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First Amendment Limitations On The Confidentiality Of Lawyer Disciplinary And Disability Proceedings

By William H. Erickson*

INTRODUCTION

Lawyer disciplinary and disability proceedings give rise to a myriad of constitutional issues. One of the more problem-producing areas is the attempt to conduct and review disciplinary proceedings in such a manner as to avoid damaging the individual attorney and his professional reputation should the charges against him prove groundless. In an effort to provide such protection, the American Bar Association (ABA) in its Standards for Lawyer Disciplinary and Disability Proceedings has suggested guidelines and directions for disciplinary actions. Among these protections is a requirement that attorney discipline and disability proceedings be kept confidential by those participating in the proceedings.

This article will focus on two questions which arise from attempts to keep such proceedings confidential. The first is a question of policy: What degree of confidentiality is desirable? The second question is one of constitutional law: What limits does the first amendment impose upon requirements of confidentiality? In order to provide a foundation for the formulation of rules governing confidentiality, this analysis will focus on the ABA standards.¹ A further advantage of using the Disci-

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* Justice of the Colorado Supreme Court, Judicial-Member-at-Large on the Board of Governors of the American Bar Association. The assistance of my Law Clerk, Steven G. Francis, in researching the issues reviewed in this article is gratefully acknowledged.

¹ABA Standards for Lawyer Disciplinary and Disability Proceedings (1978) [hereinafter cited as Disciplinary Standards]. Section 8.24 of the Disciplinary Standards provides:

Proceedings Normally Not Public Until Filing and Service of Formal Charges. Prior to the filing and service of formal charges, the proceeding should be confidential, except that the pendency, subject matter, and status of an investigation may be disclosed if:
Disciplinary Standards stems from the disparity in the degree to which various jurisdictions mandate confidentiality. Basically, the ABA Disciplinary Standards provide that proceedings shall remain confidential until a formal complaint has been filed with the appropriate tribunal.

(a) the respondent has waived confidentiality;
(b) the proceeding is based upon conviction of a crime;
(c) the proceeding is based upon allegations that have become generally known to the public.

The comments to that rule note that:
The confidentiality that attaches prior to a finding of probable cause and the filing of formal charges is primarily for the benefit of the respondent to protect him against publicity predicated upon unfounded accusations. See, State v. Turner, 528 P.2d 966 (Kan. 1975); Baggott v. Hughes, 296 N.E.2d 696 (Ohio 1973).

If the respondent waives confidentiality or if the nature of the accusation is already known to the public, the basis for confidentiality no longer exists. Moreover, refusal of the agency to acknowledge the existence of an investigation when allegations of misconduct against a lawyer are publicly known only serves to embarrass the agency by implying it is unaware of or uninterested in allegations of misconduct, without in any way protecting the reputation of the lawyer.

Section 8.25 provides:
Proceeding Public Upon Filing of Formal Charges. Upon the filing and service of formal charges, the proceeding should be public, except for:
(a) deliberations of the hearing committee, board or court; and
(b) information with respect to which the hearing committee has issued a protective order.

The comments accompanying that rule observe that:
Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous. The need to assure the integrity of the disciplinary process in the eyes of the public requires that at this point further proceedings be open to the public. An announcement that a lawyer accused of serious misconduct has been exonerated after a hearing behind closed doors will be suspect. The same disposition will command respect if the public has had access to the evidence.

Upon a showing of good cause, any individual should be able to seek a protective order requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information which is the subject of the request.

2 Several states open disciplinary proceedings to the public upon a determination of probable cause. See, e.g., Rule 11.12(5), art. XI, THE INTEGRATION RULES OF THE FLA. BAR; Rule 4-215(d), RULES AND REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR OF GEORGIA; and Rule 15.28, PROCEDURAL AND ADMINISTRATIVE RULES OF THE STATE BAR GRIEVANCE BOARD, supplementing Rule 15 of the RULES OF THE MICHIGAN SUPREME COURT. Many others maintain confidentiality until a much later date. See, e.g., COLO. R. Civ. P. 259(a); PA. R. OF DISCIPLINARY ENFORCEMENT 402; Rule 20, RULES OF PROCEDURE OF THE BOARD OF BAR OVERSEERS (Massachusetts).
I. LANDMARK COMMUNICATIONS, INC. V. VIRGINIA

A. The Issue Before the Court

The Virginia Constitution creates a "Judicial Inquiry and Review Commission . . . with the power to investigate charges which would be the basis for the retirement, censure, or removal of a judge." The enabling legislation which implemented the constitutional mandate provides that proceedings before the commission shall remain confidential until a complaint is filed with the Supreme Court of Virginia. After a complaint is filed, the commission records are opened to public view.

