WHAT A LAWYER MAY SAY TO THE MEDIA

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The present Code of Professional Responsibility principally deals with the limits of attorney comment to the media under DR 7-107 (trial publicity). The Director's Office believes that there are constitutional problems with enforcement of DR 7-107. So do most courts that have considered the issue. DR 7-107 has been the subject of litigation in federal appellate courts and recently in state disciplinary proceedings.

An attorney's right to free speech under the First Amendment may not easily be circumscribed. However, DR 7-107 does not appear to recognize sufficiently the broad reach of free speech rights. While the Director's Office would institute disciplinary proceedings for a violation of DR 7-107 in a criminal jury setting, we would require more than a literal violation of the rule in other settings. Actual prejudice to the attorney's client or to the fact-finding process would need to be obvious. The proposed new Model Rules of Professional Conduct (discussed below), if adopted, would in my judgment eliminate the constitutional infirmities of DR 7-107.

Constitutional Challenges to DR 7-107

Disciplinary Rule 7-107 has been the subject of several recent federal and state cases. These cases have approached DR 7-107 differently, but all regard the rule either as unconstitutional or as being salvageable only by restricting its application or constructively changing the rule.

Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979), held DR 7-107 to be constitutional only in its application to pending criminal jury trials. As to civil litigation, the court found the rule unconstitutionally vague and overbroad. In reaching this decision, the court balanced three factors: (1) a party's right to a fair trial; (2) an attorney's right of free speech; and (3) the public's right to know. In criminal matters, trial publicity could be limited only if there was a "reasonable likelihood" of prejudice to a fair jury trial. The Seventh Circuit also addressed the issue in *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976). Balancing the same three factors, the court required the more strict standard of traditional First Amendment analysis, ruling that only a "clear and present danger" of prejudice authorized restrictions on the attorney's First Amendment rights, even in a criminal proceeding.

Most state courts have followed the *Hirschkop* approach in dealing with attorney discipline under DR 7-107. In civil matters the state courts have generally found that only a traditional First Amendment "clear and present danger" to a fair trial will authorize speech restrictions. The criminal jury trial is considered to present special difficulties, however, which allow discipline if an attorney comments to the media knowing that there is a "reasonable likelihood" of prejudice to the proceedings. *See, e.g., In re Hinds,* 90 N.J. 604, 449 A.2d 483, 491 (1982); *In re Lasswell,* 296 Or. 121, 673 P.2d 855, 858 (1983). On the other hand, the Montana

Supreme Court recently held the entire disciplinary rule unconstitutional and refused to save even the portions dealing with criminal trials by adopting an implicit intent standard. The court stated a new disciplinary rule should be drafted. *In the Matter of Robert S. Keller,* 83-110, (Mont., 11/1/84). The Montana Commission on Practice alleged violations of DR 7-107(B) and (H) when an attorney representing a dentist on criminal charges wrote to the dentist's patients and friends describing the weaknesses of the state's case and the merits of the defense. The court stated a new disciplinary rule should be drafted, which would explicitly utilize the *Hirschkop* or *Chicago Council* or some other test.

In *Lasswell,* the Oregon Supreme Court construed DR 7-107 to imply an intent test:

> The disciplinary rule deals with purposes and prospective effects, not with completed harm. It addresses the [attorney's] professional responsibility at the time he or she chooses what to speak or write. At that time it is incompatible with his or her professional performance in a concrete case to make extrajudicial statements on the matters covered by the rule either with the intent to affect the factfinding process in the case, or when a lawyer knows or is bound to know that the statements pose a serious and imminent threat to the process and acts with indifference to that effect. In a subsequent disciplinary inquiry, therefore, the question is not whether the tribunal believes the lawyer's comments impaired the fairness of an actual trial, which may or may not have taken place. The question, rather, is the lawyer's intent or knowledge or indifference when making published statements that were highly likely to have this effect. 673 P.2d at 858.

