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COMMISSION FOR LAWYER DISCIPLINE V. BENTON

HEDGES: My name is Dan Hedges. I am counsel for the petitioner, the Commission for Lawyer Discipline. My co-counsel is Linda Acevado. This is a unique case. This is the first time the CA has struck down as unconstitutional one of the disciplinary rules promulgated by this court. An almost identical disciplinary rule existed in 18 other states, including New York, California and Illinois.

PHILLIPS: Your brief says, still. Did this rule previously exist in a later number of states?

HEDGES: Not to my knowledge. I don't know the answer to that. And no courts of any of those states have stricken the rule as unconstitutional.

PHILLIPS: Has there been any cases upholding the rule in any of those courts?

HEDGES: I do not know the answer to that. The importance of this rule is that it does relate to jurors. And jurors are the most vulnerable part of our system. The lawyers and the judges have training, the parties have lawyers representing them, the lawyers and the judges get paid to participate in the system, the jurors probably own pass through the system once. They have no training. They are essentially unpaid. They have no lawyers representing them.

PHILLIPS: If the jurors only pass through once, then how does it hurt the jury system for them to have an unpleasant experience _____?

HEDGES: It would not hurt as much perhaps in Houston or Dallas where they may very well pass through the system only once. In some of the smaller areas where they don't have as big a jury pool, the jurors will pass through the system probably a great deal more than once. You're right, the way it would hurt the jury system is for those jurors who might becoming back, because any sort of intimidation of those jurors - harassment of those jurors is certainly going to do two things: they will be a less willing juror to participate in the system; and if they are forced to participate as they probably would be there's a greater risk of them being not as impartial or as fair a juror.

Very, very briefly on the facts. I know the court is familiar with them. Mr. Benton was the losing lawyer in a dog bite case. After the trial, he wrote to all of the jurors a letter in which he told them, and just a few notes from the letter because the letter has been classified, it's been characterized as political speech, and it's our position it is certainly not political speech. Some of the language from it is that "he was so angry with their verdict that he couldn't speak to them after the trial, that they obviously had been influenced by the lawsuit abuse campaign, that they had

breached their oath to render a true verdict, that they had perverted and corrupted the civil justice system, and that they had contributed to the corruption of good government, and that they were cold and unfair."

The Commission filed a disciplinary petition alleging violation of Rule 3.06(d), the TC assigned a judgment finding that Benton had committed professional misconduct and assessed a probated suspension. The judgment did not address the constitutionality of Rule 3.06(d). The published opinion by the Corpus Christi court only addresses one of the four points raised on appeal by Mr. Benton. The CC court's reversal and dismissal is on the sole basis that the rule is unconstitutionally vague and it focuses on the terms "harass," "embarrass," and "influence." The Commission filed a motion for rehearing which was overruled with slight revisions in the previously published opinion. A second motion for rehearing was filed, and in that one, the CJ wrote a concurrence saying he did not believe the letter harassed and embarrassed, and that he further believed that the rule, particularly the part about influence, was violative of the first amendment.

Our first point is that lawyer disciplinary rules should not be subject to the same constitutional vagueness standards as other statutes.

ENOCH: This case was retried, then there was a verdict returned for the plaintiff, did I read that somewhere?

HEDGES: I believe that is correct.

ENOCH: The letter as I read it could be harassing, but could the letter be true? Could the jury have disobeyed its oath? Could the jury have ignored the instructions of the judge? Could the jury have done the things that Mr. Benton said? I mean, do we have to come to this with the assumption that what he said was not true in order to find the letter harassing, or can the letter be harassing even if it's reflecting true facts?

HEDGES: To begin with, unless some kind of an inquiry had been conducted of the jurors, which was not, the jurors had been somehow brought into question, I don't know how you would ever be able to answer that question. We can't know that.

ENOCH: To determine whether the letter is harassing or embarrassing to the jury, would we have to make a determination that what the juror is being accused of is groundless or frivolous or some sort of no basis at all?

HEDGES: I don't think so. I think the letter could be true, that it could still be harassing, embarrassing and seeking to influence the jurors. Juries can be wrong. Juries are wrong from time to time. Juries sometimes make their decisions for the wrong reasons. I've certainly observed enough mock trials with the video and all that, I've seen mock juries arrive at decisions for incredibly wrong reasons. But they can still perform a function in our system. Hopefully if a jury

did something wrong it will be overturned, but there are processes for overturning it. That's what the appellate process is for.