The Virginia Pilot, a newspaper owned by Landmark Communications, Inc., published an accurate report of confidential commission proceedings. The report identified the judge under investigation. As a result of this publication, Landmark was convicted for violating a Virginia misdemeanor statute which prohibited divulgence of information concerning judicial inquiry and review proceedings before the filing of a complaint. In affirming the convictions, the Virginia Supreme Court held that Landmark's first amendment right to publish without governmental interference was outweighed by the "clear and present danger to the orderly administration of justice [which] would be created by divulgence of the confidential proceedings of the Commission." Furthermore, the court found a sufficiently compelling state interest in the desire to protect the reputation of judges and the courts as well as to prevent recrimination against complainants and witnesses.

3 Va. Const. art. VI, § 10.
8 The first amendment provides, in part, that: "Congress shall make no law . . . abridging the freedom of speech . . . " U.S. Const. amend. I.
9 233 S.E.2d at 126.
10 Id. at 128-29. For further consideration of this policy, see ABA Standards Relating to Sentencing Alternatives and Procedures 4.4(b) and comments thereto, at 225 (1967).
The United States Supreme Court found there was no danger to the "orderly administration of justice" and reversed the conviction. The High Court also declared that the state interests involved did not provide sufficient reason "for repressing speech that would otherwise be free."

The United States Supreme Court's opinion raises several questions more serious and complex than the narrow question it considered and answered. The Court's holding rests upon its determination that the first amendment did not permit punishment for truthful disclosure by persons who were not involved in the proceedings. But the Court, in dicta, strongly suggested that states may still keep judicial disciplinary proceedings confidential. The opinion reiterated the oft-repeated dictum that courts may promulgate rules which restrain those privy to its proceedings from commenting on them publicly, and punish "participants for breach of this mandate" with contempt of court. The problems inherent in imposing such restraints on participants in judicial proceedings have not been fully addressed by the Supreme Court.

B. The Issues Left Unresolved

Although the Court's opinion contains language allowing courts to adopt rules mandating confidentiality and to enforce those rules through use of the contempt power, the Supreme Court specifically declined to answer three essential questions.

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11 Landmark Communications, Inc. v. Virginia, 98 S. Ct. 1535, 1543 (1978) (quoting New York Times v. Sullivan, 376 U.S. 254, 272-73 (1964)). In support of this statement, the Court cited several cases which reversed contempt convictions for comments concerning the courts. See 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). Since the Court found the threat to the courts more substantial in those cases, it saw no reason to treat the less serious threat in Landmark differently. 98 S. Ct. at 1544.

12 98 S. Ct. at 1540.

13 "[M]uch of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings." Id. at 1545. See also id. at 1542, n.12.


15 98 S. Ct. at 1540-41.

16 See the authorities cited in note 2 supra, for attempts to implement this suggestion.
The first question left unanswered is whether the court system is constitutionally required to open its disciplinary proceedings to the public at some point—that is, whether the public or the press has a "right of access" to those proceedings.

The second question which must be resolved before constitutionally valid rules can be drafted is: By what standards will courts and participants in confidential proceedings identify the speech which is prohibited?

The third issue left unresolved by Landmark Communications, Inc. v. Virginia is delicately intertwined with the second: How can a court identify and restrain speech in advance of its publication and not run afoul of the constitutional bias against prior restraints?17

1. "The Right of Access"

Legal scholars have put forth many arguments justifying a public right of access to information within the state's control.18 The United States Supreme Court has found only a limited constitutional basis for this asserted right.19

In Pell v. Procunier20 and Saxbe v. Washington Post Co.,21 two of the more significant cases which have discussed this issue, representatives of the news media challenged prison regulations which barred the press from interviewing specific inmates selected by the press. The Supreme Court upheld the regulation on two grounds. First, the Court noted that even

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18 See, e.g., Emerson, Legal Foundations of the Right to Know, 1976 Wash. U.L.Q. 1. "The public, as sovereign, must have all information available in order to instruct its servant, the government. . . . [I]f democracy is to work, there can be no holding back of information; otherwise ultimate decision-making by the people, to whom that function is committed, becomes impossible." Id. at 14.


though the press and the public were denied face-to-face encounters with selected inmates, they had many other means of access to information about conditions in state and federal prisons.\textsuperscript{22} Second, the opinion pointed out that the regulations which barred interviews were not "part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions."\textsuperscript{23}

In much the same way, the public's need for information concerning attorney discipline and disability proceedings is satisfied by the Disciplinary Standards. Disability proceedings in which a formal charge has been filed,\textsuperscript{24} or in which certain other criteria have been met,\textsuperscript{25} are open to the public. Little would be served by the disclosure of complaints against an attorney which later proved groundless. The Disciplinary Standards are not designed to conceal the processes by which the public is protected from attorneys in need of discipline. Rather, they are designed to protect attorneys from the public calumny which can result from even the most baseless charges.

