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Applying Due Process to Gag Rules and Orders

Laurie Smith Camp
University of Nebraska College of Law, lsc@ned.uscourts.gov

Commentary

Applying Due Process To Gag Rules and Orders

ABA Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press.[1]

I. INTRODUCTION

At its 1976 annual meeting held in August, the ABA House of Delegates recommended a new court procedure for the application of due process to the issuance of gag orders.[2] The proposal seeks to render standing gag rules unenforceable and would provide for special gag orders only after notice and an opportunity for a hearing are given to interested parties. The ABA proposal will help to reduce the current glut of judicial restraints by providing more specific procedural guidance than was offered by the Supreme Court in *Nebraska Press Ass'n v. Stuart.*[3]

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1. ABA LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, REVISED DRAFT RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (Nov. 1975) [hereinafter cited as ABA PROPOSAL FOR JUDICIAL RESTRAINTS].
2. The ABA Legal Advisory Committee on Fair Trial and Free Press, which is subject to the Standing Committee on Communications, studied the possibility of standard court procedures for the issuance and enforcement of restrictive orders. The Committee consisted of two judges, three practicing attorneys, and two media representatives. In addition, at the 1974 ABA annual meeting, the opinions of judges, lawyers, laymen, and new media personnel were solicited. *Id.* at 3-4.
3. 44 U.S.L.W. 5149 (U.S. June 30, 1976). The Supreme Court limited its decision to the facts of the Simants' case in finding that a restraint on media comment was not justified.

   Jack C. Landau, Supreme Court reporter for Newhouse News Service initiated the ABA proposal. As a representative of the Reporters Committee for Freedom of the Press at the 1974 ABA midyear meeting and later at the 1974 ABA annual meeting in Honolulu, he suggested that procedural due process be available to all those affected by the issuance of restrictive judicial orders.

This article will first explore the structure of the ABA proposal and how it could improve the current system of judicial restraints by reducing unneeded gag orders, preserving first amendment freedoms of speech and press without the expense and delay of traditional court procedures, and eliminating the hidden jeopardy of standing gag rules. It will then examine the two pressing issues left unsolved: When does the Constitution allow a judge to gag a journalist, lawyer, or other individual interested in a trial? Should one who violates an improper or erroneous order be punished?

It will be concluded that the ABA proposal approved by the House of Delegates may be a long overdue improvement in the area of judicial restraints.[4] However, the House of Delegates could have strengthened the proposal by expressing an opinion on the constitutional standards which should apply to the issuance of gag orders, and by recommending that those who violate erroneous court orders not be punished.

II. STRUCTURE OF THE PROPOSAL

The ABA proposal entails a "standing guidelines—special order approach" to court action.[5] It recommends that courts adopt standing guidelines for the conduct of reporters,[6] attorneys, law enforcement officers, judges and judicial employees in regard to the release of information at the pretrial and trial stages of criminal litigation. The new guidelines would replace old standing gag rules and would not be enforceable by contempt proceedings. Special orders would be entered by a court only if it found that "under applicable constitutional standards"[7] there was sufficient danger that prejudicial publicity would prevent a fair trial. The orders would be tailored to the circumstances of the individual case and violations would be punished as contempt.[8]

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4. Prior to the new ABA proposal, the media and bar attempted to resolve their differences through "voluntary agreements." *See* ABA FAIR TRIAL-FREE PRESS VOLUNTARY AGREEMENTS (1974).
5. ABA PROPOSAL FOR JUDICIAL RESTRAINTS, *supra* note 1, at 6-7.
6. The proposal suggests that the procedures outlined are "directed primarily to lawyers, court and law enforcement personnel and not to the press." *Id.* at 1. However, the proposal was prompted by complaints from the media. *See* note 3 *supra*. Therefore, the ABA's disclaimer is most likely a response to journalists' charges that the proposal does not provide enough protection for the rights of the media.
7. ABA PROPOSAL FOR JUDICIAL RESTRAINTS, *supra* note 1, at 10.
8. For support of restrictive orders applied to the press, see Hornstein, *Gag Order on Press Justified by 'Irresponsible' Crime News Reporting*,