Even those jurors who are wrong deserve protection within the system. It should not be harassment. I think the short answer to your honor's question is, I think the rules should apply even if what the letter says is true, it can still be a harassing letter. I see no reason why it should not be.

The cases involving Judge Howell and the Fifth Circuit and in the entire CA, I think gives us the best description of why the rules that would apply to regulations of lawyers in determining whether they are vague is not the same vagueness test that would be applied to a criminal statue. The criminal statute applies to all of the people. It applies to people with absolutely no legal training whatsoever, that's mostly who it applies to. Regulations of lawyers are regulating people who have special education, they have a special training, they have access to special resources. So while the customary rule is whether or not a person exercising ordinary common sense can sufficiently understand and comply with without sacrifice to the public interest, the regulation, that is not the rule for lawyers. That should not be the rule for lawyers. The rule for lawyers should be whether a lawyer with the training experiences and resources available to him or her should be able to understand and comply with the rule.

The Corpus Christi CA talked about the ordinary rule, and said a few things about how lawyers should be treated differently, but when they got down to the end of their determination of vagueness they applied the ordinary man test, and did not apply the test as to lawyers.

SPECTOR: Is there any difference between going up to a juror immediately after the trial and writing them a letter 6 months later?

HEDGES: Not under the terms of the rule. I don't think it would be. You have to have a lawyer who tried the case, you have to have jurors who were on jury in that case, those are two of the elements of the rule. So it's a very, very narrow limited rule in who it applies to. And then it says: "The lawyer shall not ask questions of or make comments to a member of that jury that are calculated to harass" I would think, even a letter several months later if it is a communication to one of the jurors, in that case where he was the lawyer and it has the effect of harassing or embarrassing, would still be a violation.

PHILLIPS: _____ the word "merely", merely to harass or embarrass?

HEDGES: I think in this particular case if you substituted the word "solely," for the word "merely," you would still come out with the same result. This letter served no purpose other than that. As I said at the outset, some effort has been made to portray it as political speech. The only

way you can do that at all is if it does have the words "lawsuit abuse" in the letter. But it doesn't talk about the lawsuit abuse campaign. It doesn't explain what it is. It doesn't say whether Mr. Benton is for it or against it. In essence all it says: "Your decision is so incredibly wrong and stupid, the only thing I can think of to explain it is is that you've been victimized by the lawsuit abuse campaign."

PHILLIPS: It's informational isn't it, that the judge set aside what the jury did and issued another trial, and that's information juries might find helpful?

HEDGES: In the context of the whole letter it would not appear that was done to be informational and helpful. It appears in the context of the overall letter that "it isn't just me who is saying how wrong you were, you were so wrong that the judge threw out your verdict, he had to have another trial and all the time we spent was completely wasted."

HANKINSON: How can you tell that it clearly indicates in a negative manner? One of the complaints that Mr. Benton makes is that this particular rule is subject to discriminatory enforcement.

HEDGES: That's correct. If you look at the purpose of the rule as stated in the commentary, the purpose of the rule is fair and impartial justice and to encourage jurors to participate. So it could be totally contrary to the purpose of the rule to say that a letter that influences them to participate willingly in the system was violative of the rule. The purpose of the rule is not to discourage them, such as the letter that was involved here, that simply said: "Thank you very much for your service; I hope you will continue to serve in the future," that kind of a letter actually works towards the purpose of the rule. So if we look at the words in context, we look at "harass," "embarrass," and "influence," and we look at the purpose of the rule, I think it's pretty clear that the rule is intended to dissuade lawyers from trying to intimidate people to stay off of juries, not to in anyway punish lawyers who write letters thanking people for their jury service and encouraging them to serve.

BAKER: In this case though, the defense lawyer wrote a letter lauding the jury in their efforts and thought they did a good job. Why doesn't that violate the rule if it's attempting to influence the jury on his viewpoint of the case

HEDGES: I think because, as I just said, the purpose of the rule is to encourage jurors to willingly serve.

BAKER: Such as: "Well, you did such a good job, I hope you will remember me the next time we have you on the jury," and things like that, that's a positive thing.

HEDGES: I don't think that would be violative of the rule. I think that would not be discouraging them from jury services, that would be encouraging jury service.