Thus, whatever the limits of the so-called "right to know" doctrine, the right is adequately protected by opening the proceedings to the public after a formal charge is filed. The public and the press have no constitutional "right to access" to initial discipline and disability proceedings which the courts have determined should be confidential. Moreover, participants in those proceedings who violate the mandates of confidentiality will not be protected by a constitutional right of access or by a "reporter's privilege" to refuse to reveal the names of those who have violated that mandate.\textsuperscript{26}

\textbf{2. Identifying the Speech to be Restrained}

One essential attribute of any statute or court rule which

\textsuperscript{22} The Court noted that prisoners can send and receive mail, Pell v. Procunier, 417 U.S. 817, 824 (1974); have personal visitors, \textit{id. at} 824-25; and that the press can interview any of the 12,000 inmates of federal prisons who are released each year. Saxbe v. Washington Post Co., 417 U.S. 843, 848 n.9 (1974).

\textsuperscript{23} Pell v. Procunier, 417 U.S. at 830.

\textsuperscript{24} For the text of § 8.25, see note 1 \textit{supra}.

\textsuperscript{25} For the text of § 8.24, see note 1 \textit{supra}.

impinges on first amendment rights is that the prohibition must target the speech to be suppressed with some precision. The test by which that speech is identified has had numerous formulations.

The most common test employed by the Court is to allow suppression only of speech which presents a "clear and present danger" of some substantive evil. A classic example is seen in Brandenburg v. Ohio where the Supreme Court declared that the state could only punish speech which was "directed to inciting or producing imminent lawless action," and "likely to incite or produce such action." In Bridges v. California a labor leader was convicted of contempt because he threatened to call for a strike which would close the seaports of the Western United States unless California refrained from enforcing a particular labor decision. The United States Supreme Court held that the California courts could not punish the defendant for contempt unless his statements caused the danger of prejudice to the court's ability to enforce its orders to be "extremely serious and the degree of imminence extremely high." The Court reversed his conviction because it was unable to conclude that his threat was of such a magnitude.

A somewhat different approach was taken by the Court in Dennis v. United States. There the Court adopted the language of Judge Learned Hand: "[W]hether the gravity of the 'evil,' discounted by its improbability, justifies [the State's] invasion of free speech as necessary to avoid the danger." While this language was reaffirmed in Nebraska Press Ass'n v. Stuart, Chief Justice Burger did not cite Dennis v. United

29 Id. at 447.
30 314 U.S. 252 (1941).
31 Id. at 263.
32 "If Bridges' threat to cripple the economy of the entire West Coast did not present danger enough, the lesson of the case must be that almost nothing said outside the courtroom is punishable as contempt." L. Tribe, AMERICAN CONSTITUTIONAL LAW 624 (1978).
States or Nebraska Press Ass’n v. Stuart in his opinion for the Court in Landmark Communications, Inc. v. Virginia. Still, the test posed in Landmark Communications is strongly reminiscent of the Hand formulation. The Landmark opinion, in reviewing the clear and present danger test employed by the Virginia Supreme Court, may create some confusion as to the proper standard which courts should apply in their attempts to keep attorney discipline and disability proceedings confidential.

The Supreme Court of Virginia relied on the clear and present danger test in rejecting Landmark’s claim. We question the relevance of that standard here; moreover we cannot accept the mechanical application of the test which led that court to its conclusion. Mr. Justice Holmes’ test was never intended “to express a technical legal doctrine or to convey a formula for adjudicating cases.” Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State’s interests should also be weighed.36

This statement may be read in two ways. The Chief Justice could be saying that the clear and present danger test is inadequate and that it must be replaced by the Hand language. Or, Hand’s formulation may be viewed merely as a definition of the clear and present danger test. Despite the fact that the Hand test has not been employed in a sufficient number of cases to give the lower courts guidance, it is clear that the Court will require a substantial cause and effect relationship between the speech restrained and the evil sought to be prevented.

3. Prior Restraints

The first amendment’s guarantee of free speech does permit limited regulation by governmental authorities under appropriate circumstances. On several occasions, the United

States Supreme Court has recognized certain state or individual interests as being paramount to a speaker's need for expression or to society's need to hear that speaker. Such speech can result in the imposition of sanctions.\(^{37}\) If some speech is so detrimental to the orderly processes of society that it can be punished after the fact, the Supreme Court has concluded that it can be prohibited or regulated in advance.

