When it overturned a federal court's order suppressing a litigant's right to publicly gripe about a pending suit late last month, the Ninth Circuit took the opportunity to remind those of us in the legal profession that we are held to a different, higher standard when it comes to public comment on litigation. In an early footnote in the Court's opinion in In re Dan Farr Productions, the Ninth Circuit distinguished the instant case from its prior decision in Levine v. U.S. Dist. Court, noting that counsel "are officers of the court subject to fiduciary and ethical obligations" which "do[] not apply to non-attorney participants." Slip Op. at fn. 3.

In California, those obligations include abiding by the Rules of Professional Conduct, which broadly prohibit counsel from commenting extrajudicially on their cases when "the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Se eRule 5-120 Trial Publicity. Certain basic facts about a litigation are excluded from scrutiny (such as information in the public record), and broader leeway is provided when the attorneys' comments are intended to counteract adverse publicity, so long as it wasn't initiated by that counsel or her client. See id. ¶¶ (B), (C). But the rule specifically counsels against publicizing inadmissible hearsay evidence. See id. "Discussion" (publication "information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue" is a factor in determining whether there has been a violation of the rule).

It is worth noting that, while a stronger case can be, and has been, made to impose greater restraints on attorneys, the constitutional doctrine does not differ for attorney and non-attorney participants. Indeed, the Levine Court and the Dan Farr Court applied the same standard - whether "the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest" in a fair trial. Compare 764 F.2d at 595 with Slip. Op. at 6 (considering whether the speech posed either "a clear and present danger" or "a seriour and imminent threat to SDCC's interest in a fair trial."). Nor does there appear to be a material difference in the constitutional standard and the ethical standard, both of which rightly focus on the key interest in ensuring the integrity of the judicial process.

If that is right, then why would the Ninth Circuit express that there is a different standard for non-attorneys than there is for attorneys? It is not obvious that extrajudicial statements by an attorney are any more harmful or threatening to the conduct of a trial than speech by a litigant. Indeed, the Levine Court implicitly recognized that the identity of the

speaker shouldn’t matter when it wrote, “[t]he mere fact that a threat to the integrity of the judicial process is created by a private litigant, rather than by the government, is of little consequence.” 764 F.2d at 597. And yet, both Levine, which allowed prior restraints against attorneys, and Dan Farr, which prohibited prior restraints against non-attorneys, seem correctly decided. The most likely justification? Attorneys are being held to a higher de facto standard than their clients because courts expect them to know better, and they would be wise to wait until the trial is over before stepping up to the microphone.

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Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. US vs Olmstead

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764 F.2d 590 (1985)
Joel LEVINE, et al., Petitioners,
v.
UNITED STATES DISTRICT COURT FOR the CENTRAL DISTRICT OF CALIFORNIA, Respondent,
United States of America, Real Party in Interest.
No. 85-7208.

United States Court of Appeals, Ninth Circuit. https://scholar.google.com/scholar_case?case=11796083287176891073&hl=en&as_sdt=6&as_vis=1&oi=scholarr

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