BAKER: How does somebody that's supposed to be enforcing it know under the circumstances, whether you do or you don't, and that's why the complaint is made in this case, that there's uneven enforcement?

HEDGES: It's not uneven. It's totally even and consistent with the purpose of the rule. And the purpose of the rule is to encourage juries to continue to serve. When you keep that purpose of the rule in mind, then you read the rule with that purpose of the rule in mind.

PHILLIPS: Wait a minute. If the letter says: "I'm delighted you returned a zero verdict, and you will be glad to know in the last two years the majority of this county have returned 50% zero verdicts, and that's kept your insurance premiums only rising 2% instead of 8% like they rose before. If all jurors work together to keep these verdicts down, we will all live happily ever after." Wouldn't that be calculated to influence the jurors' actions in future jury service?

HEDGES: I think it might be calculated to encourage them to be willing jurors in the future.

PHILLIPS: Well, there's an "or" here. You're looking at harassing and embarrass the jurors. You can't say, "Or to influence his actions in future jury service?"

HEDGES: At the risk of repeating myself, the best answer I have to that is to look to the commentary. And remember we are dealing with lawyers, and lawyers are supposed to know how to look to the commentary and read the commentary. Lawyers are supposed to be able to understand the purpose of the rule, interpret the rule in accordance with the purpose of the rule, and the purpose of the rule is to keep the lawyers from writing negative letters to jurors influencing them, so they will not serve on juries.

SPECTOR: If a judge has granted a new trial, and that is communicated to the jurors, in other words, "your jury verdict was disregarded by the judge, and I just wanted you to know that," do you think that negatively influences them to not want to serve again?

HEDGES: I think that question put side-by-side with the question from the CJ earlier, that is certainly a tougher question to answer than this letter in its entirety would be. Certainly, an argument could be made, that's informational. I think an argument could also be made that it served no purpose other than to say: "ah, ha, see you are wrong." But it would certainly be much closer question than what we have before us today.

ENOCH: But a letter that says: "You were wrong," is a different letter than a letter that says: "You are corrupt?"

HEDGES: "You are corrupt, you were cold and unfair. I hope if you are able exposed to the system and you think the system is crooked, you will look back on how you corrupted the

system in this instance." It's very harsh language in this letter. It is really nothing but a very harsh personal attack on the jurors. I would argue, viewing that letter in its whole, is exactly the kind of letter that the rule was designed to prevent and the kind of conduct that jurors should be protected from.

PHILLIPS: Even in the few short years since we've promulgated this rule there's been a strong move in the federal courts to extend full speech rights to lawyers and judges. Several provisions of the Code of Judicial Conduct have faired poorly in courts around the nation. Aren't we in the middle of a strong trend that way, laws as to business, you don't give up any civil liberties in exchange for this license to do this business?

HEDGES: I would agree there is a trend in that direction. But, certainly, we still have cases coming out regularly. I would refer the court to the case (I've sent a copy to the court after the briefs were filed) the *Mary Nell Maloney* case out of San Antonio, where certainly I think federal and state courts are still taking the position that if you are going to get benefits of participating as a lawyer in judicial system, you are going to have to abide by the rules of that system, you are going to have to abide by certain disciplinary rules. And disciplinary rules on lawyers essentially by definition are limits on speech. Lawyers don't have much, but, speech.

PHILLIPS: The *Maloney* case, as in our recent *Havener* case, involved speech directly to the court, in essence within the courtroom as opposed to outside speech.

HEDGES: Two responses to that. Number 1, if you're kind of looking at the relative strengths of the parties and their abilities to deal with one another, I would argue to the court that judges are at a far stronger position to deal with abusive lawyers than jurors are. The judges have sanctions they can impose on the lawyers, the judges are lawyers, the judges have the same training if not better training than the lawyers do. With all due respect to the court, the court deserves proper treatment and proper respect, but the jurors have no protections. They don't have the training, they don't have any sanctions they can render. So I would argue that when the court is considering the _____, I know the court is doing as we speak of the interrelationship between what lawyers can say to judges, greater protection should be granted to jurors. And to the extent they were outside the system there are other laws and rules that still give protection to jurors after they have returned their verdicts. They should not simply be let go and unprotected by the system. On the criminal side, we have the retaliation rules. If somebody is a juror in a criminal case and they've rendered their verdict, they walk outside the courtroom and the lawyer walks up and slaps them in the face, instead of a misdemeanor assault, he's got a felony retaliation statute that he's looking at. So this is certainly not the only rule or regulation. We have to protect jurors after they have performed their services. And I would argue, one of the protections they ought to add is once they've entered their verdict they ought to be free from the system. They ought to be able to get back to their lives and go on about their business. And this kind of harassment impinges upon their ability to do so.

