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Chicago Council of Lawyers v. Bauer: Gag Rules - The First Amendment vs. the Sixth

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Chicago Council of Lawyers v. Bauer: Gag Rules—The First Amendment vs. the Sixth

Chicago Council of Lawyers, an association of attorneys, brought an action for declaratory and injunctive relief to halt enforcement of a local rule of the district court[1] and a disciplinary rule of the American Bar Association,[2] collectively referred to as "gag" or no-comment rules. The rules prohibit dissemination by counsel of information or opinions in connection with pending litigation if there is a "reasonable likelihood" that such dissemination might interfere with a fair trial or otherwise prejudice the due administration of justice.[3] The plaintiffs contended that the rules were unconstitutionally vague and overbroad because they were not restricted to situations which "present a clear and present danger of a serious and imminent threat" to a fair trial, and, as such, violated the first amendment rights of the lawyers who practiced before the district court. The district court dismissed for failure to state a cause of action.[4] *Held, reversed and remanded*: Although the right of free speech must give way to the right to a fair trial when an irreconcilable conflict exists, the "reasonable likelihood" standard of the Code of Professional Responsibility and of the district court rules is overbroad and does not meet constitutional requisites. Only those comments which pose a "serious and imminent threat" of interference with the fair administration of justice can be constitutionally proscribed. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *petition for cert. filed sub nom. Cunningham v. Chicago Council of Lawyers*, 44 U.S.L.W. 3533 (March 11, 1976) (No. 75-1296).

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1. U.S. DIST. CT., N.D. ILL., (CRIM.) RULE 1.07 [hereinafter cited as LOCAL RULE 1.07].

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1969) [hereinafter cited as ABA DR 7-107]. The district court and the court of appeals assumed *arguendo* that DR 7-107 was incorporated within Local General Rule 8 which allows disbarment or suspension of attorneys who fail to abide by the provisions of the ABA Code.

3. The "reasonable likelihood" standard is set forth in § (a) of LOCAL RULE 1.07 as follows:

> (a) It is the duty of the United States Attorney, or a lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which he or the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

Section (a) sets forth the general standard of rule 1.07, which is also the underlying theory behind ABA DR 7-107, and was meant to apply to all succeeding paragraphs of the rule. In other words, section (a) expressly sets forth the "duty" underlying the specific restrictions of sections (b) through (e) of rule 1.07 and sections (a) through (g) of ABA DR 7-107. *See* ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 84-85 (Tent. Draft 1966).

4. Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689 (N.D. Ill. 1974).

I. EVOLUTION OF GAG RULES

Freedom of speech and the right to a fair trial by an impartial jury are fundamental counstitutional guarantees.[5] Their simultaneous application to the judicial process illustrates, however, that neither right operates in a void. Wide dissemination by the press of out-of-court comments by participating counsel made in connection with pending litigation raises the possibility that the right to a fair trial may be impeded by a full exercise of the right to free speech.[6]

The courts have been faced with a number of circumstances in which the freedom of speech and press is incompatible with some other constitutional guarantee. In these situations the fundamental problem has been to determine the point at which the rights of the individual become subordinate to the right of an organized society to protect itself.[7] Attempting to determine this point, early cases held that the right of free speech could be restricted only when the printed or spoken word created a "clear and present danger" of bringing about a substantive evil.[8] In time the Court expanded the use of the clear and present danger test from situations involving only "pure speech" to application in almost all first amendment situations, regardless of the mode of expression.[9] In recent years, however, the Court has moved away from the clear and present danger test to a more sophisticated balancing approach in which the gravity and probability of the harm caused by the expression is weighed against the interference with first amendment rights within the context of each case.[10]

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5. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. VI: "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 . . . ."

6. The dilemma faced by courts in attempting to harmonize these sometimes competing rights is reflected by the Supreme Court's decision in Sheppard v. Maxwell, 384 U.S. 333, 350, 362 (1966). On the one hand, the Court referred to the press as the "handmaiden" of effective judicial administration guarding against the miscarriage of justice by subjecting the judicial process to extensive public scrutiny. On the other hand, the Court recognized the difficulty in the current era of mass media of effacing prejudicial publicity from the minds of potential jurors, and ruled that courts must take strong measures to ensure that the balance is never weighed against the accused.

