AJ

AJ. CVSG w/news toward Grant

Now Grant
AJ

X VI/SG PR

S.G. views received 11/30/90
Rules satisfy clear & present danger std.
"substantial likelihood of material prejudice" is equivalent to clear and present danger, so no split ii Dann

I agree w/ petr that the "clear & present danger" test has a temporal proximity element which the "substantial likelihood" test employed below lacks.

I recommend a grant

AJ 12/9/90.

PRELIMINARY MEMORANDUM

Jan 4, 1991

September 24, 1990 Conference
Summer List 9, Sheet 2 (Page 39)
3 1 13

No. 89-1836-CSX

Gentile (tried his case in the press and won) — Cert to Sup Ct Nev (Steffen, Springer, Mowbray, Rose) (pc)

v.

State Bar of Nevada — State/Civil — Timely

1. SUMMARY: Petr claims his 1A rights were violated when he was reprimanded for public comments made prior to his client's criminal trial. I recommend CVSG.

Reply received. 12/19/90,
Adds nothing.
AJ. 12/28/90

89-1836 Gentile v. State Bar of Nev.

2. FACTS AND PROCEEDINGS BELOW: Petr's client, the proprietor of Western Vault Company in Las Vegas, was indicted for stealing money and drugs from a safe deposit box rented by undercover Las Vegas police officers. Desiring to respond to adverse publicity about his client, petr studied the relevant ethical rules and then held a press conference the day after the indictment, six months prior to the eventual trial. At the press conference, petr stated that he had evidence showing his client's innocence, and portrayed his client as a police scapegoat. Petr identified a particular police detective, who was a potential trial witness, as the likely thief, and suggested the detective was a drug user. Petr also criticized the motives of other potential witnesses, and stated that they were convicted drug dealers and money launderers. Petr's client was acquitted.

Resp State Bar filed a complaint against petr for violating Nev Sup Ct Rule 177. That rule is modeled after ABA Model Rule 3.6. It prohibits an attorney from making

> an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

SCR 177(1). A statement referring to a criminal matter is presumed to violate the rule ("ordinarily is likely to have such an effect") if it falls within certain listed categories, including statements relating to the "character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness," SCR 177(2)(a), or statements expressing an "opinion as to the guilt or innocence of a defendant or suspect in a crim-

inal case," SCR 177(2)(d). The rule also lists certain "safe harbor" categories of statements that an attorney may make to the press "without elaboration." SCR 177(3).

The State Bar's Southern Nevada Disciplinary Board found that petr had violated the portions of the rule prohibiting statements about the character, credibility, reputation or criminal record of a witness and statements expressing an opinion about the guilt or innocence of a defendant. The Board summarily rejected petr's constitutional arguments and recommended a private reprimand. Petr waived the confidentiality of the proceedings and appealed to the Nev Sup Ct.

Nev Sup Ct aff'd: In a disciplinary proceeding, the standard of proof is clear and convincing evidence. The Board's recommendations are persuasive, but we review the record de novo and make an independent judgment concerning the discipline warranted. The Board's discipline was appropriate here. Clear and convincing evidence shows petr knew or reasonably should have known that his comments were substantially likely to materially prejudice adjudication of his client's case. The press conference was held at a time when public interest in a notorious case was at its peak. Although the evidence demonstrates that there was no actual prejudice in this case, there was still a substantial likelihood of such prejudice when the comments were made. [The ct dealt exclusively with the Board's determination that petr made improper comments concerning witnesses, and did not mention petr's comments concerning the guilt or innocence of his client.]

Petr's constitutional challenges lack merit under either the federal or state constitution.