GONZALEZ: In focusing on political speech, it cannot help anytime you see these

billboards, as I travel throughout the state in my campaign they are everywhere. And not only the campaign against lawsuit abuse, but there are competing billboards in answer to those billboards. And there have been a lot of articles written about them. There have been editorials written about it, so there's been a lot of coffee shop talk about this campaign. What does the record show with regards to that? If the record doesn't show anything about that, to what extent can we take judicial notice of these things as we weigh whether or not this is political speech or not?

HEDGES: There was some talk about that, I believe, in the record your honor, but mostly I've been focusing on the letter itself, and is the letter really a discussion of the lawsuit abuse issue? I think that's a perfectly valid issue obviously for political speech discourse. But it is mentioned only once in this letter, and that sentence is: "I can't think of any possible explanation on God's green earth you doing something as stupid as you did other than you must have been influenced by the lawsuit in this campaign." It's not a discussion of that campaign. A discussion of that campaign in the billboards, a discussion of that campaign in the letters to the editor, and other context would probably be valid public speech. But here, the particulars strike me on the first amendment analysis of this, and part of that is is it political speech, but part of that is how narrow is this restriction.

This rule applies to a very, very small number of people. It doesn't apply to all lawyers. It only applies to lawyers who have tried a particular case in front of a particular jury, and it only restricts them as to their expression of opinion as to twelve people. Really, twelve people on earth who they cannot say some of these things to. Otherwise, they can go on television and say it. They can put in on billboards. They can put it in the newspaper. But the rule is simply, when those twelve people who have made their contribution to the system, they should be able to go free and not have anything more to do with it, and leave them alone. So it is a remarkable narrowly drawn restriction, and I think that is critical in any first amendment analysis of it.

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RESPONDENT

LAWYER: What I would like to first do is just touch upon some of the questions that you asked, because I think you're right in tune on some of the arguments and important issues. In fact, Judge Hester granted a new trial in the case, and it was actually settled after jury selection the second time around.

What I want to first start with is what Mr. Benton has said all along: "e regrets writing a letter." I mean, he obviously made a mistake, and he would never do that again. He felt sincerely that he was voicing his opinion, his opinion about political speech. I don't think there is any question that lawsuit abuse is a political speech issue. I believe that this court had a case in front of it just a couple of days ago, which shows on the ramifications of lawsuit abuse.

GONZALEZ: If he felt so bad about it and got a probated sentence, and he's not going to do it again, why are we here?

LAWYER: Mr. Benton was willing to take a private reprimand and they insisted that they wanted to prosecute him and put him on _____ probation.

PHILLIPS: Has any of the sentence been served, or was it superceded?

LAWYER: It's been put on hold.

PHILLIPS: So it's still a live controversy?

LAWYER: Yes.

PHILLIPS: If we were to reverse the CA, he would have a 1 year probation?

LAWYER: Yes, with some other conditions that I want to talk to you about. He was ordered to prepare a video regarding "how you should contact jurors." What do we tell law students or other lawyers on how to contact jurors if the law itself or the rule itself is vague.

Also, the record at trial contained numerous materials regarding the lawsuit abuse campaign and articles. So, again, I don't think there's any question that it is political speech.

Your honor had a great question about a lawyer contacting a juror right after the trial as opposed to a letter. There's great authority for the proposition that a letter is the least intrusive means of invasion of privacy, that a juror could discard a letter seeing that it was from Mr. Benton or not even read it as opposed to being grabbed in a hallway and say: Listen, what you did is wrong."

BAKER: Isn't there an answer to that, that maybe right after the verdict is in you're caught with emotions, but 4 months later it was like a pretty deliberate thought to write a letter of that nature?

LAWYER: Right. And actually it was months after the case was concluded, which means it would have no bearing at all on the present litigation. Also, the commentary states something about the purpose of the rule, but part of it says that "the purpose of the rule is to protect the feelings of jurors." With all due respect, feelings of jurors or feelings of people sometimes would have to be overweighed or outweighed by the constitutional provisions of freedom of speech and freedom of political speech.