7. *See* Comment, *Clear and Present Danger Standards: Its Present Viability*, 6 U. RICH. L. REV. 93 (1971).

8. The first opinion in which the term "clear and present danger" was used was Schenck v. United States, 249 U.S. 47 (1919). As in *Schenck*, most of the early cases involved alleged seditious conduct during and after World War I. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919).

9. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (struck down statute making the flag salute compulsory for public school children); Cantwell v. Connecticut, 310 U.S. 296 (1940) (overturned a conviction for disturbing the peace by publicly playing a record attacking the church); Thornhill v. Alabama, 310 U.S. 88 (1940) (invalidated a statute prohibiting picketing by labor unions).

10. The turning point was Dennis v. United States, 341 U.S. 494 (1951). The Court indicated that the result of the omnibus use of the test transformed it from a rule which could help guide the courts in making a determination of whether or not a particular method of expression should be denied or afforded first amendment protection into a strict principle against which all first amendment problems must be measured. The result was that the court became increasingly hampered by the rule in dealing individually with the range of first amendment problems. *See* Cole & Spak, *Defense Counsel and the First Amendment: "A Time to Keep Silence, and a Time to Speak"*, 6 ST. MARY'S L.J. 347, 355 (1975).

Initial efforts by the courts to resolve the problem of widespread publicity jeopardizing fair trials were attempts to block the flow of potentially harmful comments at the point of publication.[11] In these efforts courts used their contempt power to punish the press for prejudicial reports.[12] The Supreme Court, however, has severely limited the use of the contempt power where sanctions are sought to be imposed directly on the press.[13] To justify a citation the publication must constitute a "clear and present danger" to the fair and orderly administration of justice; there must be no doubt that there is a "serious and imminent" threat that those involved in the litigation in question will be denied a fair trial.[14]

Effectively blocked in this manner from stopping prejudicial statements at the point of publication, courts began to test the possibility of stemming the flow of comments at their source. The Supreme Court's first exploration of the problem raised by counsel's extrajudicial comment about pending litigation was made in *In re Sawyer*.[15] In *Sawyer* an attorney was suspended from practice for making an out-of-court speech which allegedly maligned the fairness and impartiality of the presiding judge. Although the suspension of Sawyer was overturned,[16] four dissenting justices, joined by the concurring Justice Stewart, questioned the applicability of the clear and present danger standard to protect the first amendment rights of a lawyer in on-going litigation. Although Justice Frankfurter in his dissent agreed that a lawyer, as a citizen, has a constitutional right to freedom of speech which he may use to castigate the courts,[17] he concluded that a lawyer actively participating in a trial is not merely another citizen. He is an intimate, trusted, and essential part of the machinery of justice.[18] Justice Stewart agreed with this conclusion and renounced the intimation that a lawyer can invoke the right of free speech to immunize himself from even-handed discipline for unethical conduct.[19]

Although concern over the effects of prejudicial publicity continued, the catalyst for the adoption of rules regulating publicity, such as DR 7-107 of the ABA Code of Professional Responsibility, arose from the assassination

11. *See, e.g.*, Craig v. Harney, 331 U.S. 367 (1947), in which a newspaper publisher, an editorial writer, and a news reporter appealed a conviction of criminal contempt for publishing during the pendency of a trial an editorial and several news stories which sharply criticized the actions of the presiding judge. The Supreme Court overturned the contempt conviction, stating that to justify the use of the contempt power in such a situation the threat to the administration of justice must be imminent. The Court stated that "[t]he danger must not be remote or even probable; it must immediately imperil." *Id.* at 376.

12. *See* Warren & Abell, *Free Press—Fair Trial: The "Gag Order," A California Aberration*, 45 S. CAL. L. REV. 51 (1972).