3. CONTENTIONS: Petr: (1) This Court has not addressed the fundamental 1A issues raised by regulation of lawyer speech about pending litigation. Prior cases of this Court have protected the media, public officials, and interested onlookers from punishment for speech on pending cases absent clear and present danger to the administration of justice, and last Term the Court refused to allow a grand jury witness to be indefinitely restrained from giving a truthful report of his testimony. [Citing cases]. The Court has also overturned state ethical restrictions on attorney advertising. [Citing cases]. This case is an appropriate vehicle for drawing lines balancing the competing values of freedom of speech and fairness of trials. Petr is a reputable lawyer, whose client had already been subjected to bad publicity caused by publicly reported police comments. Petr knew that the five months between the press conference and the scheduled trial, and the voir dire process, could mitigate any perceived harm. The Nev Sup Ct found no actual prejudice to the proceedings in this case, apparently confirming the accuracy of petr's prior assessment. The timing of the disciplinary charge suggests selective enforcement.

(2)(A) State cts take widely differing approaches and apply differing standards to resolve 1A claims like petr's. The federal CAs are also split. Compare Hirschkop v. Snead, 594 F.2d 356 (CA4 1979) (en banc) with Chicago Council of Lawyers v. Bauer,

cert. denied, 427 U.S. 912 (1976). (i) Nevada and several other states do not engage in any fact-specific balancing or careful scrutiny of 1A claims by lawyers whose speech falls within an ethical proscription. These states view speech falling within a disciplinary rule as outside the scope of 1A protection. Nevada upheld a prior rule regulating a lawyer's pretrial speech in In re Raggio, 487 P.2d 499 (Nev 1971), essentially arguing that a lawyer sheds 1A protection by virtue of his role in the system of justice. Raggio was heavily relied on by the State Bar in its brief below, and adumbrated the Nev Sup Ct's consideration of petr's constitutional arguments. This Court has rejected categorical regulations of speech which assume harm to the system of justice. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978) (legislative finding of clear and present danger could not substitute for individual finding). Such categorical regulations unnecessarily abridge speech in cases like this, where no harm was done to the adjudicative process. Petr's practice will be affected by the fear that future speech might result in harsher sanctions. (ii) Federal and state cts apply a variety of balancing tests. Some cts apply a "clear and present danger" or "serious and imminent threat" test, either of which focuses on the immediacy of harm. These tests find their roots in the Court's 1A jurisprudence. Other cts apply a "substantial likelihood of material prejudice" (the Nev standard) or the least stringent "reasonable likelihood" of prejudice test. These latter standards focus on the foreseeable likelihood of prejudice, a requirement which can be traced to this Court's fair trial prece-

dents. Elimination of a constitutional requirement of immediate harm is an important distinction given the vagaries of litigation, especially in a case such as this where the remarks were made six months prior to trial with the voir dire process yet to come. This Court should give guidance on the standard adequate to meet 1A and fair trial concerns. The Court should also consider the existence of alternative means of protecting the fairness of trials, such as extensive voir dire, change of venue, jury sequestration and trial postponement.

(3) The Nev regulations are vague and overbroad. Petr might reasonably have thought his comments fell within the "safe harbor" provisions allowing statements "without elaboration" about "the general nature of the ... defense," "the information contained in the public record," and "that an investigation ... is in progress, including the general scope of the investigation, the ... defense involved and ... the identity of the persons involved." See SCR 177(3)(c)(1),(2),(3). Petr had to guess about the permissible scope of speech. For instance, the prohibition of opinions about a client's guilt or innocence conflicts with the provision permitting discussion "without elaboration" of "the general nature of the claim or defense." Similarly, the ban on statements relating to the credibility of witnesses conflicts with the provision allowing discussion of the scope of the investigation, the defense involved, and the people involved. The rules provide insufficient notice of proscribed conduct. The Mont Sup Ct struck down DR7-107 on vagueness grounds, Matter of Keller, 693 P.2d 1211, 1214 (Mont 1984), and Model Rule 3.6 suf-

fers from the same infirmities. Further, the Nev rules impute a forbidden intent based on what counsel reasonably should know. The 1A may well require proof of an actual intent to embrace unlawful conduct where clearly protected speech is combined with arguably unprotected speech. The ambiguity of the rules makes discriminatory enforcement possible in cases such as this, where the advocate's speech relates to corrupt law enforcement. SCR 177 is also overbroad because it prohibits protected speech that does not threaten fair trials.