PHILLIPS: Could the commentary be rewritten to make the rule constitutional?

LAWYER: I was thinking about maybe we shouldn't contact jurors at all, but a lot of jurisdictions are doing the federal court system, and those cases have been upheld. It may be better

to have a rule where you should not contact a juror at all as opposed to saying: "Well you can contact a juror if what you tell them is nice, but you can't contact a juror if what you tell them is not nice."

PHILLIPS: Is there any correlation between a lawyer's ability to contact a juror and the ability to impeach a juror's verdict by testimony? What I am getting at is this rule we have left over from the days when we allow a post-verdict inquiry into what the jurors considered and how they reached their verdict.

LAWYER: I'm not really sure about that your honor. I apologize. I'm not sure I know how to answer that. Also, the trend is correct, that laws abridging free speech especially lawyer's free speech have changed over the years, they have changed in favor of lawyers enjoying the full rights of citizenship. And we are aware that the right to free speech is dependent largely upon your values and your opinions, and as long as the constitution has been interpreted to mean something besides "congress shall make no law abridging a freedom of speech," it's going to be dependent upon the public judges. And we ask that you put a high value on the free speech in Texas. The trend is growing for lawyers to be treated just like any other citizen, and we call the controlling case of *Gentile*, the court states: "We have not in recent years, and this is 1991, accepted our colleagues apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions infringe upon the first amendment. There cannot be any disciplinary rules that infringe upon the first amendment rights or any constitutional rights." A lawyer is just like any other citizen, and that trend is growing and continues to grow.

GONZALEZ: So you're saying that all the federal court rules that prohibit lawyers from contacting jurors are unconstitutional?

LAWYER: No, sir. As a matter of fact, I think that may be a better practice because...

GONZALEZ: Certainly an infringement of speech. I mean there's a complete bar.

LAWYER: The problem here is there's discriminatory enforcement.

HECHT: Where is the discriminatory enforcement?

LAWYER: As pointed out by her honor that Mr. Hollis, the opposing counsel in the underlying personal injury case, wrote a letter to jurors saying: "You guys did a great job, and he admitted that he wrote that to influence their jury in the future."

HECHT: But he didn't write it to harass them.

LAWYER: But he did write it to influence their future jury service, and that's what the rule prohibits.

HECHT: It also prohibits harassment, and there is no way you can read those two letters and think that one letter is not harassing and the other letter is.

LAWYER: Right. But the rule I think as the CJ pointed out has "or's" in it. It's either harass, embarrass or to influence their future jury service.

HECHT: Would it be okay if it just said "harassment?"

LAWYER: As long as harassment is defined to some extent...

HANKINSON: Don't the words "harass," "embarrass," or "influence," have settled usage in Texas law? Aren't those terms used regularly in Texas law so that the usage is known?

LAWYER: I believe the penal statutes have a specific definition of harassment where there is none in this case. That would be the distinction for me. I think the case that's pointed out in the brief, the *Long* case, where most of the penal...when they use harassment has a specific definitions where here it doesn't.

HANKINSON: Do you have to have a specific definition to go with the rule or if the word has a common meaning, a settled usage isn't that sufficient to avoid a successful vagueness challenge?

LAWYER: My response would be that to what may be embarrassing to some jurors may not be to others. Apparently 12 jurors got this letter, but only three of them basically complained about it, which may mean that the other 9 weren't embarrassed or didn't feel that they were harassed.

SPECTOR: Is it a subjective standard, or is it a standard of ...

LAWYER: In my mind it's subjective. What is embarrassing and harassing to one person may not be to another.

SPECTOR: Because jurors, as opposing counsel pointed out, this may be their only time to have anything to do with the judicial system, and sometimes can be more sensitive to what goes on in the courtroom than others.

LAWYER: That's true.

PHILLIPS: If it became a general practice among the bar that every losing lawyer wrote this type of letter to every jury panel so that that just becomes common knowledge, what's that going to do to an already declining pool of people who want to serve?

LAWYER: I think the state bar wants to argue if you reverse the CA's decision, you are going to have all kinds of lawyers writing all kinds of stupid letters like this. But quite honestly, I

don't think any lawyer would write a letter like this. Mr. Benton regrets it now. I don't think the court has to be concerned with opening the floodgates for lawyers criticizing jurors because most lawyers practice in small towns, no jurors or potential clients, no ones going to do that.