13. For a summary of freedom of speech and press as a limitation on the contempt power see Annot., 159 A.L.R. 1379 (1945).

14. Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

15. 360 U.S. 622 (1959).

16. The majority held that the evidence was insufficient to sustain the charge of professional misconduct. *Id.* at 626.

17. *Id.* at 666 (Frankfurter, J., dissenting).

18. *Id.*

19. Mr. Justice Stewart agreed with the principles espoused by the dissent, yet he did not feel that the evidence was sufficient to uphold the conviction. He concurred, therefore, with the majority's decision to reverse. *Id.* at 647.

of President Kennedy and the subsequent *Warren Report*.[20] The report criticized the Dallas police for the publicity surrounding the case being assembled against Lee Harvey Oswald. The Commission suggested that the bar, the police, and the media should work together to establish ethical standards concerning the collection and presentation of information to the public "so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."[21] As a result, the American Bar Association in 1964 created the Advisory Committee on Fair Trial and Free Press, popularly called the Reardon Committee after its chairman.[22]

During the pendency of this study the Supreme Court decided two cases which undoubtedly had significant influence on the committee. In *Estes v. Texas*[23] the Court held that in a confrontation of sixth amendment rights with other constitutional guarantees the former must prevail. The Court stated that "[t]he atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."[24] In *Sheppard v. Maxwell*[25] the Court overturned the murder conviction of Dr. Sam Sheppard because of the carnival atmosphere of the investigation and trial and the extensive publicity before and during trial. While avoiding the placement of specific controls on media publication,[26] the Court advocated adoption of rules and regulations to stop the flow of prejudicial information at its source by preventing its release to the press by parties, counsel, court officials, and others actively participating in judicial proceedings.[27]

Shortly after *Sheppard* the Reardon Committee published the results of its study[28] calling for strict controls upon all counsel and law enforcement agencies in order to restrict the release of public statements when there is a

20. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (1964).

21. *Id.* at 27.

22. 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). The Committee was chaired by the Honorable Paul C. Reardon, then Associate Justice of the Supreme Judicial Court of Massachusetts, and was composed of several eminent judges and lawyers.

23. 381 U.S. 532 (1965). In *Estes* a well-known financier, Billie Sol Estes, was convicted in a state district court for swindling. The Texas Supreme Court upheld the conviction, but the United States Supreme Court subsequently reversed. The Court held that the great publicity surrounding the trial, including television and radio broadcasts of the trial itself, brought about the denial of the accused's due process rights.

24. *Id.* at 540.

25. 384 U.S. 333 (1966).

26. The Court eschewed media guidelines which were attempts to control what was published. The Court, however, did prescribe broad measures for control of the premises of the courtroom and courthouse. The Court suggested that in the interest of a fair trial the presence of the press at judicial proceedings can be limited and, furthermore, conduct of the press allowed to be present in the courtroom can be regulated. *Id.* at 358.

27. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Id. at 363.

28. REARDON REPORT, *supra* note 22.

"reasonable likelihood" that such statements may prejudice a fair trial.[29] The study suggests that these controls consist of internal regulation, canons of ethics, rules of the court, and the contempt power.[30] The report was adopted by the House of Delegates of the American Bar Association in February 1968.[31] The United States District Court for Northern Illinois incorporated substantially the same provisions into its local rules of court in 1971.[32]

II. CHICAGO COUNCIL OF LAWYERS V. BAUER

In *Chicago Council of Lawyers v. Bauer* the Seventh Circuit held that the "reasonable likelihood" standard employed by those rules is constitutionally infirm.[33] The court rejected the plaintiffs' contention that the rules constituted prior restraints of first amendment rights.[34] Recognizing that the rules have some of the inherent features of prior restraints[35] but refusing to apply a "heavy presumption" against validity, the court claimed that the rules must be subjected only to closer scrutiny than a legislative restriction.[36] This scrutiny was to center on constitutional standards relating to clearness, precision, and narrowness; rules which would deny a lawyer his first amendment rights in the interest of a fair trial must be neither vague nor overbroad.[37] The court then held that the term "reasonable likelihood" is overbroad; the only comments the rules could constitutionally proscribe are those which pose a "serious and imminent threat" to a fair trial.[38] The latter standard, the court concluded, is narrower and more restrictive and would put a lawyer on stricter notice than would what the court termed "the more amorphous" reasonableness standard.[39]

