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In 1941 Justice Black wrote: "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[1] Ideally, these constitutionally protected rights should be able to coexist in harmony. However, the media interest generated by sensational cases creates an opportunity for the publication of statements which may prejudice a defendant's trial. Therefore, to insure an impartial forum some restriction on speech is required. But if the measures taken to safeguard the fairness of a trial entail greater sacrifice of the freedom to speak than can be jusitfied in the interest of providing an impartial forum, such restriction should be held unconstitutional.

Striking a balance between two valued yet competing interests is never easy. One must constantly question the necessity and scope of any restraint. Standards which reflect the permissible degree of restraint that can be imposed on the constitutionally protected right to speak have been devised to aid the balancing process. The traditional formula has been the clear and present danger standard. Under it, speech will be restricted if it creates a clear and present danger to the impartiality of the trial. This formula has been criticized for not adequately reflecting the problems involved in attempting to protect the defendant's sixth amendment right to an impartial jury. In its place, some courts have proposed the use of the reasonable likelihood of harm formula. Application of this formula would restrict speech when it poses a reasonable likelihood of affecting the fairness of the trial. Difficulties arise, however, because the reasonable likelihood standard has not been adopted uniformly to restrict the speech of all parties concerned with the litigation.

Attorneys are one source from which potentially prejudicial statements arise. There are basically two methods of restricting

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1. Bridges v. California, 314 U.S. 252 (1941).

their speech: (1) through disciplinary rules, designed and enforced by state bar committees; and (2) by court ordered restrictions. This article will discuss the history of the formulation of the disciplinary rules and the recent constitutional attack on them for their use of the reasonable likelihood formula. California's approach in this area will also be defined, and a proposal will be offered which should protect more adequately attorney's first amendment rights.

Defendants and the news media are further sources from which potentially prejudicial publicity may reach the jury. Some of the states which have adopted the reasonable likelihood formula apply it to the defendant, whereas others do not. No court has advocated its adoption with reference to direct restraints on the news media. The method of controlling prejudicial statements from these sources has been court ordered restraints. However, this method has been criticized when applied to the news media. Reasons for this criticism are many, but alternatives do exist which, in application, can achieve a reasonable balance between free speech and fair trials. These criticisms and alternatives will be discussed below.

It is important to distinguish the factors considered upon issuance of a court ordered restriction from the altered circumstances which arise once a violation of the order has occurred. A finding of contempt for violation of an order will not automatically be upheld in California. An independent review of the comments and their prejudicial effect will be made by the appellate court. Because a more definitive finding of possible prejudice can be made, substitution of a stricter standard for the reasonable likelihood formula may be preferable at this stage. A stricter standard would operate to balance more fairly the first amendment right to free speech against the sixth amendment right of the defendant to an impartial jury. Further, if used judiciously, this proposed standard would not interfere with the court's endeavor to provide an impartial forum.

The use of court ordered restrictions in civil litigation and bench trials will also be discussed. The reasonable likelihood formula has not extended into these areas as yet, and reasons against such an extension will be discussed.

Finally, results of a survey of superior court judges conducted in the fall of 1975 in California will be examined to support many of the proposals made in this article. The survey findings

give some indication of how California trial courts presently deal with potentially prejudicial publicity. Unfortunately, they also show that a degree of uncertainty exists with regard to the appropriate constitutional formula to be used when the interests served by free speech are balanced against those served by fair trials. This uncertainty derives from the piecemeal adoption and application of these standards. Ambiguous areas exist, and some of them will be discussed in light of the survey responses.

I. HISTORY OF THE CONFLICT[2]

Although sensational cases generating great publicity were not unknown prior to the 1960s,[3] it was not until the assassination of President Kennedy in November, 1963, that the bench, bar and news media began to take cognizance of the problems involved in conducting a fair trial in the midst of tremendous publicity. The Warren Commission recommended in its report of September 24, 1964, that:

> [R]epresentatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.[4]

The American Bar Association recognized the need for more definitive guidelines in the free speech-fair trial area and, in February of 1968, approved the recommendations of the ABA Advisory Committee on Fair Trial and Free Press, chaired by Justice Paul Reardon of the Supreme Judicial Council of Massachusetts. The Reardon Committee made recommendations in four areas. First, it revised the section of the Canon of Ethics regulating an

2. For a detailed discussion of the history of the free press-fair trial controversy see Warren & Abell, *Free Press-Fair Trial: The "Gag Order," a California Aberration*, 45 S. CAL. L. REV. 51 (1972). For more general judicial discussions of the subject see United States v. Dickinson, 465 F.2d 496, 502-06 (5th Cir. 1972); Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 822-25, 105 Cal. Rptr. 873, 878-81 (1973).

3. *See, e.g., Report of the Committee on the Operation of the Jury System on the Free Press-Fair Trial Issue*, 45 F.R.D. 391, 394-95 (1968) (listing some notorious criminal prosecutions).

4. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS vii (Approved Draft, 1968) (quoting the Warren Commission Report).

attorney's public discussion of pending or imminent litigation and recommended its adoption by state bar associations. Second, the Committee recommended that judges, judicial employees and law enforcement officers adopt self-regulatory measures concerning public disclosures. In the absence of such departmental regulation, the Committee recommended that court rules be formulated to impose the necessary control. The third committee recommendation urged courts to adopt their own rules to control various phases of criminal proceedings, such as pretrial hearings, motions for change of venue, waivers of jury trials and conduct during a trial. Finally, the Committee recommended that courts hold in contempt anyone who "disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is willfully designed by that person to affect the outcome of the trial, and that seriously threatens to have such an effect. . . ." [5]

The recommendations of the Reardon Committee have not totally been approved by subsequent committees. The Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of New York City in its report found that:

> [I]t is a serious question, both of power and of policy, whether the court in which the case is to be tried, or any court, should, by rule of court, by authority of legislative enactment, or by virtue of some competence supposed to be inherent in the judicial function, have the right, vis-à-vis, lawyers, members of the police force, or representatives of the press, to proscribe the publication or utterance of matter deemed prejudicial to the right of the accused to a fair trial. If such right exists, . . . then the judges, in this pretrial period, must have the power to fine and imprison as for contempt of court all lawyers, members of the police force and representatives of the press who violate the orders or rules of proscription. The prospect in this pretrial period, of judges of various criminal courts of high and low degree sitting as petty tyrants, handing

5. *Id.* § 4.1(a)(1).

> down sentences of fine and imprisonment for contempt of court against lawyers, policemen and reporters and editors, is not attractive. Such an innovation might well cut prejudicial publicity to a minimum. But at what a price![6]

The news media, too, sharply criticized the Reardon recommendations for their inflexibility and potential abuse. It was feared that when cases were closed to public scrutiny a valuable check on the judicial process would be lost.[7] In response to this criticism, and in recognition of the problems of enforcing their recommendations against the news media, the

> ABA agreed to seek implementation of only that section of the *Reardon Report* dealing with its own members. It would not push other sections—those restricting statements law enforcement officers might release to the press, those dealing with closed preliminary hearings, and those providing contempt citations for reporters wilfully influencing trials. In turn, the media agreed to exert efforts to bring about more voluntary codes.[8]

II. CALIFORNIA'S APPROACH TO LIMITING POTENTIALLY PREJUDICIAL PUBLICITY

California is the only state in the nation which has not adopted the American Bar Association's recommendations concerning regulation of attorneys who make public comments about a case.[9] The State Bar of California instead endorsed a joint declaration issued by the bench, bar and news media. This declaration was the product of twenty months of negotiations between the State Bar, The Freedom of Information Committee (representing the state's working press), and the Committee of the Conference of California Judges.[10] Since the joint declaration is merely a

6. SPECIAL COMMITTEE ON RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT 39 (1967).

7. A. PICKERELL & M. LIPMAN, THE COURTS AND THE NEWS MEDIA 67 (1974).

8. *Id.* at 69.

9. Letter from Russell Twist, Staff Director of the ABA, to the author, July 24, 1975, on file with *Golden Gate University Law Review*. By 1975 every state except California had adopted ABA Disciplinary Rule 7-107 [hereinafter DR 7-107]. Six states have adopted DR 7-107 with some modifications.

10. A. PICKERELL & M. LIPMAN, *supra* note 7, at 70-71. These pages additionally contain a detailed review of the negotiations leading up to the issuance of this joint declaration. The portion of the policy statement which most directly affects attorneys reads:

statement of policy, rather than an actual disciplinary rule, the State Bar of California can only prevent defiance of the policy by disciplining an attorney for violation of some other article of the Business and Professions Code, or some other California rule of professional conduct.[11]

The decision not to adopt the ABA's disciplinary standards, which were assimilated into ABA Disciplinary Rule 7-107 (DR 7-107), leaves California courts with primary responsibility for regulating an attorney's comments concerning a case. The advantage of this approach is that an attorney's comments will be restricted only when a need for restraint can be shown. This contrasts with disciplinary rules which seek to regulate all comments, by all attorneys, concerning all cases which they are litigating. Another advantage is that violation of a court restriction can be punished promptly. Discipline by state bar associations, on the other hand, can be imposed only after lengthy investigation and committee hearings.