HECHT: Well if nobody is going to do it, and they know not to do it, how can a rule that prohibits it, be vague?

LAWYER: I would like to proceed with our argument regarding the political freedom of speech aspect.

HECHT: What's the answer to my question. How can it be vague if lawyers are not going to do it, they know not to do it, and they know in the words of your brief, that it's not good professional practice to write such a letter, that's what the rules of discipline are about, what's wrong with prohibiting it on vagueness?

LAWYER: On vagueness, I still think that it calls for discriminatory enforcement.

HECHT: Everybody knows not to do it, but we can't prohibit it?

LAWYER: No. Somebody may write a letter that they think is not embarrassing and a juror may feel oversensitive and feel embarrassed. I think there's still going to be a problem with the discriminatory enforcement.

PHILLIPS: Discriminatory enforcement is virtually impossible to prove, is it not?

LAWYER: No, it's very subjective. I keep repeating myself. What may be embarrassing may not affect someone else.

PHILLIPS: As I read the rule, forget the comment, it doesn't have anything to do with what it actually does to a juror. It's what the lawyer has in his or her own mind if they are writing it calculating the _____.

LAWYER: That may be more reason to hold that the rule is in fact vague, unconstitutional. But it's a different interpretation. Mr. Benton also argues that the rule allows for censorship of political speech, which is presumptively unconstitutional. There's plenty of cases on that. The growing trend as you are aware of now is that lawyers should be treated equally in that regard.

PHILLIPS: We put all kinds of restrictions on lawyers in terms of what speech they can make and they are outlined in opposing counsel's brief, but you've got client confidentialities for life, and beyond the grave, and lots of comments you cannot make during a trial, or before a trial.

LAWYER: And those are good rules because they could interfere with the justice system. Again, this is a case where a letter was written 4-5 months that had nothing to do with the trial at that time.

OWEN: But you stipulated it was to influence in future cases. That's a direct impact on the system is it not?

LAWYER: That was the stipulation that Mr. Benton wrote the letter to influence jurors' future service.

OWEN: It is calculated to have a direct impact on an adjudication in the future?

LAWYER: Yes. But when the question arises between what lawyer's rights, it's usually in opposition to a fundamental right, a right to a fair trial, a right to your client's confidentiality. Here it's his right to freedom of speech verses the feelings of a juror. It's not infringing on the judicial system...

OWEN: You keep saying feelings of a juror, but we do have the stipulation that this was done intentionally to influence the outcome of their vote in another case, and that's not feeling is it?

LAWYER: I'm not sure about it. It was done to influence their future service. My response would be that Mr. Hollis, the other lawyer, admitted he wrote a letter that was very complimentary and also to influence their future jury service, and why isn't he being disciplined? He basically admitted to violating the rule himself, that he wrote it to influence them, but in a positive effect. And that's where you get into ___ "Well Mr. Benton's letter is critical, Mr. Hollis' letter is not critical". Who are we to judge that what's critical to one may not be critical to another?

BAKER: Do you also have a problem that if you stipulate that you did it to influence a future jury service, that you are acknowledging that you know what you said is not in response to a vague standard?

LAWYER: We would acknowledge that he wrote it to influence the future jury service, he didn't stipulate that he wrote it to embarrass or harass.

BAKER: I understand. But as been pointed out, the last clause of the rule says: "Or, to influence." So you violate the rule. How is that a vague...

LAWYER: The part of the rule that mentions harassment and embarrassment is still vague.

BAKER: But in this particular case under these particular facts, he could be found to

violate the disciplinary rule without having to discuss whether "harass" or "embarrasses" involved at all, but purely based on the stipulation.

LAWYER: I think, we have three stronger arguments regarding political speech and equal protection.

BAKER: But we're only here right now, at least at this point, on the vagueness situation. We have to get past vagueness before you can get to this court or the CA to write again on your other three points; isn't that right?