While the court held that the serious and imminent test would eliminate overbreadth in the general standard underlying the rules, it also deemed it necessary to examine the specific rules which form the context in which the general standard operates.[40] In this examination the Seventh Circuit deter-

29. *Id.* at 1.
30. *Id.* at 17, 21.
31. Reardon, *The Fair Trial—Free Press Standards*, 54 A.B.A.J. 343 (1968).
32. Both ABA DR 7-107 and LOCAL RULE 1.07 are set forth in full in Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 261-64 (1975).
33. 522 F.2d at 249.
34. The court defined a prior restraint as a predetermined judicial prohibition restraining specified expression. Even though the judicial action is unconstitutional, such a prohibition cannot be violated if opportunities for appeal existed and were ignored. *Id.* at 248, citing Walker v. City of Birmingham, 388 U.S. 307 (1967). Although not per se unconstitutional, prior restraints face a "heavy presumption" against constitutional validity. 522 F.2d at 248, citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).
35. A violation of both the rules and a prior restraint is punishable by the contempt power. The rules, however, are distinguishable from a prior restraint since the validity of the rules can be challenged by one prosecuted for violating them. 522 F.2d at 248.
36. *Id.* at 249.
37. *Id.*
38. *Id.*
39. *Id.*
40. The court held that the serious and imminent threat standard must always be an element of any prohibition. The court found it proper to formulate rules which declare that comments concerning certain matters set forth in the rules are presumed to be a serious and imminent threat to the fair administration of justice. *Id.* at 251.

mined that most of the rules would be constitutional if they incorporated the serious and imminent threat standard. The two important exceptions are that comments by defense counsel before arrest or indictment may not be proscribed[41] and that the rules may not apply to civil litigation.[42] The court's conclusions regarding the specific rules are important. The major impact of this decision, however, will be the court's implicit return to the clear and present danger doctrine as the general test to be used in applying gag rules to extrajudicial statements by counsel.[43] One problem with the court's repudiation of "reasonable likelihood" is its somewhat circular reasoning. The court stated that the "serious and imminent threat" formulation is in keeping with certain precepts promulgated by the Supreme Court.[44] Yet, the only precepts the court had discussed were used to establish the fact that limitations on free speech must be clearly marked[45] and must be neither too broad nor too drastic.[46] The court never discussed or cited persuasive authority[47] for its holding that "reasonable likelihood" is less clearly defined than is "serious and imminent."

The district court, on the other hand, used three very specific arguments to uphold the constitutionality of the "reasonable likelihood" aspect of the rules.[48] First, the court relied on *In re Sawyer*[49] to establish the concept of the "special status" of an attorney of record by his relationship to pending litigation and to raise doubt that the clear and present danger/serious and

41. The court reasoned that since complete discretion is placed in the executive—the prosecutor—for launching an investigation, and since the only check on that discretion is the ballot box, the defendant and his counsel are the best able to inform the public of possible abuses of that discretionary power and should be allowed to do so. *Id.* at 253.

42. Noting that "many important social issues" become entangled in civil litigation, the court ruled that great benefits are derived from allowing "uninhibited comment" by knowledgeable attorneys involved in civil litigation. *Id.* at 259. By this reasoning the Seventh Circuit seems to have suggested that the public right to know thrusts first amendment freedoms to a position of priority over the right to a fair trial. However, this reasoning runs contrary to the Supreme Court's holding in Estes v. Texas, 381 U.S. 532 (1965), *see* notes 23, 24 *supra* and accompanying text, and it ignores the district court's reaffirmation of the Supreme Court statement that " '[t]he very purpose of our court system is to adjudicate controversies, *both criminal and civil*, in the calmness and solemnity of the courtroom according to legal procedures.' " 371 F. Supp. 689, 697 (N.D. Ill. 1974) (emphasis by the court), quoting Cox v. Louisiana, 379 U.S. 559, 583-84 (1965) (Black, J., concurring).