A. Protective Orders

The device most commonly used by California courts to preserve the impartiality of the proceedings is the issuance of a protective order.[12] Such orders are often controversial, as even a

> No lawyer should use publicity to promote his version of a pending case. The public prosecutor should not take unfair advantage of his position as an important source of news. These cautions shall not be construed to limit a lawyer's making available information to which the public is entitled. Editors should be cautious about publishing information received from lawyers who seek to try their cases in the press.

Id. at 87.

11. Cal. Bus. & Prof. Code §§ 6068, 6103 (West 1974); Cal. Rules of Professional Conduct § 7-105 (Jan., 1975). None of the preceding code sections or rules are necessarily violated when defiance of the policy statement occurs. However, in some circumstances they may be considered a basis for disciplinary action.

12. Another practice of courts, apart from the use of protective orders to limit prejudicial publicity, is to close the trial or preliminary hearing to the public. Although beyond the scope of this article, this practice entails serious constitutional objections. *See, e.g.*, Dickinson v. United States, 465 F.2d 496 (5th Cir. 1972); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971).

Clearly, a defendant does have a right to close certain phases of his prosecution from the public. *See* Cal. Penal Code § 868 (West 1970), which provides that the magistrate must close the preliminary hearing at the request of a defendant. *But cf.* Cal. Code of Civ. Proc. § 124 (West Supp. 1975), which states that, except for Cal. Civ. Code § 226m (West Supp. 1975) (regarding adoption proceedings), Cal. Civ. Code § 4306 (West 1972) (relating to marriage licenses) or any other provision of law, the sittings of every court shall be public.

discussion in *Younger v. Smith*[13] regarding their nomenclature indicates:

> Orders of the kind under consideration are sometimes referred to as "gag orders" or "publicity orders." The first term is pejorative, the latter perhaps too restrictive. We therefore accept the suggestion of one of the amici curiae who have filed briefs on this matter, and refer to such orders as "protective orders." We realize that those who oppose such orders on principle may find this designation too benign. At least, however, it correctly describes their purpose.[14]

Protective orders are court ordered restrictions designed to limit prejudicial publicity. They are generally requested by a defendant, but can be issued at the prosecution's request or on motion of the court.[15] There are no definitive guidelines as to what a petitioner must show to have a protective order issued. However, in *Younger*, a leading decision in this area, the court ruled that it is sufficient if the petitioner shows that in absence of the order there exists a reasonable likelihood that the trial will be prejudiced.[16] This showing was deemed sufficient, however, only in reference to restraints imposed upon attorneys.[17]

Protective orders typically list the defendant, attorneys, law enforcement officials and judicial employees as the parties to be directly restrained. It is generally provided that the order will remain in force until modification by the court or until completion of the proceedings.[18] The showing required to have the order modified to either lessen or increase the restrictions will depend on the nature and facts of the case. However, a protective order is always subject to modification, even on the court's own initiative.[19]

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13. 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

14. *Id.* at 143 n.1, 106 Cal. Rptr. at 228 n.1.

15. *See, e.g.*, People v. Watson, 46 Cal. 2d 818, 299 P.2d (1956); Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969), wherein the court on its own initiative issued a protective order.

16. 30 Cal. App. 3d at 159-67, 106 Cal. Rptr. at 239-44 (1973).

17. *Id.* at 163 n.36, 106 Cal. Rptr. at 242 n.36.

18. Examples of previously issued protective orders can be found in 6A TRIAL MANAGEMENT DESKBOOK (1972), *reproducing* Order re Publicity, People v. Mullin, No. 50219 (Cal. Super. Ct., Santa Cruz County, Mar., 1973); Order re Publicity, People v. Corona, No. 17399 (Cal. Super. Ct., Sutter County, April, 1972).

19. 30 Cal. App. 3d at 159, 106 Cal. Rptr. at 239 (1973).

B. Judicial Statements Regarding Protective Orders

Younger is the most recent California case which discussed and analyzed the issuance of protective orders. Three cases were consolidated on appeal,[20] and the decision in part revolved around two methods of attacking a protective order. One method is to petition for a writ of mandate to seek vacation or modification of the order. The Busch and Times Mirror petitions sought such a review. The second avenue involves some risk to the petitioner, but can be successful. It entails an attack on the order subsequent to its violation.[21] The portion of the decision which dealt with Younger's contempt citation discussed such a post violation review.

Different considerations are obviously involved depending on which method is utilized. With the former, the threat to be avoided—prejudice to the trial—is still in the future. This requires that the protective order be specific in describing the type of comments which are forbidden, but general enough to control those comments which may prejudice the trial. The latter method employs hindsight. Was the protective order justified under the circumstances? Was the language in the order explicit and specific? Did the violation threaten the impartiality of the forum? Depending on the answers to such questions, a contempt citation may be reversed.

III. WHEN RESTRAINT ON SPEECH WILL BE IMPOSED: RELEVANT FACTORS UPON ISSUANCE OF A PROTECTIVE ORDER

A. Orders Restraining Comments by Attorneys

The success of an attack on a protective order will vary de-

20. Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); Times Mirror Co. v. Superior Court, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); Busch v. Superior Court, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

21. *In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968). There is language in *Berry* which implies that a collateral attack will only be approved when the order or injunction is unconstitutional on its face. By this reasoning, if the order is seen as constitutionally infirm only in its application to the facts, the order will not have been issued in excess of the court's jurisdiction and thus the contempt citation cannot be voided. This follows from the statutory pronouncement that contempt convictions are not appealable except on jurisdictional grounds. *See* Cal. Code of Civ. Proc. § 1222 (West 1972). The *Younger* court did not emphasize this language from *Berry*. Because the protective order issued in the *Younger* litigation was held not to be totally void, one must assume that collateral attack remedies will be sustained even if the protective order is not unconstitutional on its face. *See* 30 Cal. App. 3d at 151-53, 106 Cal. Rptr. at 233-35.

pending on whether the objections are made before or after violation of the order. An equally important factor, however, is the status of the party seeking review of the order. This latter consideration is derived from the *Younger* court's adoption of a lesser constitutional standard for determining when an attorney's speech can be restricted.

In one of the companion cases to *Younger*, Joseph Busch, the prosecuting attorney, sought a writ of mandate against the protective order issued in *People v. Antelo*.[22] The order in *Antelo* restrained the prosecution, the defense and "all agencies of the public media" from making public comments about the case.[23] Busch attacked the order on the grounds that the lower court: (1) did not adequately articulate the justification for the order; and (2) did not apply the clear and present danger standard.[24] The court of appeal reached the conclusion that the clear and present danger standard was not an appropriate constitutional criterion for evaluating the validity of protective orders imposed against attorneys. The court instead adopted the reasonable likelihood standard.

Both of these formulas have long and colorful histories.[25] The clear and present danger test has as its basic premise the notion that speech may not be restricted unless a clear and present danger to the impartiality of the proceedings is found. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utter-

22. *People v. Antelo* is an unreported trial case referred to in *Younger*. 30 Cal. App. 3d at 146, 106 Cal. Rptr. at 230.

23. *Id.* at 148, 106 Cal. Rptr. at 231-32.

24. *Id.* at 158, 106 Cal. Rptr. at 238.

25. The "clear and present danger" formula was first announced in Schenck v. United States, 249 U.S. 47, 50-51 (1919), somewhat diluted in Dennis v. United States, 341 U.S. 494 (1951), transformed into a balancing technique in, *e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959), but clearly held determinative in Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); and Wood v. Georgia, 370 U.S. 375 (1962).

Phraseology similar to the "reasonable likelihood" formula was first rejected in Bridges v. California, *supra* at 272-73. Then, a variation of this phrase was suggested by Justice Frankfurter in his dissenting opinion in *In re* Sawyer, 360 U.S. 622 (1959): "Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution." *Id.* at 668. Finally, the "reasonable likelihood" test was applied in United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969): "The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices." *Id.* at 666.

ances can be punished."[26] The reasonable likelihood test requires a less stringent finding. If the court determines that there is a reasonable likelihood that without the order the trial may be prejudiced, then under this standard the restriction is constitutional.

The clear and present danger formula has been applied by the United States Supreme Court in the cases of *Bridges v. California*,[27] *Pennekamp v. Florida*,[28] *Craig v. Harney*[29] and *Wood v. Georgia*.[30] Each of these cases involved a layman who was cited for contempt because of his criticism of a trial and the presiding judge. The Supreme Court reversed each contempt citation, finding that the laymen's comments had not created a clear and present danger to the administration of justice. The *Younger* court distinguished these cases from Busch's situation on five grounds: (1) none of the cases involved the application of a protective order; (2) they dealt with speech which had already occurred; (3) they primarily dealt with criticism of judges; (4) in all of the cases the trial had already occurred or was not heard by a jury; and (5) the cases did not arise in the context of an individual being on trial.[31]

The *Younger* court believed the reasonable likelihood test had greater relevancy when judging the validity of a protective order issued against attorneys. The court stated that a judge can, realistically, only be asked to determine whether there exists a reasonable likelihood of prejudicial publicity which might affect the case. The court believed a greater finding of prejudice would be difficult in light of the fact that protective orders cannot quote the speech to be restricted and the danger to be avoided is, at best, an uncertain future possibility.