LAWYER: Our position is, we filed cross-appeals on those three other issues, so we feel that they are in front of the court now. Also, the state bar from one of the jurisdictional aspects of even being here mentioned that there was a conflict between the justices of the CA. Justice Seerden wrote a concurring opinion that "he felt maybe it wasn't vague, but it's definitely unconstitutional because it violates his freedom of speech, his right to free speech." So my opinion, with all due respect, we feel that all those issues are before the court this morning. And that's why I was trying to expand on those. We filed the cross-appeals on the equal protection, the freedom of speech. And that's what I was getting into, that a lawyer's rights now have become equal. The *Gentile* case is, I, think controlling that we're not second class citizens any longer.

Wouldn't it be ironic that lawyers who are advocates for people's rights and their constitutional rights would now be _____ of being a second class citizen themselves. That trend is changing. And it's come to a point where only clear and convincing evidence would outweigh a lawyer's right to freedom of expression, freedom of speech. The Corpus Christi, the *Harney* case talked about a march on the courthouse, that would affect the administration of justice, but nothing short of that will. It's got to be eminent. And in this case, Mr. Benton has a right to express his feelings about lawsuit abuse. He sincerely felt that that's what affected the jury, which obviously made a mistake in this case. Judge Hester granted a new trial instantly. The defense at the underlying trial never even...just basically stipulated to liability. It's just a matter of how much. Mr. Benton felt that the lawsuit abuse was affecting the jury, he wrote that. The record is full of lawsuit abuse, thus, we feel that he is expressing his right to express political speech, and that can't be infringed just because of jurors' feelings.

OWEN: Had he done this in a letter to the editor, he would have reached the same jurors would he not, but wouldn't that be a better avenue for him to vent his political speech if that truly were his intent?

LAWYER: That could be interpreted as also being in violation, that jurors could have read that, and that you are contacting the jurors. That's why that rule is so open and in my mind vague.

HECHT: But the rules are full of those kinds of answers. That's all there is in the rules. 306(a)(1) says: "You shall not conduct a vexatious or harassing investigation." Isn't that the same

problem?

LAWYER: Yes, sir.

HECHT: And there's nothing but that...I mean there are a few provisions that say you shouldn't break the law, but so much of the rules is setting a standard that can't be completely fully defined.

LAWYER: And, I think the best argument I would have is again going back to the discriminatory enforcement. We were fortunate in this case where the other lawyer actually did write a letter. And I think that says a lot where one lawyer is writing a letter and he's getting criticized.

PHILLIPS: And he's subject to the same standards on discriminatory enforcement that a criminal defendant has to prove to strike down a prosecution because of discriminatory enforcement?

LAWYER: That's true.

PHILLIPS: And you're familiar with those cases?

LAWYER: To a certain degree.

PHILLIPS: It's virtually impossible.

LAWYER: To me, it seems like it's just so subjective. Again, I feel that before the court is the other constitutional issues that we ask that you take serious consideration of those. The equal protection issue is a serious issue. I don't think the court should be concerned about opening the floodgates.

Through all of our research there was one other incident in the entire US where this has occurred. It was out of Indiana, the *Berring* case, and the court never even addressed the constitutional issues, just addressed the rule.

The equal protection standard is whether there is a compelling state interest to justify treating one person differently. Basically regarding the equal protection argument, anybody else in the courtroom could have contacted the jurors, the bailiff, even the parties, the judge, anybody, but only the lawyer, Mr. Benton and any other lawyer in Texas has been prohibited from doing that. That's just not treating everyone equally and there's no compelling state interest to treat lawyers differently. A party could have harassed jurors, the judge could have sent letters.

PHILLIPS: Don't you think a judge sending this type of letter that the judicial conduct commission would have something to say under broader standards that are applicable?

LAWYER: It's very likely. But this rule doesn't prohibit the judges from doing that.
PHILLIPS: Judges are sanctioned all the time for _____ rules about maintaining the dignity of the office, etc.

LAWYER: To me there just seems to be no simple compelling justification for only censoring lawyers. The parties could have done it, or anybody else could have approached jurors, but the lawyer, and again Mr. Benton approached the jurors long after this whole case was over. It would not have interfered with the administration of justice. What we see is a lawyer's right to free speech is different only when it conflicts with some other fundamental right, which I was talking about, a right to a fair trial. Freedom of speech verses a right to a fair trial gag orders. There are a lot of cases out of the 40s concerning where editors and newspapers were held in contempt, and those were some fundamental issues, a person's right to a fair trial, client's confidences, the confidentiality of communication. When a lawyer's speech does not directly affect one of these interests, these fundamental interests, the lawyer has the same right to free speech as everyone else does, including the media, and that's what the *Gentile* case speaks about, and that's what that *Harney* case out of the Corpus Christi publisher case speaks about.

