IN THE SUPREME COURT OF MISSOURI

In re:	)	
ERIC G. ZAHND	)	
Missouri Bar No. 47196	)	**Case No. SC96939**
	)	
Respondent.	)	

BRIEF OF

MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS

IN SUPPORT OF RESPONDENT

AS *AMICUS CURIAE*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Missouri Association of Prosecuting Attorneys (MAPA), established in 1969, is a non-profit, voluntary association representing over 500 prosecutors, including elected and assistants, and their investigators statewide. MAPA strives to provide uniformity and efficiency in the discharge of duties and functions of Missouri's prosecutors, to promote high levels of professionalism amongst Missouri's prosecutors, and to continually improve the criminal justice system in Missouri.

This case raises a matter of interest to Missouri's prosecutors as it has the potential to greatly impact the way that prosecutors communicate with the public.

ARGUMENT

PROSECUTORS HAVE A FIRST AMENDMENT RIGHT AND AN ETHICAL AND GOVERNMENTAL DUTY TO COMMUNICATE TRUTHFUL FACTS ABOUT WHAT HAS HAPPENED IN COURT RECORDS TO THE PUBLIC. THE OFFICE OF CHIEF DISCIPLINARY COUNSEL'S INTERPRETATION OF THE ETHICAL RULES WOULD HAVE A CHILLING EFFECT ON PROSECUTORS AND ALL ELECTED OFFICIALS WHO ARE ATTORNEYS STATEWIDE, AND THEIR ABILITY TO COMMUNICATE WITH THE PUBLIC ABOUT TRUTHFUL MATTERS IN THE PUBLIC RECORD.

Rule 4-3.8 sets out special responsibilities of a prosecutor. Missouri's prosecutors embrace these responsibilities as ministers of justice. Specifically, Rule 4-3.8(f) governs statements that prosecutors may make prior to adjudication in a criminal case.

> *The prosecutor in a criminal case shall:*
>
> *(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the* ***accused****, and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 4-3.6 or this Rule 3.8.*

> The commentary to this rule is instructive:
>
> *[5] Rule 4-3.8(f) supplements Rule 4-3.6, which prohibits extrajudicial statements that have a substantial likelihood of* ***prejudicing an adjudicatory proceeding****. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the* ***accused****. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a prosecutor may make which comply with Rule 4-3.6(b) or (c)(emphasis added).*

Both the Rule and the commentary make clear that the restrictions placed upon a prosecutor regarding extra-judicial statements only apply to an "accused." A criminal defendant who has been found guilty is no longer an "accused." To impose the standard suggested by the Office of Chief Disciplinary Counsel (OCDC) would infringe upon the First Amendment rights of the prosecutor, and have a chilling effect on prosecutors across the state (and potentially the nation), and would essentially gag them from communicating with the public about the outcome of cases. This invades the province of the public and the people's right to be informed about what has happened in open court.

A prosecutor, or any elected official, upon entry into his or her office, decidedly does not surrender those rights, except in those limited circumstances where they are held

to impinge on other rights of **accused** persons. The Supreme Court of the United States has held, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2), 720, (1991) quoting *Pennekamp v. Florida*, 328 U.S. 331, 66 S. Ct. 1029 (1946),

> We are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Fourteenth Amendment, protect. *Gentile, supra*, at page 1038.

Here, the statements complained of were designed to advise the public about the disposition of a high-profile criminal case, after such disposition, and contained only information that was already in the public record. To hold such statements as violative of the Rules of Professional Conduct, as urged by the OCDC, would not only infringe on the First Amendment rights of Respondent, but would have s significant chilling effect on the protected speech of other prosecutors in the state, and would also impair the public's interest in learning about the proceedings of the criminal justice system.[1]

Prosecutors are elected by the people. They answer directly to the people. Their client is the State, which is comprised of the people. As such, it is not only the prerogative, but indeed the ethical and governmental duty of the prosecutor to inform the people about

[1] Indeed, this is already occurring. An elected prosecutor in another Missouri county is facing a similar situation and is stymied on how to respond to media request due to this pending case. This places the public's right to know truthful information about court proceedings in limbo.

criminal cases. The State is the client of the prosecutor, and the people constitute the State. While this duty is balanced to protect the rights of the accused prior to adjudication, that balance tips decidedly in favor of the free dissemination of truthful information once the accused has been found guilty (as in the underlying criminal case where the defendant had pleaded guilty and, with respect to the press release, had been sentenced). Rule 4-3.6, comment. [1].