> We have already pictured the typical situation in which a trial judge must decide whether or not to issue a protective order. To ask him to determine the need for such an order by a finding that the situation presents a clear and present danger to the administration of justice, is simply to require him to palm off guesswork as finding. It would put a pre-

26. Bridges v. California, 314 U.S. 252, 263 (1941).
27. 314 U.S. 252 (1941).
28. 328 U.S. 331 (1946).
29. 331 U.S. 367 (1947).
30. 370 U.S. 375 (1962).
31. 30 Cal. App. 3d at 161-62, 106 Cal. Rptr. at 241.

> mium on hypocritical adherence to an abstract formula. . . .
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> . . .A "reasonable likelihood" test, on the other hand, permits the court to consider openly and frankly the many future variants which collectively may amount to a reasonable likelihood but, by their very contingent nature, can never amount to a clear and present danger—unless, of course, the meaning of that term is to be so diluted as to make it indistinguishable from its rival criterion.[32]

The *Younger* court thus held that the evidence before the issuing judge in *People v. Antelo* was sufficient for him to have found a reasonable likelihood of prejudice to the trial if speech was not restricted. Therefore, they refused to vacate the order as applied to Busch.

B. Orders Restraining the News Media

The same protective order that was issued in *Antelo* was held unconstitutional as applied to the Times Mirror of Los Angeles. The Times Mirror petition is the other companion case to *Younger* and, like Busch, the newspaper had sought a writ of mandate against the protective order. Although the order was based on the finding that there existed a reasonable likelihood of prejudice without a court ordered restraint, the court believed that this standard was not adequate to protect the freedom of the press.

The *Younger* court found that neither Antelo, as the real party in interest and movant in the respondent court, nor the court itself, carried the "heavy burden of showing justification for the imposition" of a prior restraint in the case.[33] The court compared the *Antelo* case to *Sheppard v. Maxwell*,[34] a Supreme Court case in which the defendant's conviction for murder was reversed and remanded because tremendous amounts of unrestrained prejudicial publicity had denied him due process. Compared with *Sheppard*, the *Younger* court found that the *Antelo* case did not create the same amount of news coverage, the tone of the coverage was much less hostile, and the case was not of nationwide interest. The United States Supreme Court believed less drastic

32. *Id.* at 163-64, 106 Cal. Rptr. at 242.

33. *Id.* at 153, 106 Cal. Rptr. at 235, *citing* New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

34. 384 U.S. 333 (1966).

measures than the imposition of sanctions against the press could guarantee Sheppard a fair trial.[35] Therefore, upon comparison, the *Younger* court found the direct restraint against the press in *Antelo* unjustified.[36]

The *Younger* court did not specifically apply the clear and present danger formula to the constitutionality of the restraint imposed upon the news media. The court did comment, however, that:

> [I]t should be obvious that nothing we say here with respect to the appropriate criteria for protective orders against prosecutors and others involved in the criminal trial, should ever be read as being in the least relevant if and when a court one day should decide that orders directed to the press are sometimes proper.[37]

The clear and present danger formula is applied in all situations where first amendment freedoms are concerned, except those areas defined by the *Younger* court as confined by the reasonable likelihood standard. Therefore, this formula should be used if and when the news media are ever directly restrained by the order.

C. Orders Restraining the Defendant's Comments

The *Younger* court, in dictum, refused to extend the reasonable likelihood standard to encompass comments by a defendant.

> Quite conceivably a different standard might be applicable to the defendant himself. Indeed, *Hamilton v. Municipal Court* did involve the impact of a protective order on the defendant. If it be thought that *Hamilton* did actually hold that a clear and present danger test was appropriate, it should be remembered that there the contemner was not an officer of the court, but an unwilling party.[38]

Nevertheless, inclusion of the defendant under the reasonable likelihood standard when fashioning the protective order would have many advantages. First, the same degree of first amendment protection could be given to the defendant, attor-

35. *Id.* at 361-63.
36. 30 Cal. App. 3d at 154, 106 Cal. Rptr. at 235-36.
37. *Id.* at 163 n.36, 106 Cal. Rptr. at 242 n.36.
38. *Id.* (citation omitted).

neys, judicial employees and law enforcement officers alike. Second, for practical reasons it is easier to issue only one order which can then be distributed to the parties directly restrained. Inclusion of the defendant under the reasonable likelihood standard enables the order to recite simply that the court finds a reasonable likelihood of prejudice absent the order. The court would not have to distinguish a higher "clear and present" danger of the same threat from the defendant. Finally, inclusion of the defendant within the lesser standard would not be unjustified. He or she is a party to the litigation and would have adequate knowledge of the order and its purpose, which is to protect the interests of the defendant and provide an impartial forum.

Inclusion of the defendant under the reasonable likelihood standard when fashioning a protective order thus appears justified under the circumstances. The hesitation of the *Younger* court to do so stems from the fact that the reasonable likelihood standard would also apply when determining whether violation of the order by the defendant should subject him to contempt. In light of this fact, it is proposed that a stricter constitutional standard be applied at the contempt stage of the proceedings.

IV. WHEN RESTRAINT ON SPEECH WILL BE IMPOSED: RELEVANT FACTORS SUBSEQUENT TO A VIOLATION OF A PROTECTIVE ORDER

Both the Busch and the Times Mirror petitions sought review of the protective order prior to its violation. In reviewing Younger's contempt citation, the court of appeal faced a different problem. Should the comments made by Evelle Younger, in violation of the protective order, be punished by contempt? Younger, then the District Attorney of Los Angeles County, released to the news media a list of the witnesses at the preliminary hearing of *People v. Senff*[39] and a one sentence description of their testimony. This violated the protective order which had prohibited all attorneys connected with the case from making any statements outside of court as to the nature, substance, or effect of any testimony that had been given.[40] The respondent court found the statements "sterile," but held Younger in contempt for seeking a confrontation with the court, for engaging in civil disobedience,

39. *People v. Senff* is an unreported trial case referred to in *Younger*. *Id.* at 144, 106 Cal. Rptr. at 228.

40. *Id.* at 150, 106 Cal. Rptr. at 233.

and for his "flamboyant" conduct in holding a press conference to violate the protective order.[41]

Nevertheless, the court of appeal found the protective order overbroad and violative of Younger's first amendment rights. The *Younger* court believed that a court ordered restriction on the freedom to speak is necessarily limited by its justification:

> When the court correctly determines that a particular utterance has no tendency to prejudice a pending criminal prosecution, but nevertheless punishes the utterer because he is in literal or technical violation of an order designed to curb potentially prejudicial pretrial publicity, the court inferentially admits that the order covers more ground than the First Amendment allows—that it is overbroad.[42]

The justification of the original order stemmed from a finding that there existed a reasonable threat of prejudice to the trial if speech was not controlled. By finding Younger's comments nonprejudicial, conceptually, the protective order was not called into operation. Until speech is found to create a reasonable likelihood of prejudice, it cannot be proscribed. A protective order which seeks to restrict anything less than a reasonable likelihood of prejudice is overbroad. Overbroad orders are generally considered totally void because of the chilling effect they have on freedom of speech.[43] However, when an order contains both valid and invalid restrictions on free speech, the doctrine of severance can uphold the valid portions without totally invalidating the order.[44] Therefore, the *Younger* court found the order to be valid, but held the overbroad portions unconstitutional as an unjustified restraint on the freedom to speak.

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41. *Id.* at 145-46, 106 Cal. Rptr. at 229-30.

42. *Id.* at 150, 106 Cal. Rptr. at 233.

43. *Id.* at 165, 106 Cal. Rptr. at 243, *citing* Dombrowski v. Pfister, 380 U.S. 479, 491 (1965).

44. *In re* Berry, 68 Cal. 2d 137, 156-57, 436 P.2d 273, 286, 65 Cal. Rptr. 273, 286 (1968), acknowledged the applicability of the doctrine of severability to court orders, but found the order therein non-severable. The *Berry* court likewise rejected the doctrine of construction. *Younger* suggests the application of the doctrine of construction when an order is capable of two meanings and only one of them is constitutional. 30 Cal. App. 3d at 165, 106 Cal. Rptr. at 243. In the context of protective orders, both doctrines may be applicable to achieve the desired purpose of upholding the valid portions of the order.

The theory upon which Younger's contempt citation was reversed requires an examination of the jurisdiction of the issuing court. California Code of Civil Procedure section 1222 states that judgments of contempt are final and conclusive.[45] The courts have therefore held that such judgments are appealable only on jurisdictional grounds.[46] This typically means that the order upon which the citation rests must be declared to have been issued in excess of the court's jurisdiction. Jurisdiction has been defined broadly, however, to include more than mere subject matter or personal jurisdiction: the concept of "jurisdiction" inherently involves a court's power to act—"whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis* . . . ."[47] In the context of protective orders, the issuing court only has *power* to restrain those statements which create a reasonable likelihood of prejudice to a trial. Because Younger's order was based on such a finding, it was issued within the court's jurisdiction. But the punishment of Younger under that order was beyond the scope of the issuing court's purpose in imposing the restraint. Thus the contempt conviction was exercised beyond the court's jurisdiction.