Due process would be afforded by a court to interested parties before it adopted standing guidelines and special orders. Before adopting standing guidelines, it would be required to solicit the written and oral opinions of news media, bar organizations, law enforcement agencies, public defenders and prosecutors. The guidelines also would be subject to periodic review and change. Before issuing a special order, a court would have to determine whether sufficient danger of prejudicial publicity existed; then it would draft a proposed order, give notice to the parties affected and provide them with a hearing. A final special order would be detailed and specific and would list reasons for its issuance.

In "extraordinary circumstances" a court could enter a temporary special order which would be enforceable before the requirements of a hearing had been met. The court would explain the necessity for the temporary special order and would provide a prompt hearing to consider continuing, modifying or terminating the order. All those aggrieved by the order would be able to appeal in the most prompt manner provided in the jurisdiction for contesting other court orders, such as injunctions.[9]

The structure of the ABA proposal shows promise of improving the present system of judicial restraints in three major respects.

First, the use of due process standards may prevent the issuance of unnecessary gag orders.[10] Accelerating numbers of restrictive orders have been issued to lawyers and reporters in the last decade.[11] Since the Supreme Court decided in 1966 that the duty of insulating a trial from excessive publicity rested with the trial

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Omaha World-Herald, Dec. 3, 1975, at 6, col. 1; Califano, *Persecuting Patty Hearst*, NEWSWEEK, Nov. 3, 1975, at 13 (containing the views of Catherine Hearst); Greenberg, *Court Gag Rule? Tush, It's 'Discretion'*, Lincoln Journal, Nov. 11, 1975, at 5, col. 2, (wherein Chief Justice Warren Burger is quoted as saying: "The Constitution merely says 'Congress shall make no law,' it does not mean a court cannot use discretion in a trial.").

9. *See* ABA PROPOSAL FOR JUDICIAL RESTRAINTS, *supra* note 1, at 6-10 for an outline of the structure of the proposal.
10. The Reporters Committee for Freedom of the Press contends by way of a 1972 survey that in no single case litigated by the media was a gag order upheld on its merits. *See* Landau, *The Challenge of the Communications Media*, 62 A.B.A.J. 55, 59 (1976).
11. The Reporters Committee cites 174 cases involving restrictive orders since 1966:

> Following is a breakdown of orders . . . litigated and unlitigated, which have in some way restricted access to or comment about the judicial process. . . . Cases are listed only

court judge,[12] the United States Judicial Conference[13] and the ABA[14] each have proposed barring comments by attorneys and other court officers which were "reasonably likely" to interfere with the fair administration of justice. However, individual courts have gone far beyond the Supreme Court decision and the Judicial Conference and ABA proposals of the late 1960s and have gagged members of the media, sometimes without even a pretext of a clear and present danger to the trial.[15] If those who will be affected are given notice of the planned restrictive order, an opportunity to refute the need for the order, and an expedited appeal of the court decision, fewer unjustified judicial restraints will be imposed. If an erroneous restraint *is* imposed, at least its duration should be

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once, although the order might fall into more than one category.

	Closing court proceedings or records	Prior restraint of statements by participants	Prior restraints on publications	Restraints on photography
1967	1	2	0	2
1968	5	7	1	0
1969	1	4	1	0
1970	0	7	0	1
1971	5	6	2	1
1972	4	1	4	1
1973	8	7	4	0
1974	12	11	13	1
1975	25	18	14	5
	61	63	39	11

Id. at 57.

