizes someone's right to a fair trial. The breadth of these often conflicting interests makes clear that this is not merely an esoteric ethical point, with implications limited to the legal profession.[9]

RESTRAINING EXTRA-JUDICIAL ATTORNEY SPEECH: ITS HISTORY AND SCOPE

DR 7-107 is a relatively new Disciplinary Rule. It was inspired by two Supreme Court decisions in the mid-1960s,[10] as well as the Warren Commission's expressed concern, in the aftermath of President Kennedy's assassination, about balancing the public's right to know and the accused's right to a free trial.[11] Thus, rather than being a throw-back to a pre-media era, DR 7-107 was introduced just as the media era was exploding, and was designed to address this precise phenomenon.

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9. More generally, the escalating interplay between the media and the legal profession has lead to bizarre episodes like Oliver North's criminal trial, where because of the months of intensive media coverage of the Iran-Contra crises and resulting Congressional hearings (which included North's televised, immunized testimony) any potential juror was struck if he or she had read, heard or seen anything about the Iran-Contra matter. As a result, the jury panel, which was charged with evaluating very complicated matters involving the Executive and Legislative branches of the federal government consisted of people who had no knowledge of current affairs. *See* T. Draper, "Revelations of the North Trial," The New York Review of Books 54, Aug. 17, 1989.

The oddity of such a situation is heightened by the fact that it is directly contrary to the initial conception of how the jury system was to work; members of the jury were expected to be fully conversant with the facts of the case prior to trial. *See* 2 POLLOCK and MAITLAND, The History of English Law, 621-22 (2d ed. 1909).

10. *See* note 2 *supra*. For a general history of the interplay of the media and the judicial process in the United States prior to the 1960s, *see* Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1 (1961); much of the bar's attention prior to the adoption of DR 7-107 focused on the issue of whether to permit radio broadcasting and/or televising of trials. *See, e.g.*, 42 A.B.A.J. 834, 838, 843 (1956)(reporting on the Special Bar-Media Conference Committee on Fair Trial-Free Press).

11. ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 19, 19 n.1 (1968).

The Rule restricts extra-judicial attorney speech in a number of areas: criminal investigations, criminal actions, civil actions, administrative proceedings. Not surprisingly, the most controversial and litigated areas relate to the criminal process. Within that process DR 7-107 recognizes four separate stages: (1) pre-arrest or indictment, (2) post-arrest or indictment (but pre-jury selection), (3) trial (including jury selection), and (4) post-verdict (until sentencing).

In each of the first two stages the Rule details what information an attorney may and may not pass out in public. The matters on which lawyers may comment are limited, straightforward and unexceptional;[12] there has not been too much controversy about the Rule as applied to these stages.[13]

As to the latter two stages, there are no specific "dos" and "don'ts." Rather, those sub-parts of the Rule set forth a somewhat subjective standard: whether the extra-judicial speech is "reasonably likely to interfere with a fair trial;" applying this has been controversial. While some courts have upheld the "reasonably likely" standard from First Amendment challenge,[14] others have rejected it on that ground and have adopted instead a standard of "serious and imminent threat" to the administration of justice;[15] and still others have utilized a standard whereby the test is whether the extra-judicial speech is a "clear and present danger" to the administration of justice.[16] Without belittling the importance of establishing the correct First Amendment standard under which speech may be restrained,[17] this debate, in my view, does not address the real issue.

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12. What speech is allowed at the first stage (DR 7-107 (A)) is, not surprisingly, directed principally to prosecutors. The second stage (DR 7-107 (B)) applies equally to prosecution and defense lawyers, and is quite explicit in what may or may not be said in public.

13. Where the first two stages have been controversial, such controversy has been sparked by certain prosecutors' excessive media exposure, so-called "speaking" indictments read to the television audience and leaks by unidentified government officials about the progress of investigations. *See* S. Arkin, *Prosecutors' Use of Discretion and Abuse - Effect of Leaks*, N.Y.L.J., Mar. 17, 1987, at 1; S. Arkin, *Government Leaks — Breach of Investigative Confidentiality*, N.Y.L.J., Jan. 8, 1987, at 1. Excepting leaks, so long as a prosecutor stays within the boundaries of DR 7-107 (A) & (B), such speech should be tolerated, at a minimum, on the ground that the public is entitled to be aware of whether and the extent to which the criminal justice system is working to ensure justice and community safety.

14. *E.g.* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); *In re* Hinds, 449 A.2d 483 (N.J. 1982).

