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Commentary

By DAVID B. NEWDORF

# DIVERTED BY SENSATIONALISM

## The State Bar reacts to the excesses of the Simpson case with a proposed rule that would stifle lawyers but do little to enhance the fairness of most trials

Lawyers say stupid things sometimes. I know. Before becoming one myself, I wrote about lawyers for daily newspapers. Lawyers' loose lips were my stock in trade.

Yet, save for the rare case, the First Amendment has always stood for the right of lawyers, along with everyone else, to speak freely about trials. Whether they should or not is a different question. Now, the State Bar is considering a rule that would subject lawyers to discipline for talking about their cases. Unless the State Bar and California Legislature quickly come to their senses, the proposed disciplinary rule will carve a large hole in lawyers' First Amendment rights and the public's right to know.

The State Bar's proposed gag rule has its genesis in S.B. 254, authored by Sen. Quentin Kopp, which directs the State Bar to submit by March 1, 1995, a rule of professional conduct governing lawyers' out-of-court statements. The State Bar responded with Proposed Rule 5-120, which would subject a lawyer involved in a trial to discipline for uttering any public comment that the lawyer "knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The rule would apply to all trials: civil or criminal, jury or bench.

### EXCEPTIONAL CASES, BAD STANDARD

Sen. Kopp says the gag rule is needed because of media frenzies such as the one surrounding the O.J. Simpson trial. Like most laws reacting to exceptional cases, the State Bar's proposed rule would make bad law. If Judge Ito feels it is necessary to gag the lawyers in the Simpson trial, he has the power to craft an order tailored to the case. So far, he has not, perhaps because he realizes such gags are ineffective and difficult to enforce. Silencing the trial bar in every case because of excessive publicity in a few cases will not make trials fairer -- but it will reduce the public's access to information about courts and hamstring lawyers' ability to represent their clients.

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The image of the publicity-seeking lawyer on the courthouse steps surrounded by television cameras is the central myth of the debate. Most trial lawyers will go their entire career without participating in a trial that produces saturation coverage -- the overwhelming TV coverage needed to create a substantial risk of tainting the jury pool.

As a newspaper reporter, I wrote about hundreds of trials and suits and almost never participated in a Simpson-style

courthouse press conference. Most of the lawyers I dealt with were not publicity-crazed. Usually I had to overcome their inbred reluctance to talk to the media. When lawyers involved in cases were willing to explain complex legal subjects, it made my reporting fairer and more accurate. The proposed gag rule would chill lawyers, reluctant to talk in the first place, and the public will be the loser.

## OTHER SPEAKERS UNIMPEDED

In the handful of notorious cases, silencing the lawyers will not stop the drumbeat of publicity. The State Bar rule would not gag law enforcement, law professors and legal commentators, or the parties themselves. If lawyers can no longer act as spokesperson and respond to adverse publicity, the sophisticated and well-heeled client will find other avenues to get the message out.

If you gag Simpson's trial team, it would not take long for O.J. to hire a Hollywood publicist to act as his mouthpiece. Financier Michael Milken hired a New York PR firm, reportedly at $150,000 a month, to polish his public image while he was under investigation. Corporations can and would do the same. Only the unfortunate litigant who cannot afford both a lawyer and PR person would be silenced.

Proposed Rule 5-120 doesn't raise the ethical standards for lawyers. California lawyers are already constrained by Cal. Business & Professions Code §6068(d) "to employ ... such means only as are consistent with truth."

However, the current climate of lawyer-bashing and Simpson-overload makes it likely that California will follow the majority of states that have adopted trial publicity rules. If there must be a rule, it should not be the one currently proposed for several reasons.

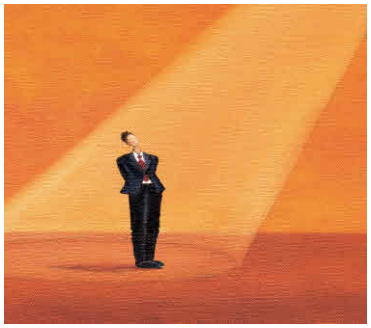
First, the proposed rule's "substantial likelihood of material prejudice" standard does not adequately protect speech. The State Bar proposal takes the safe route, since five members of the U.S. Supreme Court upheld this standard against First Amendment attack in *Gentile v. State Bar of Nevada*, 498 U.S. 1023 (1991). While the high court upheld the "substantial likelihood" standard, it did not mandate such a standard. Other states have adopted standards more protective of speech. Virginia follows the "clear and present danger" test, while Illinois, North Dakota, Oregon and the District of Columbia require a "serious and imminent threat."

California should not abdicate its own protection of speech under Article I, §2 of the state Constitution. As theCalifornia Court of Appeal stated in *Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543 (1993): "The California Constitution is more definitive and inclusive than the First Amendment in protecting expression." California decisional law has favored the "clear and present danger" test in balancing fair trial against free speech. *See Sun Co. v. Superior Court*, 29 Cal.App.3d 815 (1973).

Second, the rule should include a right-to-respond provision modeled after ABA Model Rule 3.6(c). The ABA model rule allows any public comment that "a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." The ABA Standing Committee on Ethics and Professional Responsibility said that when the lawyer responds to unfair publicity, "the danger of the second statement prejudicing the proceeding is minimized, and the rights of the client can be protected."

Third, if there must be a rule -- and I don't believe there should -- it should not apply to civil trials or bench trials. The State Bar proposal applies to all adjudicative proceedings, yet the prime examples of pernicious publicity (as well as the leading cases on the subject) involve high-profile criminal cases. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Gentile v. State Bar of Nevada*, 498 U.S. 1023 (1991). Given the presumption that prior restraints on speech are invalid, any trial-publicity rule should specifically target the area of greatest harm.

The State Bar should buck the political pressure and resist muzzling its members. Instead, the State Bar and the Legislature should recognize California's commitment to free speech, which protects lawyers, their clients and the public's right to know. The guiding principle of freedom of expression is that the antidote to unpopular, extreme or harmful speech is not censorship, but the freedom to respond.



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