V. HOW MUCH OF A RESTRAINT SHOULD BE IMPOSED?

The preceding analysis applied the reasonable likelihood standard both as a justification for the issuance of the protective order and as the measure of prejudice needed before a violator is held in contempt. But is the second phase of its application justified? The *Younger* court at times appeared to distinguish the different considerations inherent in a pre-violation versus a post-violation examination of a protective order. "We are not concerned with the question of what criterion to apply to past utterances, where we know their content and the circumstances under which they were made. We are faced with a prior restraint, which can only define and describe the speech it prohibits. It

45. CAL. CODE OF CIV. PROC. § 1222 (West 1972). Section 1222 reads: "The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive."

46. *See, e.g., In re* Donovan, 96 Cal. App. 2d 693, 698-99, 216 P.2d 123, 127 (1950) (dictum); Otis v. Superior Court, 148 Cal. 129, 130, 82 P. 853, 853-54 (1905); Huerstal v. Muir, 62 Cal. 479, 481 (1880).

47. *In re* Berry, 68 Cal. 2d 137, 147, 436 P.2d 273, 280, 65 Cal. Rptr. 273, 280 (1968), *quoting* Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 291, 109 P.2d 942, 948 (1941).

cannot quote it."[48] Presumably, the *Younger* court would apply a more exacting review of the comment and its affect on the trial before holding the utterer in contempt.

This two-step approach reflects the fact that the task of designing a protective order to cover uncertain future contingencies is distinguishable from an examination of a comment to determine if it tended to prejudice the trial. In the former task, the reasonable likelihood standard acknowledges the uncertainty of future occurrences; in the latter, a more specific showing of prejudice, possible prejudice, or nonprejudice can be made. Because speech should never be restrained unless justified to achieve an equitable goal, it can be posited that upon reviewing a contempt citation a different standard should be applied.

A justifiable criticism of the reasonable likelihood standard is that it is unnecessarily vague when applied at the contempt stage of the proceedings. Its application by state bar committees before discipline of an attorney ensues has likewise been criticized. The reasonable likelihood standard has been held not to adequately protect first amendment rights in *Chicago Council of Lawyers v. Bauer*.[49] This case involved a suit by concerned attorneys to have the ABA's DR 7-107 and the local court rule 1.07 declared an unconstitutional restraint on their first amendment rights. The Court of Appeals for the Seventh Circuit held the rules unconstitutional, overbroad and vague. The disciplinary rule employed the "reasonable likelihood" of interference with a fair trial standard in determining whether there was a violation of the rules, and thus, whether an attorney should be disciplined by the bar. The *Chicago Council* court held this standard did not fully and adequately protect the first amendment rights of the attorneys involved: "Only those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."[50]

The court of appeals in *Chicago Council* felt this standard, as formulated in *Chase v. Robson*[51] and reaffirmed in *In re Oliver*,[52] was more specific than the reasonable likelihood standard in stating when an attorney could or could not talk to the press. Fur-

48. 30 Cal. App. 3d at 159, 106 Cal. Rptr. at 239.
49. 522 F.2d 242, 249 (7th Cir. 1975), *rev'g* 371 F. Supp. 689 (N.D. Ill. 1974).
50. 522 F.2d at 249.
51. Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).
52. *In re* Oliver, 452 F.2d 111 (7th Cir. 1971).

thermore, this standard was seen to balance more fairly the right of the defendant to a fair trial against the first amendment right of attorneys to speak. Because attorneys are a crucial source of information and opinion, it was felt that their comments, expressed when the public is most interested in the litigation, would act as a valuable check on the judicial process.[53]

Disciplinary rules are, of course, sufficiently different from protective orders so that the same analysis may not be applicable. Disciplinary rules seek to limit prejudicial publicity in all criminal cases. Protective orders are issued only when a reasonable likelihood of prejudicial publicity affecting a case is shown. Additionally, disciplinary rules are not modifiable and thus their restraint is more demanding and permanent. Issuance of a protective order puts all parties sought to be restrained on strict notice as to what type of comments are circumscribed. In comparison, discipline under DR 7-107 results only when a violation of the restraint is brought to the attention of the state bar committee. Thus, a protective order is less frequently imposed and is more specific as to what type of comment is circumscribed. Further, it can be modified or vacated upon an appropriate showing by a petitioner.

Both methods of restraint, however, do limit first amendment freedoms. Although disciplinary rules can be enforced in reference to all criminal cases, the deterrence of "discipline" may, in many instances, be less of a real threat to physical and/or financial freedom than the issuance of a contempt citation. Punishing one for making a comment which has a "reasonable likelihood" of affecting the fairness of a trial may, theoretically, impose restraint even when the comment does not, in fact, threaten the impartiality of the proceedings. Therefore, not only would this standard deter permissible comment, it would also punish the speakers for their nonprejudicial statements. Adopting the serious and imminent threat formula would give greater protection to first amendment freedoms without substantially affecting the defendant's right to a fair trial. A protective order could thus be issued upon a showing that without such restraint, there exists a reasonable likelihood of prejudicial publicity. Upon a violation of the order, however, the speaker would be held in contempt only when the statement poses a serious and imminent threat to the impartiality of the proceedings.

53. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975).

VI. APPELLATE REVIEW OF PROTECTIVE ORDERS

Substitution of the serious and imminent threat formula at the review level would not seem to be precluded under an analysis of a series of California cases which have defined the collateral and appellate procedures for attacking a protective order. Unlike the practice in many states,[54] California has two alternative methods by which a challenge to the validity of a court order can be made. Both methods challenge the order on the ground that it was issued without or in excess of jurisdiction. The first method entails compliance with the order until a judicial declaration regarding its jurisdictional validity can be made.[55] However, if the petitioner concludes that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril, he may follow the alternative course—disobey the order and raise his jurisdictional contentions when an attempt is made to punish him for such disobedience.[56] Then, as stated in *In re Berry*:[57]

> If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong.[58]

The first method, which entails challenging the order prior to violation, requires the application of the reasonable likelihood standard. The petitioner would argue that there does not exist a reasonable likelihood that the trial may be prejudiced by dissemination of his or her extrajudicial statements to the public. If the latter course is followed and the order is challenged on jurisdictional grounds subsequent to its violation, the challenge will fail if the trial court's order is found to be properly based on a finding that, without such restriction, there exists a reasonable likelihood

54. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307 (1967). In *Walker*, the United States Supreme Court approved of Alabama's practice of refusing to hear arguments concerning the constitutionality of a court order subsequent to its violation when there were no prior attempts to modify or vacate the order.

55. *In re* Berry, 68 Cal. 2d 137, 148, 436 P.2d 273, 281, 65 Cal. Rptr. 273, 281 (1968), *citing* Mason v. United States Fidelity & Guar. Co., 60 Cal. App. 2d 587, 590-91, 141 P.2d 475, 477-78 (1943).

56. *In re* Berry, 68 Cal. 2d 137, 148-49, 436 P.2d 273, 281, 65 Cal. Rptr. 273, 281 (1968).

57. 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

58. *Id.* at 149, 436 P.2d at 281, 65 Cal. Rptr. at 281, *citing* Kreling v. Superior Court, 18 Cal. 2d 884, 118 P.2d 470 (1941) (citations omitted).

that the trial will be prejudiced, for such a finding by a trial court is what confers jurisdiction.

However, if it is posited that the order seeks to restrain only those comments creating a serious and imminent threat to the impartiality of the proceedings, a restraint on less prejudicial statements would be overbroad. Applying the doctrine of severability, the order would be valid when it restrains comments which create a serious and imminent threat to the fairness of the trial, but invalid if it attempts to restrain less prejudicial statements. This analysis involves some alteration of the court's original jurisdiction, but in light of the importance of barring speech only when it materially interferes with fair trials, the practice may result in greater justice.

Substitution of the serious and imminent standard would require an independent examination of the facts on review. This practice has been approved by California courts when first amendment rights are involved.[59] Furthermore, the question of whether free speech has been impaired and whether such impairment is permissible is one of law, not of fact.[60] If the facts of the case are not disputed, the reviewing court can determine for itself how extensive the reach of the order should be. If they find that the order controls permissible comment, the overbroad application of the order can be reversed.