Prior restraints on speech strike at the heart of first amendment freedoms and are therefore suspect in every instance.\(^{38}\) The Supreme Court has often stated that any "system of prior restraints of expression comes to th[е] Court bearing a heavy presumption against its constitutional validity."\(^{39}\) Again, however, prior restraints have been upheld in limited instances. An examination of the cases establishes the boundaries which must be honored if restraints on speech are to be imposed on those participating in lawyer disciplinary and disability proceedings.\(^{40}\)

The Supreme Court has permitted broad restraints when

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\(^{38}\) Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.

Carroll v. Princess Anne, 393 U.S. 175, 180-81 (1968).


the sovereign has sought to regulate business activity. While Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc. elevated commercial speech to a constitutional level, the Supreme Court still took care to point out that the objective nature of "speech that does 'no more than propose a commercial transaction'" makes it particularly liable to regulation for the non-ideological protection of consumers and suppression of falsity. In Bates v. State Bar of Arizona, the Supreme Court expanded the Virginia Board of Pharmacy case by declaring that the first amendment was abrogated by a total ban on advertising by attorneys. As with Virginia State Board of Pharmacy, the Court left the door open for regulation of some forms of speech, such as in-person solicitation and advertising which referred to the quality of a lawyer's work product. The strong governmental interest in suppressing discrimination has also provided the basis for the imposition of restraints on speech.

Probably the most detailed and confused guidelines have been created in cases relating to censorship of obscenity. In

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41 In Lorain Journal Co. v. United States, 342 U.S. 143 (1951), a newspaper which enjoyed an effective monopoly of news distribution was enjoined from refusing to accept advertisements from business which also advertised on a competing radio station. The defendant's first amendment objections were dismissed on the grounds that the newspaper had attempted to monopolize interstate commerce.

Although the case represents a prior order to publish, rather than a prior restraint on publication, the Supreme Court has equated these concepts. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Cf., Associated Press v. United States, 326 U.S. 1 (1945) (by-laws of a cooperative news service prohibited members from selling news to non-members).


43 Id. at 771, n.24.

44 Id. at 772, n.24.

45 Id. at 777 (Stewart, J., concurring).


47 Id. at 366. The Court has since approved state regulation of in-person solicitation. Ohralik v. Ohio State Bar Ass'n, 98 S. Ct. 1925 (1978).

48 See Pittsburg Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), where the Court approved a prohibition of help-wanted advertisements phrased as "male only" or "female only." The state's authority was seen as arising from its mandate to reduce discrimination. It is important to note that the prohibition avoided condemnation as a prior restraint only because there was an adequate judicial determination that the speed could be proscribed. Id. at 390.

TIMES FILM CORP. v. CHICAGO, the Court upheld a Chicago ordinance which required that all films be submitted to the police commissioner for review before they could be exhibited to the public. The challenge to the ordinance was based on the claim that no prior restraint of speech could ever be constitutional. Relief was denied because of the Supreme Court's determination that prior restraints were not invalid per se.

Freedman v. Maryland presented another case where a motion picture exhibitor refused to submit his film for prior review by a governmental agency. But the appellant in Freedman justified his refusal, not on absolute principles of constitutional law, but on specific flaws in the Maryland motion picture censorship statute. In upholding the appellant's contentions as to the statute's shortcomings, the Supreme Court laid down the basic procedures a state must provide before it can censor speech in advance of publication:

[T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. . . . [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial.

Finally, we can turn for guidance to a case involving judicially imposed restraints on the speech of participants in judicial proceedings or representatives of the press who wished to report them. Again, in addition to requiring a sufficiently im-
portant state interest, the case reflects the concern that the speech proscribed be targeted with precision and that judicial determinations on the protected status of the speech be made with all due speed.

*Nebraska Press Ass'n v. Stuart* is the landmark case on prior restraints in this area. *Nebraska Press Ass'n v. Stuart* struck down a state district court order prohibiting publication of certain facts about an accused murderer. For a variety of reasons, the Supreme Court concluded that the order could not be squared with the law of prior restraints. The opinion specifically addressed the dangers presented by the delays inherent in any system of prior restraints:

Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there is often a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter.

As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.

*Nebraska Press Ass'n v. Stuart* also discussed the question of how sufficiently to identify beforehand the speech which will be punished. One part of the district court order, as modified by the Nebraska Supreme Court, prohibited the dissemination of all "information strongly implicative of the accused as the perpetrator of the slayings." The Supreme Court struck down this prohibition because the language was "too vague" and "too broad."