The rule censors more than is necessary to promote its goal: protecting former juror's feelings. If the rule stopped at prohibiting "harassment" or "embarrassment" maybe it could be constitutional. But it goes much further. It prohibits speech which would influence jury service in the future, preventing lawyers from seeking to influence former jurors in the future, literally prohibits them from encouraging them to participate. Again, we feel that there is just too much leeway and you have a complimentary letter, you have a critical letter, and Mr. Benton was ordered to be disciplined because of that. Mr. Hollis, who wrote the complimentary letter, wrote the letter to influence other jurors' future service.

GONZALEZ: You keep focusing on similarity of the two letters that they were both intended to influence future jury service. But you're shying away from harassment and embarrassing the jurors.

LAWYER: Regarding harassment, I think it's clear that harassment has to be some sort of continuous episode. Even the penal statutes regard it...

GONZALEZ: So if a dog is entitled to one bite before occurring liability, a lawyer is entitled to one letter?

LAWYER: I don't think one letter constitutes harassment. One letter, depending on how subjective you are or what your personal feels are may be embarrassing. But I don't think one letter can be harassing. That's what the question is: What does harassing mean? In my mind it means something that's a continuous annoyance as in the penal statutes, the stalking or the telephone harassment penal statutes.

Even Judge Seerden said: "One letter shouldn't be harassment." But there are constitutional issues, that besides vagueness that we would like you to consider and I appreciate your time, and Mr. Benton regrets the letter.

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REBUTTAL

HEDGES: I would like to address just two procedural matters to perhaps clarify something. The Corpus Christi CA in its majority opinion addressed only vagueness. It did not address the first amendment or equal protection issues. The first amendment issue was addressed in the concurrence. Therefore, I think if this court chooses to, this court could write its opinion based entirely upon vagueness and write a totally dispositive opinion.

PHILLIPS: Only if we confirm?

HEDGES: Correct.

PHILLIPS: If we find that this is not vague, we still cannot affirm this sentence without looking at all the other constitutional challenges, which the court below didn't reach.

HEDGES: They are not before this court on cross-appeal. There is no cross-appeal in this case contrary to what Mr. _____ had said.

PHILLIPS: There wouldn't have to be a cross-appeal just cross-points, other reasons to uphold this verdict.

HEDGES: I would love for this court to consider all those grounds. What I would not like to see happen for obvious reasons is for this court only to consider vagueness and then send the case back to the Corpus Christi CA to consider the first amendment equal protection. I, do, believe they are all before this court. And we would like to see the court consider all of them.

OWEN: You don't mention in your briefing, the *Gentile* case. How do you distinguish that?

HEDGES: I am going to need some help on the holding on that one. I am sorry.

OWEN: It upheld in a criminal case putting some restrictions on a lawyer speaking out ahead of time, the court held that there has to in essence be a clear and present danger and there has to be some substantial _____ impacting a proceeding.

HEDGES: If that's a criminal statute you've got a completely different standard than you have under the disciplinary rules. The court has had a lot of questions about the rule today. It

certainly is possible to improve this rule. It's probably impossible to improve all of the rules. I would suggest to the court that the court has other means available to it to improve the rules. The court has its own inherent power. A new rule can be drafted and circulated through the membership of the state bar. I think to strike down this rule as unconstitutional, which would leave us with no rule at all, is not called for here. It's not the wise way to go. It's not the right thing to do. If the rule needs to be changed, the rule can be changed and it should be changed through those other means.

PHILLIPS: Does this rule have any more force because in Texas unlike any other state I've found so far, the lawyers vote on these rules?

HEDGES: I would certainly think so. The system is available to all the members to offer criticism, to participate. I've participated in some of that system in committees appointed by this court. This isn't something that this court went off somewhere and just came up with these things out of nowhere. The lawyers had input.

PHILLIPS: More than input, it's a vote. There's an election. We're thinking about putting some changes on now that are part of a negotiation with the US AG. And in other states the SC will promulgate it if they want to, but we have to have an election.

HEDGES: The lawyers are both on the input side and the voting side. They help to write them, and if enough of them don't like the way they are written, they can vote them down. Obviously, that didn't happen here. I would think that would give more weight to those rules.