Amicus Nat'l Ass'n of Crim Def Lawyers: (1) Attorneys often have a legitimate and important role to play as public spokespersons. An attorney in that role is often subject to vague or conflicting professional standards, codes and rules. These different and conflicting rules can be traced to the lack of clear guidance from this Court. The uncertainty hampers cts and state disciplinary boards faced with legal challenges to such rules. It also leaves lawyers to act as public spokespersons at their peril. The problem is especially acute if the lawyer practices in multiple jurisdictions. There is a possibility of discriminatory enforcement. The result is that lawyer speech is chilled. All would benefit from a decision of this Court addressing this issue. There is a need for a uniform national standard.

(2) The public benefits from lawyer speech, especially the speech of criminal defense lawyers, in a variety of ways. Such speech enables the public to serve as a check on prosecutorial discretion.

(3) The genesis of the numerous standards employed was this Court's decision in Sheppard v. Maxwell, 384 U.S. 333 (1966), in which the Court reversed a conviction because of pretrial publicity and invited cts to adopt rules to prevent such prejudice. Groups following that invitation have developed divergent standards. (A) DR7-107 of the ABA Model Code is in effect in the majority of states, and is commonly associated with a "reasonable probability" of prejudice standard. Its provisions are complex and have generated constitutional litigation. Two CAs have found different provisions of DR7-107 infirm, though they did so on differing grounds, adding to the confusion. Hirschkop, supra; Chicago Council of Lawyers, supra. (B) Rule 3.6 of the ABA Model Rules adopts a "substantial likelihood" of "material" prejudice test, though the original draft proposed a stricter "serious and imminent risk of prejudicing an impartial trial" standard. (C) The ABA Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press adopts a "clear and present danger" test. (D) The American Lawyers Code of Conduct developed by the American Trial Lawyers Association would, with three narrow exceptions, prohibit a government lawyer from "engag[ing] in publicity regarding a criminal investigation or proceeding ... until after the announcement of a disposition of the case." However, the drafters intentionally excluded non-government lawyers, recognizing the importance of lawyers' 1A rights to effective representation of clients.

Resp: (1) Petr seeks to relitigate factual issues decided on questions of state law. The attorney's 1A rights must be

balanced against the attorney's duty as an officer of the ct to refrain from actions which would deny any party a fair and impartial trial. The disciplinary rules balance these frequently competing interests. ABA Model Rule 3.6, the model for SCR 177, was drafted to meet criticism directed at old DR7-107. The "substantial likelihood" of material prejudice test is designed to be analogous to a "clear and present danger" standard. This Court has said that "[c]ourts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." In re Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). In Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982), the Court invoked the abstention doctrine to prevent federal interference in a disciplinary hearing relating to an attorney's extrajudicial comments about a pending criminal trial, noting that the state "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." Petr's argument that he was speaking about police misconduct confuses the real issue. Petr's comments were principally intended to preview petr's upcoming trial presentation and profess his client's innocence. Petr was seeking fame and notoriety. He has admitted he called the conference to rebut press coverage of his client. Petr had alternative means by which to complain about police misconduct if this had really been the motive for the press conference, such as the police department's internal affairs division or the City Council. He could have waited until after the trial.

(2) The Nev Sup Ct's decision was sound, and does not conflict with other decisions. Especially after researching the ethical issues, petr should have known not to make vituperative remarks that tend to sway public opinion. While three different formulations are often used by state cts and licensing authorities, the differences are largely semantic. The Hirschkop and Chicago Council of Lawyers cases involved DR7-107 rather than Model Rule 3.6. Both cases were on pre-enforcement review, which this Ct has discouraged, and thus there was no disciplinary hearing to review in either case. The result in this case is supported by In re John Zimmerman v. Board of Professional Responsibility, 764 S.W.2d 757 (Tenn), cert. denied, 109 S.Ct. 3160 (1989). The alternative methods proposed by petr for protecting fair trials would further overburden the cts. This rule is not vague. It applies a "reasonably prudent person" standard. A similar rule patterned after Model Rule 3.6 has been upheld against constitutional challenge. In the Matter of Disciplinary Proceedings Against Alan D. Eisenberg, 423 N.W.2d 867 (Wis 1988). The disciplinary problems in this case did not arise from vagueness or overbreadth, but rather from petr's misapplication of the rule and failure to distinguish advocacy from potentially prejudicial interference. Petr's research into his ethical responsibilities was given mitigating effect in his light discipline. Eisenberg in the Wisconsin case, by contrast, was suspended for two years.