These cases illustrate the basic outlines of a constitutionally valid system of prior restraints: (1) Speech cannot be restrained unless that restraint serves a fundamental state inter-

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55 See Erickson and Prettyman, note 17 supra, for a further discussion of this case.
56 427 U.S. at 560.
57 Id. at 561.
59 427 U.S. at 568.
est which cannot be protected by less drastic means.\(^6\) (2) The speech which is subject to prohibition must be identified as precisely as circumstances will allow.\(^6\) (3) The time which elapses between the request to speak and a final judicial determination on whether the speech can be restrained must be brief.\(^6\) (4) The state must bear the burden of initiating the proceedings which will lead to that determination, as well as the burden of persuading the court that the speech can be restrained constitutionally.\(^6\) If these tests are met, prior restraints can be imposed "where the expected loss from impeding speech in advance is minimized by the unusual clarity of the prepublication showing of harm."\(^6\) Clearly, this outline can be employed to establish a system of confidentiality in attorney disciplinary proceedings.

II. PRIOR RESTRAINTS IN LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS

A. Prior Restraints on the Speech of Lawyers

A lawyer has the same first amendment rights as any other person, but he faces added responsibility to his profession and to the courts for any abuse of his duties and responsibilities. For example, the trial of a celebrated case requires a lawyer to

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\(^4\) TRIBE, supra note 32, at 729.
gauge carefully statements which may reach the news media, to insure that the rights of the litigants are not prejudiced, and to insure that a fair trial is forthcoming.\textsuperscript{46}

In all states, the privilege to appear as an advocate before the courts is granted only to those admitted to the bar and to the parties to the case.\textsuperscript{66} That privilege provides the attorney with sufficient opportunity to satisfy his first amendment rights to freedom of expression. So long as he acts with propriety\textsuperscript{67} and submits his objections to the forum in which his case is being heard, the lawyer is beyond censure for even the most severe criticism of the law and the court.\textsuperscript{68}

But the lawyer must recognize that with this privilege come corollary restraints. The courtroom should be a place wherein is carried out a quiet, dignified search for truth.\textsuperscript{69} A lawyer bears a particular responsibility to observe the restrictions which a court may place upon his extrajudicial statements. This duty will often restrain speech which is otherwise constitutionally protected.\textsuperscript{70}

The realization that the attorney, as a condition to being admitted to practice law, has agreed to be bound by court rules of confidentiality is merely the beginning of an inquiry into whether such strictures coincide with first amendment freedoms. The state may premise a privilege to practice law on the applicant's willingness to accept certain conditions.\textsuperscript{71} However, a promise to waive part of one's first amendment rights is enforceable only if the limitation agreed to does not violate the rights the applicant would have retained had he not made the promise.\textsuperscript{72}

The effect of the above discussed principles on a problem

\textsuperscript{46} \textbf{Disciplinary Rule 7-107 American Bar Association Code of Professional Responsibility} [hereinafter cited as DR].

\textsuperscript{46} Faretta v. California, 422 U.S. 806 (1975).

\textsuperscript{47} DR 1-102.


\textsuperscript{49} Douglas, \textit{The Public Trial and the Free Press}, 33 Rocky Mt. L. Rev. 1 (1960).

\textsuperscript{50} In re Sawyer, 360 U.S. 622, 746-47 (1959) (Stewart, J., concurring).


\textsuperscript{52} United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir.) \textit{cert. denied}, 409 U.S. 1063 (1972).
similar to the subject of this article can be seen by examining Disciplinary Rule (DR) 7-107 of the American Bar Association Code of Professional Responsibility. That rule requires an attorney in a criminal case to avoid making statements during both the selection of the jury and the trial which "are reasonably likely to interfere with a fair trial." DR 7-107 and similar rules silencing attorneys have occasioned extensive commentary and criticism. The most comprehensive discussion to date is presented in Chicago Council of Lawyers v. Bauer.

Chicago Council of Lawyers v. Bauer presented an attack on a local district court criminal rule similar to DR 7-107. The Seventh Circuit invalidated the rule because, in its view, the "reasonable likelihood" standard restricted an attorney's freedom of expression more than is necessary to secure impartial trials and protect the processes of the courts.

The court concluded that "less drastic means" were available to protect the defendant's sixth amendment right to a fair trial and to preserve the institutional integrity of the judicial system. As for the statements prohibited, the court ruled that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed." The total ban would have resulted in establishing violations for making a "trivial, totally innocuous statement."

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75 522 F.2d at 249.