The advantages of applying the serious and imminent threat standard upon review of a contempt citation are considerable. When a court issues a protective order, it must determine the area of comment which may have an unfavorable effect on the fairness of the trial. This is a speculative determination, for neither the form of the statement nor the amount of actual prejudice it will create is known at the time the order is issued. Once statements are made, however, the reviewing court can make a more accurate estimate of the comment's prejudicial effect. Restricting statements which seriously and imminently threaten the process of a trial comes closer than the reasonable likelihood test in achieving the ultimate objective of a protective order. The stricter standard provides another advantage in that upon violation all contemnors would be given a higher degree of first amendment

59. Los Angeles Teachers Union v. Los Angeles City Bd. of Educ., 71 Cal. 2d 551, 557, 455 P.2d 827, 831, 78 Cal. Rptr. 723, 727 (1969), *citing* Zeitlin v. Arnebergh, 59 Cal. 2d 901, 909, 383 P.2d 152, 157, 31 Cal. Rptr. 800, 805 (1963).

60. Los Angeles Teachers Union v. Los Angeles City Bd. of Educ., 71 Cal. 2d 551, 556, 455 P.2d 827, 830, 78 Cal. Rptr. 723, 726 (1969).

constitutional protection. Because the serious and imminent standard was originally derived from the clear and present danger formula,[61] its application would give the same degree of first amendment protection to all contemnors. The formula could thus be applied to attorneys, defendants, law enforcement agents and the news media alike. This would add clarity and establish a standard precedent for lower courts to follow.

Substitution of the serious and imminent threat standard at the appellate level would not totally avoid the guesswork inherent in a determination of the likely prejudice a comment, in violation of a protective order, has on a trial. It is important to remember that the purpose of a protective order is to preserve the impartiality of the jury's deliberations. Strict and accurate post publication accountability can only be achieved by polling the jurors to see if they have heard or read the comments which are alleged to be potentially prejudicial.

This practice was suggested by Judge Finley in his concurring opinion in *State ex rel Superior Court v. Sperry*.[62] It was his opinion that until knowledge of the prejudicial comment is disseminated to the jury, the potential evil is based upon mere suspicion, speculation and conjecture. The practice of polling jurors, however, would avoid the problems of prior restraint and would not require the use of any of the proposed constitutional "tests."[63]

Judge Finley's proposal may not meet with much success in California. Polling the jurors could become a time consuming process depending on how many extrajudicial comments are made. It would also tend to interfere with the secrecy of jury deliberations and at some point may involve harassment. Furthermore, it has been said that it is a tactic which rests solely in the trial court's discretion[64] and apparently cannot be mandated. Therefore, substitution of the serious and imminent threat standard at the appellate level would appear to be the best approach to achieve a fair but workable balance between the freedom to speak and the defendant's right to a fair trial.

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61. Bridges v. California, 314 U.S. 252, 263 (1941).

62. 79 Wash. 2d 69, 101-03, 483 P.2d 608, 625-27 (1971).

63. *Id.* at 103, 483 P.2d at 627.

64. People v. Lambright, 61 Cal. 2d 482, 486, 393 P.2d 409, 412, 39 Cal. Rptr. 209, 212 (1964).

VII. ARE PROTECTIVE ORDERS AN UNCONSTITUTIONAL RESTRAINT ON THE NEWS MEDIA?

Protective orders issued against the news media can be classified into two categories. First are those which indirectly restrain the news media by putting restrictions on defendants, lawyers, law enforcement officers and other news sources. The other form seeks to directly restrain the media by extending the language of the protective order to include members of the press. This latter form of restraint has been attacked as an unconstitutional prior restraint on first amendment rights.

This constitutional objection to protective orders was utilized by the lawyers in *Chicago Council of Lawyers v. Bauer* in their attack on the disciplinary rules.[65] They argued that DR 7-107 and the local court rule 1.07 acted as an unconstitutional prior restraint on their first amendment rights. On appeal, this objection met with partial success. As the Court of Appeals for the Seventh Circuit noted, a restriction deemed a prior restraint may not be per se unconstitutional, but it comes before the court with a "heavy presumption" against its constitutional validity.[66]

Although protective orders and disciplinary rules differ in that the former is a court ordered restriction fashioned to meet the needs in a particular case, both can be enforced by use of the court's contempt power when, as in the Seventh Circuit, the disciplinary rules are deemed incorporated into the local court rules. Because "punishment by contempt is an important attribute of a 'prior restraint' that distinguishes it from a criminal statute that forbids a certain type of expression,"[67] the court of appeals found the rules contained some aspects of a prior restraint. The court also found, however, that the rules differed from a prior restraint in that they could be challenged in a collateral proceeding.[68] Because a prompt judicial determination on the question of the con-

65. 522 F.2d 242, 248-49 (7th Cir. 1975).

66. *Id.* at 248, *citing* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

67. 522 F.2d at 248.

68. *Id.* Prior restraints were also discussed in Kingsley Books, Inc. v. Brown, Corp. Counsel, 354 U.S. 436 (1957), and Walker v. City of Birmingham, 388 U.S. 307 (1967). In *Kingsley*, an injunction was upheld which restricted further distribution of material allegedly obscene. The injunction was based on a statute which provided a prompt judicial determination during its restraint. Although the injunction could be enforced by contempt, the prompt hearing on the issue of obscenity, the requirement of adequate notice, and the availability of adversary proceedings operated to distinguish it from a prior restraint.

stitutionality of the rules could be maintained, they chose not to classify them as prior restraints. The court did feel, however, that because the rules contained some of the inherent features of a prior restraint, they were to be examined with close scrutiny.[69]

Violations of protective orders are also punished by contempt, but in California a writ of mandate can be brought against an order or its constitutional validity may be argued subsequent to its violation. Even though the reasoning in *Chicago Council* suggests that protective orders, because they can be challenged, may not be "prior restraints" per se, the right to challenge an order may not be sufficient to absolve all aspects of its restraint. Challenges, no matter how promptly heard, take time. Prior to the determination of its constitutionality, an order may unnecessarily restrict free discussion of the case. This restriction is operative when the public is most interested in the proceedings. For these reasons, protective orders issued directly against the press should be closely scrutinized to strictly determine their necessity.

VIII. PROTECTIVE ORDERS AND THEIR APPLICATION TO THE NEWS MEDIA IN CALIFORNIA

In two recent California cases in which there was a direct restraint on the press, the protective order issued in each was held unconstitutional.[70] This does not necessarily mean that a direct restraint upon the news media will always be held unconstitutional, but it does emphasize the hesitancy of courts to sustain protective orders which seek to directly restrain the press.[71]

An even lesser showing of available collateral attack proceedings was sustained in *Walker*. The contemnors were stopped from making their court objections to the injunction once they had violated it. The Court felt that their opportunity to have appealed the injunction before its violation provided a sufficient remedy to contest it and thus the contemnor's prior restraint arguments were rejected.

69. 522 F.2d at 248-49.

70. Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973); Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

71. On November 21, 1975, Justice Blackmun ruled that the press could be judicially restrained from publishing prior to a trial any confession or statement against interest that the defendant has made, and certain other facts that "are highly prejudicial as, for example, facts associated with the accused's criminal record." N.Y. Times, Nov. 22, 1975, at 1, col. 4.

Portions of the order, which was issued in a criminal prosecution against Erwin Simants in Omaha, Nebraska, were stayed, including the order's wholesale adoption of the Nebraska voluntary "bar-press guidelines." However, Justice Blackmun stated that the state court was "free forthwith to reimpose particular provisions included in the guidelines" if they were deemed "pertinent" to the facts of the case and if they were specific. *Id.* at 30, col. 2. Justice Blackmun reviewed the petition for a stay of the order in his capacity as the Circuit Justice for the Eighth Circuit.

The Supreme Court language that is generally quoted when protective orders are sought to be imposed upon the press is taken from *Branzburg v. Hayes.*[72] Although the case concerned the constitutionality of forcing newsmen to reveal their sources in grand jury investigations, the following dictum from the case implies that direct restraints on newsmen are constitutional:

> Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to ensure a defendant a fair trial before an impartial tribunal.[73]

The Court then cited *Sheppard v. Maxwell,*[74] but, as pointed out by *Younger,*[75] *Sheppard* did not recommend the use of protective orders to directly restrain the press.

In a recent opinion, the United States Supreme Court held that the first and fourteenth amendments preclude a state from imposing any sanctions on the accurate publication of truthful information contained in official court records open to the public.[76] This finding militates against a portion of the dictum from *Branzburg*, but whether a direct restraint on the news media is constitutional under some circumstances remains to be decided.[77]

A. Procedural Concerns When Indirectly Restraining the News Media

Hopefully, the *Branzburg* decision will not be used as a justification for further issuance of protective orders against the press. Because members of the news media are not direct participants in the trial, the problems of notice and hearing prior to issuance of an order raise important constitutional questions. Concern regarding the absence of these procedural formalities is not new.[78]

72. 408 U.S. 665 (1972).
73. *Id.* at 684-85.
74. 384 U.S. 333 (1966).
75. 30 Cal. App. 3d at 155-56 n.25, 106 Cal. Rptr. at 237 n.25 (1973).
76. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
77. *See* discussion at note 71 *supra.*
78. *See, e.g., In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968). The *Berry* court commented:

> We note in passing our grave doubts as to the jurisdictional validity of an injunctive order directed to persons other than

Yet technically, the presence of members of the press at a preliminary hearing to discuss the need and scope of the court order may not be mandatory prior to enforcement of the protective order against them under the following rationale.

