Gag Rule Is Illegal, Virginia Court Told

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RICHMOND, Jan. 6—Washington-area civil liberties lawyer Philip J. Hirschkop told a U.S. District Court judge yesterday that a Virginia bar gag rule is an unconstitutional curb on his right to wage lawsuits on a social and legislative level as well as in the courtroom.

Hirschkop cited his successful litigation to break the sex bar against women at the University of Virginia as an example of the gag rule's impact.

"There was great hostility among university graduates and among members of the General Assembly toward these women applicants," he said.

"An important part of the suit was influencing the Assembly and influencing graduates to support this change. There was a whole social value that had to be made known to the public," he said.

Hirschkop contends that a state bar rule generally prohibiting public statements by lawyers about their cases violates the free speech guarantee of the Constitution and prevents lawyers from fulfilling the kind of social role he sees for them in connection with constitutional litigation.

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Thus, he said, the rule should be abolished.

Kirschkop also contends that the bar rule has not been enforced against public officials who are lawyers and has been used selectively in Virginia, chiefly against him and other "people the bar doesn't like."

Eleven of only 22 complaints filed in 10 years under the Virginia bar gag rule have been filed against Hirschkop. All were dismissed and Kirschkop recently won an out-of-court settlement of a suit against state bar administrators in which the officials admitted they had been unfair in processing complaints against him.

Hirschkop testified during a day-long hearing before Judge D. Dortch Warriner. The Virginia Supreme Court, which sets rules for the state bar, is the defendant in the case. The only defense witness was former New York state Judge Bernard S. Meyer, who served on the American Bar Association committee that recommended the lawyer comment policy on which the Virginia bar rule is based.

Meyer testified that restrictions on what lawyers say about pending cases are necessary to insure the constitutional right to a fair trial. He disagreed with Hirschkop's contention that the bar rule is so vague that no lawyer can understand its meaning.

The rule prohibits statements made "with a reasonable expectation" that they will be published, limits lawyers to disclosing evidence contained in "the public record," prohibits discussion of the "merits of a case" and bars statements that would diminish the "reasonable likelihood of a fair trial."

Meyer testified that the lawyers who recommended the rule felt that a judge or jury would have no special problem in determining whether statements made by lawyers were made with the expectation of publication.

He said the public record is clearly limited to records of the government or records kept pursuant to a law. Prohibitions against discussing the merits of a case do not prevent a lawyer from saying a client is not guilty, but do bar him from discussing the reasons why, he said.

Hirschkop and newspaper reporter Jack C. Landau both criticized the "reasonable likelihood" standard in judging whether a lawyer's comments were prejudicial to a fair trial. Landau cover the U.S. Supreme Court for the Newhouse publications, is a member of the New York bar and on the executive committee of the Reporters' Committee for Freedom of the Press.

He testified that a lawyer's comments should not be judged prejudicial unless they pose "an imminent threat to the administration of justice." He said he feels such a standard very likely would be upheld by the present U.S. Supreme Court.

Hirschkop also testified that he believes restrictions on what lawyers can say about cases has contributed to public mistrust of the bar by surrounding its activities in secrecy. He said he believes the District of Columbia bar enjoys more public confidence because of nonenforcement of

restrictions on comments by lawyers.

Under cross-examination by Richmond lawyer James E. Farnham, Hirschkop conceded that he could not predict what the result would be throughout Virginia if all lawyers, including prosecutors, were allowed to make any comments they wished about pending trials.

He said in general that he does not believe it is possible to influence decisions by juries and judges with public statements.

Warriner gave the lawyers in the case six weeks to file written arguments, putting off a decision until at least March. The Seventh U.S. Circuit Court of Appeals already has decided that aspects of a similar rule in Illinois are unconstitutional.