12. Sheppard v. Maxwell, 384 U.S. 333 (1966).
13. The Judicial Conference Recommendations were drafted in 1968 by twelve federal court judges, with Judge Irving R. Kaufman as chairman, and are often referred to as the "Kaufman Report." *See* 45 F.R.D. 391, 404 (1968).
14. The ABA proposals, incorporated into the ABA Canons in 1968, are often referred to as the "Reardon Report," since Paul C. Reardon was the committee chairman. *See* ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, APPROVED DRAFT (1968).
15. Last October, Nebraska's Lincoln County Judge Ronald Ruff issued a no-comment order restricting statements of attorneys, public officials, witnesses, and the press involved in the Erwin Charles Simants murder trial. He stated that a dominant factor in his decision was a "reasonable likelihood" that publicity would make the impaneling of a jury "difficult if not impossible." Lincoln Journal, Oct. 22, 1975, at 57, col. 1.

shorter than under the present system. By dispensing with the lower court hearing prior to the issuance of the gag order, those contesting the order need only wait through an "expedited" appeal to have the restraint removed.

Second, the ABA proposal's use of due process would not offend the first amendment freedoms of speech and press as gravely as does the current use of no-notice prior restraints, and yet would not be as expensive as other alternatives to the present system. Those who consider free speech and press most sacred contend that traditional court procedures should be used to preserve fair trials.[16] They note that changes in venue, careful voir dire, continuances, sequestration, court instructions, declarations of mistrial and provisions for new trials could ensure fairness with few constraints on publicity. The cost of this method in terms of time and money would be far greater than the expense of providing due process for those who will be affected by gag orders.

Third, the uncertainty of the current system should be rectified by the "standing guidelines—special order approach" of the ABA proposal. Presently, most state and federal courts operate under a system of standing rules and special orders which regulate trial publicity.[17] Violations of standing rules, as well as special orders, can be deemed as contempt; however, the standing rules have not been enforced uniformly.[18] A judge may see no reason to enforce a court rule limiting publicity if a case is not sensational. Therefore, those wishing to disseminate information about a trial have been unsure of the legal parameters regulating their speech in the absence of individual gag orders. Under the new ABA proposal, no one will be held in contempt for violating standing guidelines, and special orders will be tailored to the specific circumstances of the individual case.

III. PROBLEMS LEFT UNSOLVED

The new ABA proposal is structured to allow the imposition of restrictive orders only when "applicable constitutional standards"

16. In both Sheppard v. Maxwell and Nebraska Press Ass'n v. Stuart the Supreme Court listed several traditional court procedures for limiting the effects of trial publicity.

    For arguments against gag orders directed at the media, see Annot., 5 A.L.R. Fed. 948 (1970); C. BUSH, FREE PRESS AND FAIR TRIAL (1970); Comment, *The Gag Order, Exclusion and the Press's Right to Information*, 39 ALBANY L. REV. 317 (1975); Comment, *The Gag Order*, 45 S. CALIF. L. REV. 51 (1972).

17. Eighty of the ninety-four federal district courts have standing court rules limiting trial publicity by penalty of contempt citation. D. NEB. R. 37A limits trial publicity by attorneys and court officers. Violations are punishable through contempt citations.

18. ABA PROPOSAL FOR JUDICIAL RESTRAINTS, *supra* note 1, at 5.

indicate a sufficient danger of prejudicial publicity. Yet it is unclear what standards are applicable to members of the media or to attorneys and court officers. The proposal also provides for an appeal of orders "in the most expeditious manner provided by the particular jurisdiction for review of temporary injunctive orders or any other orders which are subject to expedited review."[19] But, if those affected by an erroneous order violate its provisions pending appeal, they still may be guilty of contempt.