People v. Saffell[79] held that under certain circumstances one who is not a party to an action and who has never formally been served with a restraining order may, nevertheless, be held in contempt of court. "One who, with knowledge of the order or injunction, does some act forbidden by it, and who comes within one of the classes of persons already mentioned [*i.e.*, a party to the litigation and his aiders and abettors] who are subject to the order or injunction, is guilty of contempt."[80] Under the court's reasoning it could be argued that if a member of the news media disseminated an extrajudicial comment of a party subject to a protective order, thereby becoming their "aider and abettor," and if they had knowledge of the order, the representative of the news media could be held in contempt of the order.

The prospect of members of the news media being held in contempt of a protective order under this rationale is frightening. The indirect restraint on the press is transformed into direct control of the news media by the courts. Neither this approach, nor the direct restraint of the news media by a protective order, should be sanctioned. Public interest in all phases of criminal litigation demands responsible press reporting. This is not to say that the news media can willfully interfere with the fairness of the trial. If such intentional interference is found, the weight of judicial authority holds that members of the news media may be held in contempt for obstruction of the judicial process.[81]

> the parties, their representatives and persons in active concert or participation with them.

Id. at 156 n.14, 436 P.2d at 286 n.14, 65 Cal. Rptr. at 286 n.14. *See also* Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973). *Younger* states:

> [T]he problem of notice and an opportunity to be heard, presents obvious difficulties when a court purports to restrain media who are not parties to a proceeding or represented in any way, directly or vicariously.

Id. at 148 n.16, 106 Cal. Rptr. at 231 n.16 (citation omitted).

79. 74 Cal. App. 2d 967, 168 P.2d 497 (1946).

80. *Id.* at 979, 168 P.2d at 505.

81. *See* authorities cited at notes 27-29 *supra*. Although "obstruction of justice" is not an enumerated offense under CAL. CODE OF CIV. PROC. § 1209 (West 1972), or CAL. PENAL CODE § 166 (West 1970), it has been held that the "courts of the state have inherent power to punish for contempt whether of a direct or constructive nature and the

B. Indirect Restraints on the News Media and the Scope of Protection From Evidence Code Section 1070

A recent California case dealing with the substantial effect an indirect restraint on the news media may have was *Rosato v. Superior Court*.[82] This case concerned the degree of protection Evidence Code section 1070 had on the press members' conditional right not to reveal their sources. Following the indictment of various city officials, the trial court, pursuant to Penal Code section 938.1(b), ordered that the grand jury transcript be sealed until completion of the defendant's trial. The court also issued a protective order prohibiting any attorney, judicial officer or employee, or any public official from releasing or authorizing the release of any documents, exhibits, or evidence concerning the case.[83]

In violation of the protective order, a news article appeared in a McClatchy Newspapers' publication, the *Fresno Bee*, quoting extensively from the grand jury transcript. The decision to publish the article was made only after a change of venue was granted to two of the defendants. The court of appeal held that the trial court's examination of the authors of the story, the managing editor and the city editor, was appropriate in determining who, among those directly restrained by the protective order, violated it. The authority for such hearing stemmed from the trial court's obligation to assure the defendants a fair trial, to protect the integrity of the judicial process, to assure the proper administration of justice, and to perfect the record pertaining to an issue likely to arise on appeal.

At the hearing, the newspersons refused to answer a series of questions designed to identify the source of the transcript leak. They were held in contempt by the lower court. On petition for writ of review, the court of appeal affirmed in part and reversed

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legislature cannot infringe on that power." Bridges v. Superior Court, 14 Cal. 2d 464, 484, 94 P.2d 983, 993 (1939), *rev'd on other grounds*, 314 U.S. 252 (1941). *See also In re* McKinney, 70 Cal. 2d 8, 447 P.2d 972, 73 Cal. Rptr. 580 (1968); *In re* Shortridge, 99 Cal. 526, 33 P. 227 (1893).

Furthermore, the provision in Cal. Code of Civ. Proc. § 1209 (West 1972) requiring that the contempt be in the presence of the court has been held to be an unconstitutional infringement of the court's power. Bridges v. Superior Court, *supra* at 479-84, 94 P.2d at 990-93. Therefore, although subsection 8 of section 1209 and subsection 5 of section 166 could be construed to mean "obstruction of justice," case authority does not require such construction to uphold a contempt citation for obstructing justice.

82. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975).

83. *Id.* at 200-01, 124 Cal. Rptr. at 433-34.

in part. The court held that the otherwise absolute protection given by Evidence Code section 1070 did not extend to questions eliciting information about criminal activity the newspersons may have engaged in or observed.[84] They further held that the provision did not shield the newspersons from a trial court's justifiable endeavor to indentify the court officers, if any, who may have violated the order. This latter limitation on Evidence Code section 1070 was seen to spring from the inherent power of the judiciary, as a separate and coequal branch of our tripartite governmental structure, to control its own proceedings and officers.[85]

The court, however, narrowly construed this limitation:

> The shield law still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court.[86]

To this end, the court determined on a question-by-question basis whether or not the answer to a question tended to endanger the revelation of a protected source.[87]

The *Rosato* court acknowledged the value of a balancing process prior to the issuance of a protective order. At that time, a defendant's right to a fair trial would be balanced against the social interests served by the freedom to speak. A second balancing of rights was also deemed appropriate at the commencement of the hearing to investigate the transcript leak. The *Rosato* court believed the rights to be balanced at this stage were the right of the defendant to a fair trial and the conditional first amendment right of the newspersons to protect their sources. The court believed that if, after balancing these rights, a trial court determines that the former outweighs the latter, then within the facts of a given case, the newspersons are "entitled to no federal constitutional privilege under the First Amendment."[88]

It is important to remember, though, that the order was originally based on the reasonable likelihood that disclosure of the grand jury transcript would prejudice the defendant's trial. Be-

84. *Id.* at 218, 124 Cal. Rptr. at 446.
85. *Id.* at 219, 124 Cal. Rptr. at 446-47.
86. *Id.* at 224, 124 Cal. Rptr. at 450.
87. *Id.*
88. *Id.* at 215, 124 Cal. Rptr. at 443.

cause the order did not directly restrain the press, they were constitutionally guaranteed the right to speak so long as their comments did not create a clear and present danger of a serious and imminent threat to the impartiality of the proceedings. However, the court balanced the newspersons conditional right not to disclose their sources instead of their constitutional right to speak. Hence, much of the first amendment protection which should have inured to the press members was not given.

It is therefore suggested that there should be three balancing processes before press members are held in contempt for refusing to reveal their sources, if the source is among court officers. First, the right of a defendant to a fair trial should be balanced against the right of newspersons, and thus the public, to know the contents of the grand jury transcript. Second, a balance between fair trials and a newsperson's freedom to speak should be made. If the transcript quotations disseminated by the news media do not create a clear and present danger of a serious and imminent threat to the fairness of a trial, a hearing to locate the source of a transcript leak would appear to be unjustified. The purpose of the protective order and the sealing of the transcript in *Rosato* was to preserve the impartiality of the proceedings. If the fairness of a trial is not threatened, a court's interest in protecting a defendant's sixth amendment right should not act as a springboard to hold members of the press in contempt. It is only upon a finding that dissemination of a transcript will pose a serious and imminent threat to the impartiality of a proceeding that a court should proceed to the third balance and weigh a defendant's right to a fair trial against the newspersons' conditional first amendment right to protect their sources.

C. Suggested Practices Prior to Indirectly Restraining The News Media

From this discussion of *Rosato*, it is clear that indirect restraints on the news media have considerable effect. For this reason, it should become the practice of courts to hold an adversary type hearing at which members of the news media may be represented by an attorney. The *Rosato* court took the position that notifying the press and giving them the opportunity to be present when the court issues a protective order was not required because the press members were not directly restrained by the

order. In support of this position, they quoted the following language from *Allegrezza v. Superior Court*:[89]

> In the context of this case the rights of the press are no greater than the rights of the public generally. And the public generally has no right to pretrial disclosure of *questionable evidence*, a disclosure which might well deny to the accused the fair and impartial trial which is his due.[90]

This position misconceives the interest of the press in being included in the hearing. It is obvious that newspersons, in exercising their first amendment rights, do not have the right to prejudice the defendant's trial. To this end, protective orders have been held appropriate under many circumstances. However, protective orders are generally designed to limit discussion involving broad issues. It is with this broader restraint, rather than the narrow restraints involving "questionable evidence," that the press is most concerned.

Because the press is the active force in fulfilling the public's "need to know," their objections to the amount or scope of the restrictions serve to clarify the interests which are being protected. It is interesting to note that upon request by an attorney for the McClatchy Newspapers, the lower court convened a hearing at which time a portion of the protective order was modified.[91] This serves to emphasize the fact that although the protective order may have properly been issued, if it becomes the normal practice of a court to include press members, any overbroad portions of the order can be modified without affecting the defendant's right to a fair trial. If inclusion of the news media at the hearing becomes an established practice, the order will reflect the full exploration and understanding of the delicate balance between the constitutional requirements for a fair trial and a free press.