This approach is consistent with enforcement of DR 7-107 by the Director's Office.Ftn 1

Disciplinary Limits of Attorney Comment Aside From DR 7-107

Whatever the limitations on enforcement of DR 7-107, there are within the Code of Professional Responsibility and the proposed new rules limits on what attorneys may say to the media. Disciplinary Rule 7-101(A)(3) prohibits a lawyer from intentionally prejudicing or damaging his or her client during the course of representation. An attorney may not reveal client confidences or secrets without client consent, after full disclosure, under DR 4-101(B) and (C). In this connection, note that technically public information may still be a client "secret" which the attorney is forbidden to disclose.Ftn 2 Furthermore, an attorney may not make false or fraudulent statements to the media or to anyone under DR 1-102(A)(4) and DR 7-102(A)(5). In criminal cases, the defendant's Fifth Amendment rights may preclude disclosure of information to the media, even such as would confirm or deny specific allegations.

In civil cases, sound trial tactics, and Canon 7's mandate to represent a client zealously, may also weigh in favor of not unnecessarily disclosing information to the media, even if prejudice to the client does not appear to exist. An attorney need not comment on allegations of an opposing party, for example, even if he or she is reasonably certain that the allegations will be proven in trial. The opposing party still has the burden of proof. The duty to represent a client zealously should be kept in mind as an implicit prohibition of attorney comments to the media which may have the purpose of enhancing the attorney's reputation or supporting the attorney's aims on behalf of another client.

The New Minnesota Rules

Rule 3.6 (trial publicity) of the proposed new Minnesota Rules of Professional Conduct attempts to encompass some of these observations and current interpretations. The Minnesota State Bar Association

has amended the ABA's proposed model rule to read as follows:

> **RULE 3.6 TRIAL PUBLICITY**
>
> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing a pending criminal jury trial.
>
> **COMMENT:**
>
> Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

As amended, the Minnesota rule would represent a major change from DR 7-107, and apparently would codify the constitutional limits on trial publicity the Director's Office and several courts have already recognized. Rule 3.6 embodies the judgment that only the public and private interest in fair criminal trials outweighs the First Amendment rights of the attorney, the client, and the media. Rule 3.6 would not go so far as the *Chicago Council* test of "clear and present danger" of prejudice to criminal proceedings but instead echoes the *Hirschkop* "reasonable likelihood" test.

The new rules would retain the other restrictions on attorney's speech discussed as to truthful statements (Rule 4.1) and confidences and secrets (Rule 1.6). They also would apparently mandate client contact concerning statements to the media (Rule 1.4, Communication). Under the new rules, an attorney would be free to speak to the media concerning a civil matter within these parameters.

Summary

In deciding what an attorney may say to the media, several courts and the Director's Office have recognized the difficult constitutional balance among at least three competing interests: (1) the public's right to know; (2) the need for fair trials; and, (3) the First Amendment rights of the attorney, the client, and the press. Canon 7 generally attempts to balance an attorney's duty of zeal to a client with duty to others, especially the court. The case law generally, and the proposed new rules, would resolve these competing concerns by applying the disciplinary rule only where it is most crucially needed: to criminal jury proceedings where prejudice is apt to result. Even then, an attorney may comment to the media, so long as his or her comments are not proscribed by other disciplinary rules and so long as they do not have "a substantial likelihood of materially prejudicing a pending criminal jury trial."

The last decade has seen substantial liberalization of attorney disciplinary rules by application of the First Amendment, first to advertising and solicitation, and now to attorney comment to the media. I join with the courts in regarding this as a positive change, one which trusts the public and the judicial system to protect itself except in those areas where discipline is genuinely appropriate.

NOTES

[1] *The Minnesota Supreme Court has not ruled on the constitutionality of DR 7-107 or appropriate First Amendment standards under DR 7-107. As a rule promulgated by the Court, DR 7-107 is presumptively constitutional.*

[2] *DR 4-101 (A) provides the following definitions: (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the*

disclosure of which would be embarrassing or could be likely to be detrimental to the client.