15. Chicago Council of Lawyers v. Bauer, 552 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

16. *In re* Markfield, 49 A.D.2d 516, 370 N.Y.S.2d 82 (1st Dept.), *appeal dismissed*, 37 N.Y. 734, 375 N.Y.S.2d 106 (1975).

17. Whether there is, in fact, a constitutionally significant difference between these standards appears doubtful. *See A Constitutional Assessment of Court Rules*

ENFORCEMENT

As stated earlier, judges have been leery of sanctioning lawyers under the third and fourth stages delineated in DR 7-107, and have instead attempted to use other techniques to ensure that media coverage does not endanger fair trials. Why? Because regardless of the appropriate First Amendment standard, it is extremely difficult to show after the fact that a lawyer knew or reasonably should have known that a statement would be a "reasonably likely" threat/"serious and imminent threat"/"clear and present danger" to the administration of justice; a judge, in light of this situation, undoubtedly finds it far easier to regulate at the outset what may and may not be disclosed.

Whether sweeping judicial prohibitions are always consistent with the First Amendment, however, is open to question.[18] And yet the other current alternative of a self-regulating legal profession being scrutinized after the fact leaves us with an unsatisfactory, "practical" answer. In the words of one authority on legal ethics: "Our standard is one of outrageousness. Discipline will be reserved for those statements that are patently indefensible."[19]Our profession can hardly be satisfied with that answer.

Instead we must attempt to design an enforceable and policeable standard which, at the same time, does not unduly/unconstitutionally restrict attorney speech. Let us examine the rule proposed by the ABA, and see whether it meets those tests.

Proposed Rule 3.6

The proposed rule differs from DR 7-107 in two significant ways. First, it employs as a First Amendment standard a "substantial likelihood of materially prejudicing an adjudicative proceeding;" this is a higher threshold which (theoretically at least)[20] would ensure more First Amendment protection for extra-judicial speech. Second, and in my view much more important, the proposed rule does not differentiate between the four stages of the criminal process; rather it sets forth what public comments would "ordinarily" fail the standard, as well as identifying what may be publicly stated "without elaboration."

Restricting Lawyer Comment on Pending Litigation, 65 CORNELL L. REV. 1106 (1980).

Nonetheless, commentators continue to debate and analyze these different standards. *See, e.g.*, Matheson, *The Prosecutor, The Press and Free Speech*, 58 FORDHAM L. REV. 865, 899-904, 922-24 (1990).

18. Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976)(unanimous Court, per curiam, struck down judicial order restraining media coverage of a criminal trial).

19. Gillers, *Free Press-Fair Trial Debate — A New Slant on an Old Practice*, N.Y.L.J., Jan. 12, 1987, at 1, 4.

20. *See* note 17 *supra*.

Comments that would fail under Rule 3.6 are simple to understand and clearly articulated. Without abridgement, they would be public statements concerning:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

From the standpoint of the least restrictive burden on speech, this enumeration meets the Constitutional tenets of clarity, precision and narrowness.[21] From an enforcement prospective, the listed items would be effective for those same reasons. Any lawyer, whether prosecutor or defense counsel, would be on notice as to what "ordinarily" would be deemed violative prior to stepping before a

21. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Chicago Council of Lawyers v. Bauer, *supra*, 552 F.2d at 251-52.

A commentator has recently written that certain provisions of Rule 3.6 are "open to vagueness and overbreadth questions," citing the bar on opinions as to guilt or innocence of a criminal defendant. *See* Matheson, *supra* note 17, at 902-03. As support for this assertion, Professor Matheson questioned whether a statement made by President Bush, in which he paraphrased advice given to him by the Attorney General on the strength of the government's case against Manuel Noriega, would be violative of the Rule. *Id.* at 903 n.216. This analysis is wide off the mark for at least three reasons. First, the President is not a lawyer and thus is not subject to disciplinary action. Second, the Attorney General's legal advice to the President (his client) is obviously not something the Attorney General "would expect to be disseminated by means of public communication." Finally, and most important, had an actual prosecutor commented to the press that he or she had a "strong case" against a particular defendant, I believe there is no vagueness or ambiguity in the Rule — the statement would clearly be in violation.

microphone — whether it be at the indictment stage, during trial or after a verdict.[22] And by that presumption, the burden would shift to the attorney of demonstrating why the circumstances of the particular case mandated what was said in public.[23]

What could be commented on in public is equally clear and unambiguous under Rule 3.6; in fact so much so that I am at a loss as to how to explain them textually any more fully than they are listed. In general, lawyers would be allowed to "state without elaboration":

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto; and/or

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.