A. What Constitutional Standards Apply?

The Constitution provides protection against the possible abuse of power by judges,[20] but does not contemplate the awesome effects of joint action by attorneys and journalists during trial proceedings. During the early 1960s, much attention was drawn to the actions of the worst among lawyers and journalists.[21] Such misconduct culminated in the 1966 Supreme Court decision of *Sheppard v. Maxwell*.[22] Dr. Sam Sheppard, accused of murdering his wife in 1954, was questioned and tried in an atmosphere the Supreme Court described as "bedlam."[23] The Court held that publicity of the trial was so extensive and untempered that Sheppard's conviction could not stand.[24] Recognizing the vital role of the free press in the administration of justice, the Court did not impose rigid rules on judges, attorneys or the media,[25] but it did suggest that the media's *sources* of information, such as attorneys, parties, witnesses and court officers, should be restrained from publicizing a case before any direct restraints were placed on journalists themselves.[26] The Court laid the duty of insulating a trial and ensuring fairness with the trial court judge.[27]

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19. *Id.* at 11.
20. *See* U.S. CONST. amend. VI, which ensures the defendant in a criminal case the right to a public trial and the assistance of counsel. In Pennekamp v. Florida, 328 U.S. 331 (1946), the Supreme Court declared that a judge could not use the power of contempt to insulate himself from criticism.
21. *See* Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 240 (1964).
22. 384 U.S. 333 (1966).
23. *Id.* at 355.
24. *Id.* at 350.
25. *Id.* at 358-59.
26. *Id.* at 363.
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

Therefore, with the *Sheppard* case, the Supreme Court interpreted the Constitution to apply a dual standard to prejudicial courtroom publicity, distinguishing comments made by attorneys from those made by the media. Statements by journalists were subject to the clear and present danger standard[28] and could not be curbed unless they posed a serious and imminent threat to a fair trial.[29] However, a more stoic demeanor was required of attorneys.

Faced with their newly-emphasized responsibility, trial court judges constitutionally could do little more to constrain members of the media than require that they conduct themselves properly in the courtroom.[30] Therefore, initially, most judicial effort was aimed at restricting the comments made by lawyers at various stages of civil and criminal proceedings, and thereby limiting the media's sources of fact, and perhaps fiction.

The judicial restrictions on lawyers took the form of both individual gag orders and standing court rules. Violation of either could result in contempt of court citations. The text of many standing court rules was a verbatim adoption of the 1968 proposal of the United States Judicial Conference.[31] It generally prohibited lawyers from releasing information about pending or imminent criminal litigation if there was a "reasonable likelihood" that the information would interefere with the administration of justice.[32]

> 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 it is highly censurable and worthy of disciplinary measures.

Id.

"More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Id.* at 361.

28. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); 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).
29. In Craig v. Harney, 331 U.S. 367, 384 (1947), the Court set out its test for when trial publicity may be curbed: "The fires which the expression kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."
30. 384 U.S. at 358-59. The Court recommended limiting the number of reporters allowed in the courtroom, seating them outside the bar, and prohibiting them from handling the exhibits. It suggested that the media's conduct outside the courtroom could be controlled through restrictions on the statements of police, witnesses, and counsel. The Court did not suggest direct restrictions on the media's rights of speech or publication.
31. 45 F.R.D. at 404.
32. The Judicial Conference proposal prohibited counsel's disseminating

The 1968 "Reardon Report" of the ABA, resulting in Canon DR 7-107 (A-D),[33] also banned public statements "reasonably likely to interfere with a fair trial" during and after the time of jury selection. DR 7-107(G) placed the same restriction on lawyers' comments "reasonably likely" to interfere with the fair trial of a civil action.

Not all judges have agreed that attorneys and other court officers should have a more limited right of free speech than members of the media. Some have "solved" this double standard by issuing gag orders to the press when its comments pose only a "reasonable likelihood" of interfering with justice,[34] but the Supreme Court has never sanctioned such a standard.