Further suggestions to protect more adequately the freedom of the press can be made. A party petitioning a court for a protective order should be required to state why less drastic measures are not appropriate. If the court determines that a threat of prej-

89. 47 Cal. App. 3d 950, 121 Cal. Rptr. 245 (1975).

90. 51 Cal. App. 3d at 208, 124 Cal. Rptr. at 439, *citing* Allegrezza v. Superior Court, 47 Cal. App. 3d 950, 951, 121 Cal. Rptr. 245, 247 (1975) (emphasis added).

91. *Id.* at 209 n.10.

udicial publicity is likely, the order should be reduced to writing, entered on the court docket, and/or distributed to all media representatives. At the very least the court should also specifically state, in the order itself: (1) why a protective order is needed; and (2) the types of comment which will not be allowed.[92]

IX. CONTROL OF PREJUDICIAL STATEMENTS IN CIVIL LITIGATION

A. Disciplinary Rules

The application of disciplinary rules to civil litigation was attacked in *Chicago Council of Lawyers v. Bauer*. The Court of Appeals for the Seventh Circuit held DR 7-107(G) to be unconstitutionally overbroad and vague. In essence, three points supported this decision. First, it was felt that the fair trial-free press issues did not have as great an impact in civil areas. "Perhaps this is symbolically reflected in the Sixth Amendment's requirement of an 'impartial jury' in criminal cases whereas the Seventh Amendment guarantees only 'trial by jury' in civil cases."[93] Second, the length of civil litigation, often lasting several years, was a factor weighing against the constitutionality of the restrictions on an attorney's first amendment rights. Finally, because important social issues are often litigated civilly, the court felt that the public's "need to know" outweighed the fear that the trial would be prejudiced by extrajudicial publicity.

B. Protective Orders

Protective orders, of course, differ from disciplinary rules so that the same rationale cannot be substituted in a discussion of

92. Many of these recommendations were taken in part from the concurring opinion in United States v. Schiavo, 504 F.2d 1, 14 (3d Cir. 1974). *See also* A. Pickerell & M. Lipman, *supra* note 7, at 75, wherein Judge Arthur L. Alarcon of the Superior Court of Los Angeles County prepared a list of minimal factors to be considered by a trial judge to justify a protective order directed against the news media. Although these guidelines are not yet mandatory, they have been discussed to some extent in *Younger* and in Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973).

Additionally helpful in forming these recommendations was a report from the American Bar Association's Legal Advisory Committee on Fair Trial and Free Press. In the report's preliminary draft the committee recommended that law enforcement agencies, public defenders, district attorneys and local news media receive notice of the proposed restrictive order accompanied by a notice giving the time within which written comments shall be received and the time for hearing any objections to the proposed order. ABA, Proposed Court Procedure for Fair Trial-Free Press Judicial Restrictive Orders 9 (1975).

93. 522 F.2d at 258.

their constitutionality. For instance, protective orders would generally not be issued in the discovery stages of civil litigation without a showing of great need. If issued during the trial, the length of the restraint would be considerably shorter. Furthermore, protective orders are always modifiable so that the intensity of the restraint and the length of its duration can vary according to need. Since protective orders are designed to reflect the needs of a particular case, they can and should be very specific in what type of speech is to be restrained. The ABA's disciplinary rules, on the other hand, are intended to cover all civil suits. Thus, the language employed is often vague. This factor obviously contributed to a ruling on their unconstitutionality in *Chicago Council*.

Although distinguishable from DR 7-107(G), protective orders would have the same effect of limiting permissible comment in civil litigation, thereby denying the public knowledge of important social issues. For this reason, in those cases in which they are issued, the court should use the clear and present danger of a serious and imminent threat formula. Additionally, this standard is justified because a criminal defendant is entitled to greater protection than a civil defendant. The criminal defendant stands accused before the entire law enforcement system, in contrast to civil defendants who are obviously not in the same position. Balanced against the public's interest in many civil suits, the need for protective orders is not as great.

A reason given by many courts for the adoption of the "reasonable likelihood" standard is that it is this showing which must be made by the defendant to have his conviction reversed for error. As stated in the district court opinion in the *Chicago Council* case:

> [I]n light of *Sheppard v. Maxwell*, the "reasonable likelihood" standard is mandatory. There, the Supreme Court established the principle that a criminal defendant need only show a probability of prejudicial circumstances to obtain reversal of his conviction. If convictions are to be overturned on a showing that publicity *probably affected* the outcome, attempts by court rule to forestall such prejudice must be judged by the same standard. To adopt a more lenient guideline would allow unprincipled attorneys to frustrate the judicial process with impunity and thus ignore the command

> of the Supreme Court in *Sheppard* to deal with the problem by "rule and regulation."[94]

This rationale is not applicable to civil cases. Although precedent for reversible error in civil suits due to prejudicial publicity is negligible, common sense would tell one that a greater showing of prejudice is probably required for reversal of a civil suit where a person's life and freedom are not at stake.

X. PROTECTIVE ORDERS IN BENCH TRIALS

The use of protective orders in bench trials is another factor which merits discussion. Although protective orders are occasionally invoked in preliminary hearings, the purpose of the order at that stage is similar to its purpose in criminal jury trials. This is due to the fact that it cannot be known at that time whether a jury will ultimately be impaneled. Therefore, for purposes of this discussion, the term bench trials will be used when referring to a suit heard and decided solely by the trial judge. In this context, protective orders are rarely issued in bench trials in California.[95]

Because the purpose of protective orders is to restrict possible prejudicial statements from reaching the jury, their need in a bench trial should be questioned. Although "judges are human,"[96] they are also trained to base their decisions solely on admissible evidence. Therefore, by invoking a protective order, they are more or less admitting that they fear their decision may be affected by inadmissible testimony. If this fear might be substantiated, then obviously the protective order should be issued. But in deference to the parties' first amendment rights, the standard used should be the clear and present danger of a serious and imminent threat to the impartiality of the proceedings.

The decision to use this standard is further substantiated by an examination of the reasoning in *Younger v. Smith*. In *Younger*, the court distinguished *Bridges*, *Craig*, *Wood* and *Pennekamp* as not

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94. Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689, 696 (N.D. Ill. 1974), *rev'd*, 522 F.2d 242 (7th Cir. 1975).

95. The results of the survey discussed in the text accompanying notes 101-03 *infra* indicate that protective orders are rarely issued in bench trials. One question asked if the responding superior court judge had ever presided over a civil or criminal bench trial in which a protective order was sought. Of twenty-three responses, four replied that they had, whereas nineteen had not.

96. 522 F.2d at 256, *citing* Cox v. Louisiana, 379 U.S. 559, 565 (1965).

applicable to the case before them. Therefore, they did not feel compelled to use the clear and present danger test, but felt a substitution of the reasonable likelihood standard was adequate. In *Bridges, Craig, Wood* and *Pennekamp*, the comments were made by laymen concerning cases which were either on appeal or were not tried by a jury. These factors contributed to the use of the clear and present danger standard, and it is this standard which should be utilized when invoking protective orders in bench trials. The *Younger* court's analysis, in opting for the reasonable likelihood test, is thus distinguishable. The reasonable likelihood standard should not apply to bench trials either when finding a need for a protective order or when punishing violators for contempt of that order.

The application of DR 7-107 to bench trials was also criticized by the plaintiffs in *Chicago Council*. The court of appeals was not persuaded by their arguments, although they did rule that the serious and imminent threat standard should be substituted for the reasonable likelihood approach throughout the rules. The defense of these rules can be reduced to three points. First, the court believed that because the court rules were sufficiently similar to the criminal statute upheld by the Supreme Court in *Cox v. Louisiana*,[97] their enforcement was not unconstitutional.[98] Second, the court believed the rules could prevent decisions from appearing to be based on improper evidence.[99] The final defense of the rules was that "judges are human." "If prejudicial material can be kept from ever coming to the attention of a judge a potential benefit is derived. It is a benefit that could justify the applicability of rules to bench trials."[100]

None of these reasons for retaining the disciplinary rules' application to bench trials is persuasive. The analogy of the rules to the statute in *Cox* is weak. Picketing in front of a court house is sufficiently distinguishable from expressing opinions or discussing the elements of a case which is pending before a life-tenured federal judge. Furthermore, judges are trained to base their opinions on proper evidence. The slight benefit these rules may have

97. 379 U.S. 559 (1965).

98. 522 F.2d at 256-57. The argument against the analogy was that the criminal statute in *Cox* barring picketing before the court house combined restrictions on free speech and specific conduct. This distinction "was one of the bases upon which the Supreme Court distinguished the general contempt cases." *Id.* at 256. *Chicago Council* concluded that the disciplinary rules contain controls on both pure speech and specific conduct, thus their enforcement by analogy was permissible.

99. *Id.* at 257.

100. *Id.*

on the decision-making process does not outweigh the restraint on free speech necessarily imposed by the disciplinary rules.