4. DISCUSSION: Petr is correct that CA4's decision in Hirschkop conflicts with CA7's decision in Chicago Council of Lawyers. CA4 held that DR7-107's "reasonable likelihood" standard met constitutional requirements, while CA7 held that only comments posing a "serious and imminent threat" could be proscribed. Petr is also correct that the states use differing formulations in regulating a criminal defense lawyer's pretrial comments. The "reasonable likelihood" standard appears to derive from Sheppard v. Maxwell, supra, in which the Court required remedial action where there was a "reasonable likelihood" that prejudicial publicity would prevent a fair trial. More stringent standards, such as "clear and present danger," or "serious and imminent threat," derive from cases such as Bridges v. California, 314 U.S. 252, 262 (1941), which applied a "clear and present danger" test to overturn contempt convictions based on out-of-court publications concerning pending litigation. The Bridges Court held that the fact statements had an "inherent tendency" or "reasonable tendency" to interfere with the orderly administration of justice in a pending case would not suffice to sustain the convictions under the "clear and present danger" standard. The fact that an attorney has professional responsibilities not imposed on ordinary citizens may further complicate the 1A analysis. See In re Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring; "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.").

The extent to which pretrial comments by an attorney can be regulated is an issue that warrants review by this Court. This case may or may not be the appropriate vehicle. On the one hand, this case involves speech at the core of 1A protection. Petr apparently had sufficient grounds for his allegations of police misconduct to raise a reasonable doubt in the minds of the jury. Further, it appears that petr's comments were motivated by a perception that adverse publicity, caused in part by published police comments, would hamper his client's defense. The parties do not dispute that petr studied the relevant ethical proscriptions prior to conducting the press conference. During the press conference, petr cited his ethical duties as the basis for refusing to answer a reporter's question. The statements were made approximately six months before trial, and the Nev Sup Ct conceded that petr's comments did not actually prejudice the criminal proceedings.

On the other hand, the amicus brief indicates that the majority of states have adopted DR7-107. Model Rule 3.6, which was the model for Nevada's rule, employs a somewhat more stringent standard. The CA4 and CA7 cases which disagreed on the appropriate 1A standard were each reviewing DR7-107. Thus, the Court may wish to wait for a case involving a rule modeled after DR7-107 rather than Model Rule 3.6. In addition, the Nev Sup Ct's opinion rejected petr's constitutional claims in a summary fashion, possibly inhibiting review (though the 1A issues have been extensively discussed in other published opinions).

I recommend CVSG. This is a federal issue of substantial importance. The Justice Department could be expected to take an interest in this case because of the Department's involvement in criminal prosecutions and the fact that Justice Department prosecutors are subject to the same ethical restrictions on extrajudicial comments as their defense bar counterparts. The SG's analysis might assist in determining whether the Court should grant cert in this case or, perhaps, wait for a case from another jurisdiction.

5. RECOMMENDATION: CVSG.

There is a response and an amicus brief.

August 11, 1990 Beck Opn in petn

Brua
(CJ/Uva/Flaum, CA7)

I would recommend CVSG w/ a view toward Grant. I am swayed by the divergent authority and particularly by the differing disciplinary rules. I feel that the Ct can address the relevant issues as easily in this Model Rule 36 case as in a D.R.7-107 case.

The lack of substantive discussion of the Constitutional issues is now troubling. As the memo points out, however, there is ample judicial treatment of the issue in other cases. I must say that I am uncertain about the importance of this issue to the decision to grant.

CVSG w/view toward Grant
AJS 8/21/90

facts underlying