The United States Court of Appeals for the Seventh Circuit chose to remedy the double standard in another way. In 1974, in the case of *Chicago Council of Lawyers v. Bauer*[35] the Council of Lawyers sought a court declaration that a local district court rule, modeled after the Judicial Conference recommendations and DR 7-107 was unconstitutional.[36] The court of appeals determined that the "reasonable likelihood" test for the no-comment rules must be replaced[37] and that comments by attorneys and court officers

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specific information, including criminal records, confessions, examinations, or pleas of the accused; identity, testimony, or credibility of prospective witnesses; and opinions as to the merits of or evidence in the case. It also barred counsel's dissemination of information if "there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." *Id.*

33. ABA CANONS OF PROFESSIONAL ETHICS DR 7-107 (A-D) placed the same specific restrictions on attorneys' comments as did the Judicial Conference recommendations.
34. *See* notes 11 and 16 *supra*. The increasing volume of judicial restraints issued in the last ten years indicates a change in the standard used by judges to determine when a threat exists, rather than in the nature of trials themselves.
35. Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689 (N.D. Ill. 1974), *rev'd*, 522 F.2d 242 (7th Cir. 1975).
36. N.D. ILL. R. 1.07 is a verbatim adoption of the Judicial Conference recommendations. 45 F.R.D. at 404.
37. An individual, judge-made gag order was challenged in the Seventh Circuit in 1970. The district court order prohibiting defendants and their attorneys from making statements pending a criminal trial was overturned by the court of appeals which held that the order was overbroad, because there was no "clear and present danger of a serious and imminent threat, or a likelihood of such a threat" to the fair administration of justice. Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970). A year later, the Seventh Circuit affirmed this stance by declaring overbroad a prohibition against all extrajudicial comment by counsel in a pending case, even though violators were not held in contempt.

were not to be restrained unless they posed a clear and present danger of a "serious and imminent threat" to justice.[38] The court recognized that the discussion of some specific topics listed in the no-comment rules presumptively could be considered as a serious and imminent threat to a fair trial.[39]

By stating that restrictive orders should be imposed only when "applicable constitutional standards" indicate a sufficient danger of prejudicial publicity, the new ABA proposal suggests no answer to the basic query of what standards are applicable to the particular case. The question still remains whether the press should be restricted only when a clear and present danger of a threat to justice exists, while attorneys are gagged whenever a reasonable likelihood of such a threat appears, or whether the same right to free speech applies to both.

Those who formulated the new ABA proposal were not unmindful of this problem. The first draft[40] stated that "Special Orders, punishable by contempt shall be entered only in particular cases where there is a reasonable likelihood that prejudicial publicity will prevent a fair trial."[41] On August 7, 1975, three days after the Seventh Circuit ruled on *Bauer*, the ABA annual convention in Montreal received this first draft. By November, the proposal was revised to provide for the use of "applicable constitutional standards" rather than the reasonable likelihood test.[42]

Although the ABA may not be able to interpret the Constitution as it choses, it should take a more definite stance in this important debate.[43] By providing that "applicable constitutional

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In re Oliver, 452 F.2d 111 (7th Cir. 1971). These two cases tempered the impact of individual gag orders and court policy statements by insisting that the "serious and imminent threat" test, which had been applicable to press gag orders for nearly thirty years, be applied to gag orders and policy statements directed at counsel.

38. 522 F.2d at 249.
39. *Id.* at 251.
40. ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, PRELIMINARY DRAFT PROPOSED COURT PROCEDURE FOR FAIR TRIAL-FREE PRESS JUDICIAL RESTRICTIVE ORDERS (July, 1975).
41. *Id.* at 8.
42. *See* Roney, *The Bar Answers the Challenge*, 62 A.B.A.J. 60 (1976).
43. Judge Paul H. Roney, who served as chairman of the ABA Legal Advisory Committee on Fair Trial and Free Press that drafted the new proposal, contends that "the committee deems controversies over substantive matters irrelevant to a consideration of the proposed procedure." *Id.* at 61. By making no recommendations on "substantive matters" the committee may expect the proposal to pass the House of Delegates more easily and to be received better by judges of diverse views.