And in criminal cases, lawyers (mainly prosecutors) could also report on:

(1) the identity, residence, occupation and family status of the accused;

(2) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

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22. Although some have taken the position that there is no harm in public comments post-trial and pre-verdict, there is a body of evidence that judges are not immune to the effects of publicity. *See* Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 120, 135-36 (1985); *see also* Craig v. Harney, 331 U.S. 367, 396 (1947)(Jackson, J., dissenting)("nothing in my experience or observation confirms the idea that [a judge] is insensitive to publicity"); Bridges v. California, 314 U.S. 252, 300 (1941)(Frankfurter, J., dissenting)("If it is true of juries it is not wholly untrue of judges that they too may be 'impregnated by the environing atmosphere.' "); 75 A.B.A.J. 30, Aug., 1989 (remarks of Chief Justice Rehnquist: "Judges . . . can no more escape being influenced by public opinion in the long run than can people working at other jobs.").

23. Chicago Council of Lawyers, *supra*, at 251-52.

Professor Matheson, in his recent article, is critical of the presumption construction of Rule 3.6, questions the nature and level of evidence needed to overcome the presumption, and argues that it is constitutionally defective because it "may mistakenly sanction speech that should be protected." Matheson, *supra* note 17, at 920. To the extent these criticisms are valid, they would apply with at least equal force to DR 7-107. Furthermore, with respect to his last criticism, Rule 3.6 presumptions arguably provide greater First Amendment protection than does DR 7-107 (*see supra* nn. 17 & 20 and accompanying text), which has already been upheld as constitutional.

(3) the fact, time and place of arrest; and/or

(4) the identity of investigating and arresting officers or agencies and the length of the investigation.

Again, the clarity, precision and narrowness of these items argue strongly for their effectiveness.

WHAT CAN WE EXPECT

Rule 3.6 specifically addresses the limitations of DR 7-107, and thus would appear to be the appropriate vehicle for regulating extra-judicial speech. Hopefully, it will become the ethical standard for the legal profession.[24] Will it completely ensure fair trials? I am wary to speculate; several factors must be considered in attempting to answer that question. First, as a profession, we need to do far more in accepting as a basic principal that, when there is even a small chance of endangering a fair trial, using the media — whether it be in an attempt to gain a tactical advantage or for personal aggrandizement — is not ethically acceptable behavior. The mere fact that punishment is more likely for such conduct will not be sufficient. Second, and related to the first, is that the profession must make its ethical (and Constitutional) obligations crystal clear to the media, and thereafter not give in to the seductive temptation of the klieg lights, multitudinous microphones and ever-present note pads. And finally, we must recognize that the formidable and related problem of leaks must also be addressed and pursued. Although there are existing laws and rules extant to punish such behavior, they seem to be very difficult to enforce;[25] moreover, reporters' sources have always been well-protected by the courts. Without seeking to encroach on that protection, we need to be more creative in eliminating leaks in the criminal justice system. Otherwise, what we stop lawyers from doing in public will still find its way into the media, except it will be attributed to "unnamed sources" or "a source close to the government," etc.[26] Such a result would do little

24. To date, 15 states have adopted Model Rule 3.6; 11 states have adopted the rule with certain modifications.

25. *See* note 13 *supra*.

26. The public leaks on a daily basis, seemingly by both sides, with respect to the criminal investigation, negotiations and ultimately the terms of the guilty plea of Drexel Burnham Lambert Inc., as well as the related investigations involving individuals, represent a nadir in this area. *See, e.g.*, Wall Street Journal, Apr. 27, 1989, A4 (details of a governmental investigation into an individual's trading with Michael Milken leaked by "individuals familiar with the investigation," notwithstanding that lawyers for the individual and the government publicly declined comment). Indeed, it reached a point in that case where Mr. Milken's lawyers sought a court order barring what they claimed were illegal leaks of information by the government. *See* Wall Street Journal, Sept. 15, 1989, A3. In response to that motion, the judge overseeing the case ordered the Justice Department to investigate whether the government was in fact the source of the leaks; at the same time, how-

to ensure that "the most fundamental of all freedoms" is protected.[27]

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ever, the judge postponed a hearing on the motion itself until after the trial in order to avoid further publicity about the leaked information, thereby making a fair trial potentially even more difficult. *See* Wall Street Journal, Sept. 19, 1989, B15.

27. *See* note 2 *supra*.