In the instant case, OCDC seeks discipline based upon Respondent's comments immediately following the sentencing of the defendant. However, OCDC does not draw a distinction with respect to the immediacy of the remarks. Should OCDC's interpretation stand, a prosecutor would be barred from ever making any remarks about a case whether it be one month, one year, five years or twenty years later. This would be an absurd result. Indeed, the same standard would logically apply at all attorneys who are elected officials, including legislators and members of the executive branch. Prosecutors and other governmental officials would be estopped from providing information not only to the people through news media, but also would be prohibited from explaining courses of conduct in re-election campaigns, or in providing information in court filings, documentaries, legislative arenas that could be deemed public.

Prosecutors are ministers of justice. In *U.S. v. Berger, 295 U.S. 78 (1935)*, Justice Sutherland pronounced the obligation of a prosecutor, thus,

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern

> at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, supra, at page 88.

Although the quote is often used in aid of an argument that a prosecutor has overstepped his or her bounds, it is equally applicable to explain and defend actions of prosecutors to take such actions that will assure convictions of guilty defendants. The prosecutor's position sets him or her apart from the ordinary practitioner, and his or her actions must be considered with that premise in mind.

There is no doubt that the statements in question were entirely truthful. Indeed, Respondent is not accused violating Rule 4-4.1 which holds:

> *In the course of representing a client a lawyer shall not knowingly:*
>
> *(a) make a false statement of material fact or law to a third person; or(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a*

criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6.

Therefore, it must be inferred that even OCDC does not believe that the statements made by Respondent were false, but that they were in fact truthful statements. It makes no sense to impose such restraints on prosecutors from communicating the truth, especially when contained in the public record, after the completion of a case. There is a growing consciousness among the public about the need for transparency in government. People have an evolving expectation of communication with their elected officeholders, and from them about significant events. The proliferation of social media bears out this expectation. Social media, including Facebook, is a growing and accepted form of communication from an elected officeholder to their constituents. OCDC seeks to interpret these ethics rules within an antiquated mindset of how society does and should operate.

Rule 4-4.4(a) governs lawyers, including prosecutors, from interacting with third parties.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person.

Allowing OCDC's interpretation to stand, will dramatically change the way that prosecutors communicate with witnesses and co-defendants. Prosecutors routinely communicate offers to defendants that involve a recommendation of a more lenient

sentence in exchange for a guilty plea. The intentional implication is that the defendant should be intimidated to accept the State's offer because of the likelihood of a harsher recommendation in the absence of a guilty plea.

This is the essence of an adversarial system. To apply the OCDC logic, however, prosecutors would be barred from communicating plea offers contingent upon the waiver of trial and the plea of guilty because the defendant might feel intimidated. Likewise, OCDC's interpretation of the rule would bar prosecutors from broaching the subject of granting immunity or other leniency to co-defendants in exchange for testimony against a co-defendant because to do so would involve intimidation of the testifying co-defendant.[2]

In the case at Bar, Respondent was responding to a campaign of improper *ex parte* communications to the Court by persons at the behest of the defense. Respondent, as attorney for the State, had an absolute right to address this. As prosecutors, neither Respondent nor his employees surrender their first amendment protection. See, e.g., *In re*

[2] In its brief, *Amici* Missouri Association of Criminal Defense Lawyers and National Association of Criminal Defense Lawyers purport to quote from a MAPA Position Paper on Witness Intimidation. The paper neither considered nor addressed any of the issues found in this case or the questions presented here. The purported quotes select phrases and omit parts of the quoted sentences and paragraphs that cause the resulting quotes to mischaracterize the import and thrust of the original material. The paper addressed the issue of securing victim and witness addresses and personal identifying information from publication and from disclosure to criminal defendants because of the scourge of retaliation and harassment, causing those victims of and witnesses to crimes to be reluctant to report or testify, and the resulting public safety issues affecting crime-ridden neighborhoods. The suggested interpretation advanced by *Amici*, wholly misrepresents the arguments and conclusions of that paper. To fail to make appropriate distinctions between victims of crime and fact witnesses who are in danger for their lives on the one hand and, self-including character witnesses who claim embarrassment on the other, is to make an error of quantum level. As a result, none of that cited language should be considered by the Court.