standards" shall govern the issuance of gag orders, the ABA merely defers resolution of this issue to trial court judges.[44] During the past ten years, these judges have usually interpreted the first amendment as providing little protection to either attorneys or journalists.[45]

B. Should a Violation of an Erroneous Order Be Punished?

In England, before the formation of the Star Chamber, a person who impaired the fair proceeding of a civil or criminal trial, by excessive publicity or otherwise, could be indicted for the crime of contempt of court.[46] He was allowed all the due process protections afforded any other crime, including trial by jury. In the early seventeenth century, the Star Chamber assumed jurisdiction to punish these contempts, and after its abolition in 1641, ordinary judges began trying the contempts summarily. When this procedure was challenged in 1765, the practice was upheld.[47] Since that date, the summary method has continued, in both England and the United States.[48]

In Nebraska, as in most states,[49] once an order is imposed by a judge, in-court violations can result in conviction for contempt

44. In Nebraska Press Ass'n v. Stuart, the Supreme Court recognized that the question of a dual standard for expression by attorneys and by newsmen exists. However, the facts of the case did not allow the Court to resolve that question. 44 U.S.L.W. at 5157 n.8.

    Some judges contend that the difference between a "clear and present danger" and a "reasonable likelihood" of such a danger is a semantic one. *See* 522 F.2d at 621 (Castle, J., dissenting in part).

45. *See* note 11 *supra.*

46. H. STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 154 (3rd ed. 1972).

47. R. v. Almon, 97 Eng. Rep. 94 (1765).

48. American courts, however, have been more permissive toward journalists than have the courts in England. English law professor Harry Street has noted:

    > In the United States, the Press is free to assist in detection of crime, to interview witnesses and suspects and report their observations, to comment on trials as they proceed, and to give opinions on the guilt of suspects. Englishmen should be proud of the fact that none of these things can happen in England: the law of contempt stands in the way.

    STREET, *supra* note 47, at 155.

    See also Bridges v. California, 314 U.S. 252, 263-65 (1941), for an historical summary of judicial attitudes toward trial publicity. In *Bridges*, the Court recognized that the Constitution mandates tolerance of journalistic comment which poses no clear and present danger to a fair trial. This degree of tolerance was never required in England.

49. In most states, summary procedures are used to convict for an in-court contempt. For out-of-court contempts, however, a fact-finding proceeding may be used, though the accused cannot exonerate himself by showing the court order to be improper or erroneous. *See* Walker v.

through the use of summary proceedings,[50] while out-of-court violations can lead to conviction for contempt following a fact-finding trial.[51] Even though a rule or order may have been imposed improperly or erroneously, a violation is still subject to contempt conviction.[52]

The United States Court of Appeals for the Seventh Circuit in the case of *In re Oliver*,[53] took a pioneering step in this area as it did in *Bauer*. In 1971, an attorney challenged a standing court policy statement which prohibited all extra-judicial comment by counsel in a pending case. He did this following his reprimand for having violated the policy statement. The court of appeals determined that the statement was overbroad, and, therefore, any punishment imposed for violating it was void. It noted that when a court adopts broad rules, it acts like a legislature;[54] therefore, one who had violated a rule of a court could challenge the validity of the rule itself, and if successful, could exonerate himself.[55] However, this decision was limited to standing court rules and policies and did not apply to specific court orders.

In 1972, the United States Court of Appeals for the Fifth Circuit was faced with the problem of an allegedly invalid special court order in the case of *United States v. Dickinson*.[56] It ruled that the gag order, which was issued without due process and which barred the publication of court proceedings, must be obeyed pending appeal. Although the court noted that the order could not withstand the slightest breeze emanating from the first amendment,[57] it still insisted that the press must obey the invalid prior restraint and appeal its issuance, or face contempt conviction.[58] Under the *Dickinson* rule, if a judge erroneously restrains the

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Birmingham, 388 U.S. 307 (1967); Maggio v. Zeitz, 333 U.S. 56 (1948); United States v. United Mine Workers, 330 U.S. 258 (1947); Howat v. Kansas, 258 U.S. 181 (1922); Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); and *In re* Savin, 131 U.S. 269 (1889). *But see* Thomas v. Collins, 323 U.S. 516 (1945); Lovell v. Griffin, 303 U.S. 444 (1937).