43. Although the court does not expressly use the words "clear and present danger," the term is interchangeable with "serious and imminent threat." In cases employing the clear and present danger standard the phrase is many times stated in the way in which the plaintiffs herein set it forth, "clear and present danger of a serious and imminent threat." 522 F.2d at 247. *See also* Annot., 38 L. Ed. 2d 835 (1974).

44. 522 F.2d at 249.

45. *Id.*, citing Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

46. 522 F.2d at 249, citing Shelton v. Tucker, 364 U.S. 479, 488 (1960).

47. The court cites only two cases, both of which are Seventh Circuit cases dealing with gag orders: Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970), and *In re* Oliver, 452 F.2d 111 (7th Cir. 1971). Both of these cases dealt with blanket prohibitions against *all* extrajudicial comment by counsel regarding pending litigation. The holdings in both cases correctly ruled unconstitutional orders which would ban unilaterally any comment by counsel. However, neither decision definitively outlined under what standard an attorney's comment may be proscribed. In *Chase* the Seventh Circuit specifically declined to rule on the issue. In *Oliver* the decision was based on the unconstitutionality of the district court's blanket policy statement. No opinion was expressed as to the propriety of the reasonable likelihood standard.

48. 371 F. Supp. 689, 694-97 (N.D. Ill. 1974).

49. 360 U.S. 622 (1959).

imminent threat standard applies in that relationship.[50] Next, the court cited *United States v. Tijerina*.[51] In a set of facts very similar to *Chicago Council of Lawyers*[52] it was contended that a gag order was invalid because it was not based upon a standard of "clear and present danger" to the judicial processes. The court in *Tijerina* ruled that "reasonable likelihood" suffices.[53] Noting that under *Sheppard v. Maxwell*[54] a defendant need only show a "probability" that prejudice affected his right to a fair trial, the district court finally argued that the "reasonableness' standard for gag orders is not only constitutional but mandatory.[55] Unless the rules which attempt to block such prejudice are judged by the same standard, a defendant could at times obtain a reversal for an injurious extrajudicial statement while leaving the court no recourse against the attorney who uttered the comment. Yet, in *Sheppard* the Supreme Court emphasized that remedial measures by rules and regulations and not by reversals were the cure.[56] The Seventh Circuit in *Chicago Council of Lawyers* treated these arguments by ignoring them.

III. CONCLUSION

By rejecting the reasonable likelihood standard for use in gag rules, the Seventh Circuit departed from the apparent mainstream of authority regarding judicial restriction of public expression by participating lawyers. When measured against this authority the decision does not fare well; indeed, most of the court's conclusions were reached with authority to the contrary uncontroverted.

The court regards gag rules as such an ominous intrusion into the guarantees of the first amendment that nothing less than the clear and present danger standard may suffice as the underlying base of the rules. These rules do not seek to censor the media, however, nor do they intend to stifle public discussion; only one voice is stilled, the voice of an officer of the court who occupies a unique position of potential influence on a jury.

The prejudice of actual or potential jurors is as great a threat to our system of justice as can be imagined. The reasonableness test of the rules in question unbinds the courts from the strict, inflexible confines of the "clear and present danger" phraseology. This allows the courts to deal individually with specific circumstances of possible threats to the atmosphere essential to a fair trial—"our most fundamental of all freedoms."

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50. *See* notes 15-19 *supra* and accompanying text.
51. 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).
52. The difference lay in the fact that in *Tijerina* the dispute concerned a gag order whereas in *Chicago Council of Lawyers* it was a whole set of gag rules which were being questioned.
53. 412 F.2d at 666.
54. 384 U.S. 333 (1966).
55. 371 F. Supp. at 696, citing Sheppard v. Maxwell, 384 U.S. 333, 352 (1966).
56. 384 U.S. at 363; *see* note 27 *supra*.