76 Id. at 249. But see United States v. Tijerina, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969), withholding the "reasonable likelihood" standard in a case where extrajudicial comments by defendants resulted in contempt citations.

77 522 F.2d at 251. Chicago Council has not survived without criticism. See, e.g., Note, Chicago Council of Lawyers v. Bauer: Gag Rules—The First Amendment vs. The Sixth, 50 Sw. L.J. 507 (1976). The note suggests that the "reasonable likelihood" standard upheld by United States v. Tijerina, 412 F.2d 661 (10th Cir.), cert. denied,
Thus, the Seventh Circuit found fault in the drafting of the rule, not in its purpose. However, even the Seventh Circuit, which has voiced the strongest objections to date concerning restraints on extrajudicial comments by lawyers, has recognized that some form of control over interference with the justice system is permissible.

We think there is a place and need for specific provisions in properly drawn rules. Lawyers must be aware of exactly what areas of speech might pose a serious and imminent threat of interference with a fair trial. The serious and imminent standard must always be an element of any prohibition. 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.78

Clearly such restraints, so long as they are properly drafted, are within the power of the courts. The United States Supreme Court has repeatedly said, albeit in dictum, that lawyers involved in pending cases can be prevented from commenting on those cases.79 Indeed, it has been suggested that the sixth amendment may require their silence.80 Unless we are to assume that the Supreme Court is leading the judiciary down the primrose path to reversible error, we must assume that it means what it says.

Further support for the proposition that lawyers are subject to restraints upon their extrajudicial statements can be found in In re Sawyer.81 In that case, a lawyer representing a

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78 396 U.S. 990 (1969), is constitutionally required, since the Court in Sheppard v. Maxwell, 384 U.S. 333 (1966), suggested that the defendant need only show a "probability" of prejudice before he can request gag orders.

79 522 F.2d at 251.


defendant accused of violating the Smith Act was disciplined by the Hawaiian Territorial Court because she made a public speech during the course of the trial. In that speech the lawyer trenchantly criticized the wisdom of prosecutions under that Act, and made a number of comments which arguably reflected on the intelligence and integrity of the judge conducting the trial. The Supreme Court reversed the disciplinary action. Speaking for a four-man plurality, Justice Brennan held that the evidence was insufficient to support the disciplinary action. Although the case was briefed and argued primarily on first amendment grounds, the plurality opinion specifically did not "reach or intimate any conclusion on the constitutional issues presented."

Justice Stewart, concurring in the result, agreed with the plurality's holding that the charges were not proved, but he pointedly refused to join in Justice Brennan's avoidance of the first amendment issue.

A lawyer belongs to a profession which inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

Justice Frankfurter's opinion for the four dissenting Justices remains today a profound statement of the responsibilities assumed by a lawyer:

An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ulti-

\footnotesize{\begin{itemize}
  \item \textsuperscript{82} 18 U.S.C. § 2385 (1976).
  \item \textsuperscript{83} 360 U.S. at 627.
  \item \textsuperscript{84} Id. at 636.
  \item \textsuperscript{85} Id. at 646-47.
\end{itemize}}
mately this Court, still exercises judicial power those claims will be heard and heeded.88

Thus, five members of the *Sawyer* Court would have permitted the discipline of a lawyer for speech which would have been protected had it issued from the mouth of a non-lawyer. Justice Brennan, who spoke for the plurality in *In re Sawyer*, cited that case for this proposition in his concurring opinion in *Nebraska Press Ass'n v. Stuart*:

As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, *See In Re Sawyer*, 360 U.S. 622 (1959), and to impose suitable limitations whose transgression would result in disciplinary proceedings.87

Given the approving reference to this passage in *Landmark Communications, Inc. v. Virginia*, doubts about the court’s power in this respect should be laid to rest.

**B. Prior Restraints on Respondents in Lawyer Disciplinary and Disability Proceedings**

Any attempt to impose a prior restraint on a respondent lawyer in a lawyer disciplinary or disability proceeding may run afoul not only of the first amendment, but also of the sixth amendment. A respondent lawyer enjoys the same freedom of speech which is guaranteed to other participants in the proceeding. But, in addition, he can point to his sixth amendment right to a "public trial."88 The Supreme Court has thus far only

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88 Id. at 668.
87 427 U.S. 539, 601, n.27 (1976) (Brennan, J., concurring). *See also* Mr. Justice Stewart’s approving reference to *In re Sawyer* in his concurring opinion in *Landmark Communications, Inc. v. Virginia*, 98 S. Ct. 1535, 1546 (1978). After noting the state interest in confidentiality, the Justice commented that “I find nothing in the Constitution to prevent Virginia from punishing those who violate this confidentiality.” *Id.* at 1546.
88 “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . .” U.S. Const. amend. VI. The general view is that lawyer discipline and disability proceedings are neither criminal nor civil, but *sui generis*. *See, e.g.,*
been confronted with cases in which it construed the defendants' right to a public trial in light of his right to an "impartial jury." Few courts have addressed the problem raised when a defendant insists that his trial be made public while the state asserts policies which require the proceedings in which he is tried to be kept confidential.