Hinds, 90 N.J. 604, 449A.2d 483(1982), where the court held, "The Prosecutor does not relinquish free speech rights by virtue of being a prosecutor." *Hinds*, *supra*, at page 614.

Combining these protections with the prosecutor's duty to inform the public of matters occurring in their jurisdiction, there must be a compelling state interest to restrict such rights. In *Matter of Rachmiel,* 90 N.J. 646, 449 A.2d 505(1982), the New Jersey Supreme Court analyzed the standard against which governmental restrictions must be judged,

> In determining the validity of restrictions upon free speech, the constitutional analysis calls for the application of two demanding tests. The first is whether a substantial governmental interest is furthered by the restriction upon speech. (internal citations omitted) The second requires that the restriction be no greater than is necessary or essential to protect the governmental interest involved. The application of these tests involves a balancing of the gravity and likelihood of the harm that would result from unfettered speech against the degree to which free speech would be inhibited if the restriction is applied. (internal citations omitted) *Matter of Richmiel*, 90 N.J. at 654–55, 449 A.2d at 510.

The speech here was designed to inform the public, support the victim, and correct misinformation from the Defendant. Moreover, unlike the speech restrained in cases like *Nebraska Press Association v. Stuart*, 427 U.S.539, 96 S.Ct. 2791 (1976), or *Sheppard v. Maxwell,* 384 U.S. 383, 86 S.Ct. 1507, (1966), the speech complained of here did not occur during the pendency of the matter, and the governmental interest in regulating the

prosecutor's speech is significantly diminished. *A fortiori,* if the government's interest in assuring a proceeding free from external influence resulting from extrajudicial speech of the parties is insufficient to justify substantial restrictions on the First Amendment rights of the litigants, it certainly cannot be used to justify such restrictions when the speech occurs after the matter is concluded. That this case is a disciplinary action, not a prior restraint on the speech is not dispositive, as the imposition of discipline here would have a significantly chilling effect on other prosecutors and other elected officials who are attorneys in the future when considering whether to exercise those rights.

The provision of Rule 4-4 4(a) is also unconstitutional as applied here on a vagueness test. A [rule] is void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385,391, 46 S.Ct. 126, 127(1926). The vagueness doctrine has particular application in the First Amendment area, as rules that are uncertain in application are likely to cause self-censorship of what is otherwise protected speech. *Grayned v. City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299 (1982). Because of this danger, the Supreme Court of the United States has applied an even more stringent analysis for rules that potentially impact protected speech. *Smith v. Goguen,* 415 U.S. 566, 573, 94 S.Ct.1242,1247 (1974). In *U.S. v. Petrillo,* 332 U.S. 1, 67 S. Ct. 1538 (1947), the Court held that such a rule must be voided unless it "contains sufficiently definite warning as to the proscribed conduct." *Petrillo, supra,* at page 8. The language of the Rule here does not give such specific notice, and when terms susceptible to value and subjective interpretation

as “embarrass” are used to proscribe communications that may have other valid purpose, thee rule has a chilling effect and should not be given effect.

When balanced against these important concerns, the restrictions urged by the OCDC must not be permitted to stand. Further, to find that Respondent’s comments had “no substantial purpose other than to embarrass” ignores the substantial public interest in ensuring that the judicial process is an open and fair one, and that the rights of victims are protected in its administration.

CONCLUSION

The interpretation of the Supreme Court Rules urged by the OCDC here must not be approved as they are both infringing on the First Amendment rights of the Respondent and chilling to the exercise of First Amendment rights of prosecutors and other elected officials who are attorneys throughout the state. The ethical and governmental duty of prosecutors to inform their constituents of proceedings that are pending or completed, and which are of significant public concern, cannot be restricted unless there is a strong and compelling government interest, which interest is absent here because the matter is complete and no rights of any accused are implicated by the speech.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I, the undersigned, hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3154 words, excluding the cover, certification and appendix, as determined by Microsoft Word and;
2. That the electronic file has been scanned and found to be virus-free; and
3. That a true and correct copy of the foregoing was sent through the e-filing system this 28th day of March, 2018 to all counsel of record.

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