XI. SURVEY ANALYSIS

The foregoing discussion indicates that the use of protective orders to control prejudicial publicity in California courts is a relatively recent phenomenon. Although standards have evolved which guide the courts' use of these orders, their development has been piecemeal and thus many uncertainties remain. This fact led to the conclusion that the suggestions made herein should be predicated on at least a rudimentary understanding of how California trial courts are presently dealing with the problem of prejudicial pretrial and trial publicity. Accordingly, in the fall of 1975, survey questionnaires were sent to 250 superior court judges in ten California counties.[101] Judges in both criminal and civil divisions were surveyed.

The survey questionnaire elicited information about protective orders and their use in California.[102] Fifty-seven responses were received. Of these, seven judges declined comment altogether, and 27 responded that, since they had never issued a protective order, they did not feel it would be appropriate for them to complete the questionnaire. Twenty-three judges completed the questionnaire. Of these, 12 had never presided over a civil or a criminal jury trial in which a protective order was sought. Nineteen had never presided over a civil or criminal bench trial in which a protective order was sought. These numbers tend to show that protective orders are infrequently issued in California. Twelve judges indicated that they believe the infrequency of the order's issuance was due to the lack of cases which generated enough publicity to warrant a protective order. Thus, it appears that reliance in California on protective orders rather than disciplinary rules has not resulted in an increase in their issuance.

A. Questions Regarding the Appropriate Constitutional Standard

Three questions sought answers concerning the appropriate

101. The counties were: San Francisco, Los Angeles, Sacramento, Orange, Humboldt, San Mateo, Santa Clara, Marin, San Diego, and Alameda.

102. Space limitations preclude reproduction of the survey questionnaire here. A copy of the questionnaire can be obtained by writing to: Administrative Assistant, *Golden Gate University Law Review*, 536 Mission St., San Francisco, CA, 94105.

constitutional standard to be used to determine when a protective order has been violated. The first question dealt with the standard to be applied when the speech of a defendant is restrained. Although the *Younger* court did not extend the reasonable likelihood test's applicability to comments made by a defendant, six judges would apply this standard when determining whether a violation of the order has occurred, whereas five would use the clear and present danger formula.

Another question concerned the standard to be applied when an attorney's speech is restrained. The *Younger* court held that when an attorney is involved in a trial, his or her speech may be circumscribed if there exists a reasonable likelihood that the attorney's comments may prejudice the trial. But should this standard be used when an attorney's comments have not been restrained by a protective order? In such a situation four judges believed that they did not have the power (or they would decline to exercise the power) to hold an attorney in contempt for obstruction of justice. Four would apply the reasonable likelihood standard in holding an attorney in contempt, and five would apply the clear and present danger formula.

A third question dealt with the appropriate standard to be used to determine when members of the news media have violated a protective order. The judges were asked what standard they would apply to find members of the press in contempt for violation of a protective order which was granted at a hearing from which they were excluded (although the order did purport to restrain the press members and they were served with copies of it). Although *Younger* did not extend the reasonable likelihood test's applicability to comments made by members of the press, seven judges would apply this standard when determining whether a violation of the order has occurred. Application of this lower standard is especially noteworthy in light of the fact that *Younger* expressed concern regarding the propriety of holding members of the press in contempt for violation of an order which they did not have an opportunity to discuss, protest or to have modified.

The responses to these questions suggest that *Younger*'s adoption of the reasonable likelihood standard may have created some confusion regarding its use. The *Younger* court adopted this standard only in reference to attorneys. However the responses would lead one to conclude that either this limitation has not been

fully appreciated, or it is believed by some that the reasonable likelihood standard adequately protects the first amendment rights of attorneys, defendants and the news media.

B. Questions Regarding Notice and Hearing

One of the survey questions dealt with the suggestion made in *Younger* that members of the news media may be entitled to notice and hearings if a protective order is issued against them. Fourteen judges responded that it was not their practice to include members of the press, and/or their counsel, in the original hearing regarding the need for or scope of a protective order. Three responded that they followed this practice. Seventeen judges believed that the media's inclusion in such a hearing was not constitutionally required if they were not directly restrained by the protective order. Two believed that it was. Eleven judges believed that the media's inclusion in the hearing would be constitutionally required only if the order was directly imposed upon them; seven did not feel their inclusion is required even when the media is directly restrained.

These findings show that it is not, as yet, a practice of the California courts to allow press input into the question of whether a protective order should be issued. Because fairness of the trial ultimately depends upon cooperation among the bench, bar and news media, it would seem of great value to have the press included in the hearings, whether or not the order will directly restrain them. Awareness by press members of the difficulty of holding a fair trial in the midst of tremendous publicity can only be enhanced if they are asked to participate in the court's endeavor to insure a fair trial. The survey responses also indicate that *Younger*'s suggestion to include members of the press in the hearing, thereby providing them with more formal notice of the area of comments to be proscribed if and when a protective order is issued against them, has not met with universal approval by other judges.

C. Questions Regarding Petitioners' Showing for a Protective Order

The last major area covered by the questionnaire concerned the type of showing required from a party who petitions a court for a protective order. Seven judges responded that they require the petitioner to produce potentially prejudicial articles referring

to or discussing the case. Five would not require such a showing and two would require "some factual basis." In circumstances where the press has not yet published articles concerning the case, four judges would require a showing of a likelihood of "notorious" publicity,[103] and two would require a showing of an intention by the news media to publish prejudicial material.

These responses indicate that there is a certain lack of uniformity among the courts regarding the desired showing for the issuance of a protective order. This lack of uniformity can partially be explained by the limited adoption of the reasonable likelihood standard. *Younger* adopted this standard only in reference to limitations upon an attorney's speech. Presumably, a stronger showing of possible prejudice to the trial is needed before comments by others can be curtailed.

The best explanation for the lack of uniformity, though, is that it is difficult to accurately anticipate the public's interest in criminal prosecutions. However, some guidelines are possible. If a party requests a protective order, the judge must subjectively analyze the nature of the case to determine if it is likely to generate the degree of media interest necessary to warrant a court restriction on speech. If the case has not generated any media interest, a judge could reasonably assume that the public is not interested in the litigation. However, if the petitioner could persuasively analogize his or her case to a similar case which generated a large amount of unfavorable publicity, the judge may decide that preventing the possibility of such publicity is worth some restriction on speech. The judge must also keep in mind any time factors which may explain the apparent lack of media interest. If the petitioner could reasonably explain the delay, the judge may decide that a protective order is necessary despite the absence of media coverage.

If the media *has* shown some interest in the case, the judge must decide if its degree, tone and prominence warrants a restraint. Again, subjective analysis is involved, and it would be difficult to predict the outcome in all cases. Thus, the lack of uniformity regarding the desired showing for a protective order can be explained, but can hardly be eliminated. In light of the first amendment restrictions necessarily inherent in a protective order, however, it is suggested that such an order should not issue until

103. Although only one judge used the word "notorious," three others indicated that they would require a similar showing of notoriety.

it is reasonably certain that the case will generate the large degree of media interest which could prejudice the jury.

CONCLUSION

The right not to have the freedom of speech abridged and the right to a fair trial are among the most highly valued of our constitutional safeguards. When tensions between them exist, careful analysis of the interests and policies underlying these rights is mandatory. In the interest of an impartial forum, speech may sometimes have to be controlled. Protective orders are one method to control speech, but they should be imposed only after other methods prove ineffective. Protective orders should be issued only when it appears that in the absence of court control there exists a reasonable likelihood that the trial may be prejudiced. A finding of this nature should be sufficient to include attorneys, defendants and law enforcement officers within the ambit of a protective order. The news media, however, should rarely, if ever, be directly restrained by a protective order. A very strong showing of great and immediate prejudice is needed before a direct restraint can be imposed. Indirect restraint on the media should be sufficient to insure fair trials in almost all cases. Because of the public's "need to know," and the quickly passing newsworthiness of events, the press should be included in the original discussion of the need for and scope of a protective order. The protective order should be well defined and explicit in what comments are impermissible.

If a party directly restrained by the protective order violates the order, he or she is entitled to dispute the constitutional validity of the order during the contempt hearing and on appeal. Many of the contingencies present when the order was issued do not then exist. For this reason, a more accurate determination of possible prejudice to the trial can be made. To give as much first amendment protection to speech as possible, the reviewing court should ask if the comment creates a serious and imminent threat to the impartiality of the proceedings. If such a threat does not exist, then the overbroad portion of the order and the resulting contempt citation can be vacated under the doctrine of severability. However, the validity of the order to restrict comments which seriously and imminently threaten the trial would remain.

The extension of protective orders into civil litigation and bench trial is rare, but should be accompanied by the use of the

clear and present danger formula. This formula should not be mechanically applied. It serves merely to define the degree of protection the freedom of speech deserves; it cannot serve as a substitute for the careful examination of the interests to be balanced which must precede its application.

The right to speak is not absolute and restraints are sometimes necessary. They should be imposed, however, only when they are needed to preserve a defendant's right to an impartial jury. If this can be done, free speech will be given as great a protection as possible, and Justice Black's fear of having to choose between these rights will be avoided.