*United States v. Tijerina* presented such a case. However, the posture in which the case was presented to the court renders much of its opinion merely advisory.

Before trial, the defendants' lawyers consented to the imposition of a judicial "gag" order over all lawyers, defendants, and witnesses during the pendency of the proceedings. In violation of this order, two of the defendants made public speeches concerning the trial and were convicted of contempt. The Tenth Circuit, in affirming the conviction, noted that the agreement to abide by the gag order should have disposed of the case. However, because of "the circumstances of the case" the court went on to consider the constitutional claims presented. The defendants contended that, since the order was entered for their own protection, they could not be punished for violating it. The court said:

The public has an overriding interest that justice be done in a controversy between the government and individuals and has the right to demand and expect "fair trials designed to end in just judgments." [Citing cases]. This objective may be thwarted unless an order against extrajudicial statements applies to all parties to a controversy. The concept of a fair trial applies both to the prosecution and the defense.¹¹

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²² 412 F.2d 661 (10th Cir. 1969).

²² Id. at 666 (citations omitted).
Similar language has been employed by the Supreme Court. In *Sheppard v. Maxwell* the Court stated that:

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.\(^2\)

Despite the generalized statements quoted above, there are persuasive arguments that constitutional objections to restraining the speech of defendants may still remain. The main argument is that open speech is the defendant’s only means of countering public opinion that he is, in fact, guilty as charged.\(^3\) Several Standards suggested by the ABA have noted the difficulties involved in imposing restraints on the free speech guaranteed to respondent lawyers in disciplinary proceedings and defendants in criminal trials. Section 8.24 of the Disciplinary Standards provides that the respondent may waive confidentiality in proceedings which would otherwise be closed to the public.\(^4\) In regard to court-imposed restraints in criminal prosecutions, the first Standards Relating to Fair Trial and Free Press (1968) observed that:

> Several comments on the report have suggested that the proposed restrictions ought not to apply to defense counsel at all. The argument is that the primary threat is to the accused, that the inability to reply weights the scales even more heavily in favor of the state, and that restrictions on defense counsel are far more likely to lead to abuse than those on the prosecution.

\(\ldots\)

\(\ldots\) While recognizing the difficulty and importance of the question, the Committee believes that the proposed restriction should be retained \(\ldots\) [T]he prosecution is already somewhat disfavored by the fact that the proposed

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\(^2\) 384 U.S. 333, 363 (1966). “[T]he trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters \(\ldots\)” *Id.* at 361.


\(^4\) See note 1 *supra* in which the text of this section is set out.
restrictions do not—and probably could not—apply to the defendant himself, who does not have the same fiduciary obligation to the administration of justice as his attorney.\textsuperscript{95}

The second edition of the Standards Relating to Fair Trial and Free Press (1978) has taken an even stronger position on the first amendment rights of defendants in criminal trials:

[C]riminal defendants . . . are never in court voluntarily. . . . Even though complete forbearance from extrajudicial statements may be desirable generally, no binding instruction on parties . . . should be authorized . . . . Once parties . . . in a criminal case are outside the courtroom, they have the full prerogatives of any private citizen to question, criticize, or condemn the actions of government even though they may be swept up in its processes at the time.\textsuperscript{96}

Thus courts, in forming confidentiality rules in attorney disciplinary and disability proceedings, should recognize that respondents in such cases have no less right than other participants to be free of prior restraints on their speech and, in fact, may have considerably more.

\textbf{Conclusion}

The Disciplinary Standards provide evidence that the legal profession is deeply concerned about the need to administer promptly and fairly discipline to those lawyers who fail to honor their obligations to the profession and their clients. The confidentiality provisions of the Disciplinary Standards are important aspects in the implementation of that goal. Hopefully, the Disciplinary Standards will be reviewed and adopted by most states. However, the Disciplinary Standards have not addressed all the issues raised in this article.

The appendix to this article contains a suggested rule formulated to deal with the first amendment issues raised in attempts to insure confidentiality. The manner in which the states handle this problem will determine the accessibility of these proceedings to the media. If a state finds it desirable to

\textsuperscript{95}ABA \textsc{standards relating to fair trial and free press} 19-20 (1968).