50. NEB. REV. STAT. § 25-2122 (Reissue 1975).
51. *Id.*
52. Jenkins v. State, 59 Neb. 68, 80 N.W. 268 (1899), *aff'd* 60 Neb. 205, 82 N.W. 622 (1900). However, if the accused can prove that the court order is void for lack of jurisdiction, he may escape penalty. McFarland v. State, 172 Neb. 251, 104 N.W.2d 307 (1961).
53. 452 F.2d 111 (7th Cir. 1971).
54. *Id.* at 113-14.
55. *Id.* at 114.
56. 465 F.2d 496 (5th Cir. 1972).
57. *Id.* at 509.
58. *Id.* at 509-10.

publication of any trial information, attorneys and journalists must abide by the unconstitutional court order until an appellate decision is in effect. Otherwise, they must go to jail.[59]

While the new ABA proposal wisely avoids the possibility that violations of standing court rules will be punishable by contempt proceedings, one who violates a gag order which is overturned on appeal as erroneous will still be guilty of contempt. The use of a temporary special order, issued without due process in "extraordinary circumstances," could lengthen the time that attorneys and the media may be subject to the terms of an erroneous order.

If one who is accused of violating a law can prove that it is invalid, he will be exonerated. This fundamental rule should not be altered simply because a judge issues orders in an "adjudicative role." If the order is invalid, the individual who has violated it should not be punished. Under this theory, attorneys and journalists would not act hastily to violate court orders, because they *would* be punished if the order were upheld.

The ABA should have recognized that prior restraints on free expression are presumptively invalid[60] and that the judge who issues a gag order should have the burden of proving its validity. If the ABA cannot recommend a stay on appeal for all restrictive orders, it should at least advocate an end to punishment for those who violate invalid court orders.

IV. CONCLUSION

The carnival-like trials of the early 1960s demonstrated that some restraints are needed to insulate court proceedings from excessive publicity. Ideally, the new ABA proposal could help to

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59. Landau has noted that when a no-notice gag order is imposed on the press, a reporter has four choices:

> (1) The reporter may appeal the constitutionality of the order while the case is going forward, be unconstitutionally censored, and risk a substantial probability that the appeal will be moot before finally decided. (2) The reporter may break the order and, under *Dickinson* go to jail, even if the order is void. (3) The reporter may knowingly conspire with someone covered by the order . . . to give him information . . . thereby subjecting both [himself] and the named source to contempt. (4) The reporter may interview a [source] covered by the order, thereby subjecting himself to the threat of contempt if he refuses to reveal this "source," . . . .

Landau, *supra* note 11, at 58-59.

60. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Near v. Minnesota, 283 U.S. 697 (1931).

eliminate the issuance of unnecessary gag orders by offering due process to those who may be affected by the restraints. It could help to preserve first amendment freedoms of speech and press without the expense and delay of resorting to traditional court procedures such as continuances and retrials. Finally, it could eliminate the hidden jeopardy of the present system by removing sanctions for the violation of standing court gag rules.

However, the proposal leaves one issue in confusion and another steeped in injustice. Because the nation's judges are free to reject all or any part of a recommendation by the bar, the ABA has no reason to refuse to express an opinion on these two issues. The ABA should define the constitutional standards which it believes apply to attorneys and journalists whose speech is to be restrained by a court order. It also should make a clear recommendation as to whether attorneys and journalists who violate erroneous court orders should be punished. The way courts approach these two substantive issues will largely determine the success of the ABA's procedural proposal.

Laurie Smith Camp '77