\textsuperscript{96}Commentary to Standard 8-3.6 of \textsc{aba standards relating to fair trial and free press} (1978), at 26.
establish a rule which defines the first amendment limitations in lawyer disciplinary proceedings, the rule proposed in this article may provide a starting point.

V. PROPOSED RULE GOVERNING REQUESTS TO MAKE PUBLIC STATEMENTS CONCERNING LAWYER DISCIPLINARY OR DISABILITY PROCEEDINGS WHICH RULE 8.24 OR RULE 8.25\textsuperscript{97} REQUIRE TO BE CONFIDENTIAL

Proposed Rule 8.251:

(a) If a witness, employee of the hearing committee, or lawyer connected with any lawyer disciplinary or disability proceeding who is required by Rule 8.24 or Rule 8.25 to maintain confidentiality wishes to make a public statement concerning that proceeding, he shall submit a written copy of the proposed statement to the hearing committee before making the public statement. The proposed public statement shall be accompanied by a written brief setting forth the reasons why the statement should be permitted.

(b) Within two days\textsuperscript{98} after receipt of the proposed public statement and the brief, the hearing committee shall issue written conclusions in which it (i) denies the request to make the proposed public statement; (ii) grants the request to make the proposed public statement; (iii) grants the request to make the proposed public statement, on condition that it be modified in the manner proposed by the hearing committee; or (iv) grants the request to make the public statement, on the condition that publication of that statement be accompanied by the publication of such other information, which, in the opinion of the hearing committee, is necessary to make the proposed public statement not misleading or prejudicial to the respondent or to the administration of that attorney discipline or disability proceeding.\textsuperscript{99} The opinion of the hearing committee shall set

\textsuperscript{97} The text of these sections is contained in note 1 supra.
\textsuperscript{99} Subsections (iii) and (iv) reflect the requirement that states seek the least drastic means to implement their interests, when the state's action abridges fundamental rights. See, e.g., Landmark Communications, Inc. v. Virginia, 98 S. Ct. 1535
forth the harms that will result if the party is not permitted to make the public statement; any foreseeable prejudice to the respondent that may result if the public statement is permitted; and any foreseeable interference with the administration of the lawyer disciplinary or disability proceeding that may result if the public statement is permitted.

(c) The hearing committee shall grant the request to make the public statement unless it concludes that the public statement presents a clear and present danger of prejudice to the respondent or of interference with the administration of the lawyer disciplinary or disability proceeding, and that that clear and present danger cannot be avoided by the modification of the public statement, or by the release of additional information concerning the proceeding to which the public statement relates. It shall be presumed that any public statement which identifies the respondent in a lawyer disciplinary or disability proceeding will present a clear and present danger of prejudice to the respondent. The party seeking permission to make the public statement may overcome this presumption by a showing supported by a preponderance of the evidence.

(d) If the hearing committee denies the request to make the public statement, or imposes limitations, and the party

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100 The presumption must be that the speech is protected. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).

101 The required specificity of that conclusion has never been spelled out. But see Wood v. Georgia, 370 U.S. 375, 387-88 (1962), for some guidelines.

102 Recent United States Supreme Court pronouncements on the proper test by which prohibited speech is to be identified have been ambiguous. See note 36 and accompanying text supra for a discussion of this test. However, the "clear and present danger" test has never been held insufficient. Moreover, the Court relied on cases which employed that standard in its opinion in Landmark Communications, Inc. v. Virginia, 435 U.S. 835 (1978). The American Bar Association also uses the clear and present danger standard in its Standards Relating to Fair Trial and Free Press (1978), Standard 8-1.1.

103 The primary purpose of confidentiality in lawyer disciplinary and disability proceedings is to protect the lawyer from the calumny attendant upon groundless charges. The characterization of certain categories of speech as presumptively prejudicial was suggested by the court in Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied sub nom. Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).
seeking permission to make the public statement is unwilling to comply with the modifications proposed by the hearing committee or does not agree to the release of additional information concerning the proceeding, review may be obtained by filing a notice of appeal in the Supreme Court within two days. The notice of appeal shall be accompanied by the proposed public statement, the written brief, and the conclusions of the hearing committee. There will be no oral argument, and review will be expedited by the Supreme Court.

(e) All time limits set forth in this rule may be extended by stipulation of the hearing committee and the party requesting permission to make the public statement.

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104 Again, the status quo must be preserved for the shortest time compatible with sound resolution of the issue. See note 62 supra. As to the burden of seeking review, and the burden of persuasion on review, see Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975).