IN THE SUPREME COURT OF THE STATE OF MISSOURI
EN BANC

No. SC 96939

IN RE:
ERIC G. ZAHND, MISSOURI BAR NO. 47196
APPELLANT.

BRIEF OF AMICUS CURIAE THE MISSOURI PRESS ASSOCIATION

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INTEREST OF AMICUS CURIAE

Amicus Curiae The Missouri Press Association represents approximately 250 newspapers throughout the State of Missouri. It was organized in 1867 for the purpose of furthering efficiency and morality in the newspaper field, promoting and improving the journalism profession, and to enhance the understanding of the need for good journalists in the eyes of the people of Missouri. The Association was incorporated in 1922 as a not-for-profit corporation.

Its members cover local, regional, statewide and national news, on a daily or weekly newscycle; and among the most important areas of their coverage are their local courthouses and the officials that work within. Since inception, the Association has served as a spokesman on journalism activities for those in the newspaper field in Missouri, and as a supporter of the role newspapers and other media play within a community to foster the public's confidence in its government, courts and law enforcement system. These media entities believe strongly in the system of justice that operates within the State and also similarly in the public's interest and concern as to the operation of that system of justice.

As set out further within this brief, one of the most important roles of a newspaper in its community is to advise the public of events and acts that occur within those courthouses, of cases being heard and of judgments rendered by judges within their circuits. In its argument herein, the Amicus further supports the importance of the role of the local prosecuting attorney in accomplishing this purpose and why it believes the First Amendment rights of the prosecuting attorney should be accorded substantial weight. It is the position of this Amicus that the underlying Disciplinary Hearing Panel Decision was incorrect in its ruling in regard to the violation of Supreme Court Rule 4-4.4 (a) and should be overturned.

ARGUMENT

This is true liberty, when freeborn men having to advise the public, may speak free ... What can be juster in a state than this?

Euripides, the Greek tragedian from "The Suppliant Woman."[1]

Reporters cover the courts in the State of Missouri regularly and stories run in every issue of daily and weekly newspapers, informing the public as to how the judicial system is performing its task of administering justice to local residents who bring their matters to that forum. While many residents may go for months or years without being directly involved in matters handled within the civil court system, other than paying taxes to support it, those unfortunate citizens touched by crime become personally impacted by what happens in their criminal court system.

Reporters, to a great degree, do their job based solely on their reading and understanding of the court file and its pleadings. Journalists, as most citizens, are not trained to understand technical details contained in many of those pleadings. Judges at times are willing to accommodate general questions from a reporter, but cannot comment on pending or recently decided matters due to ethics restrictions.

And so, it is critical that reporters be able to talk to prosecuting attorneys when they have questions about a pending criminal matter. And prosecuting attorneys, wanting to be helpful, tread carefully as they work within the ethical guidelines imposed upon all attorneys, and upon them in particular, to provide the information reporters need. Without guidance

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1. From his play written in 421 B.C. This quote is etched on the vestibule walls of the building which formerly housed the offices of the CHICAGO TRIBUNE, 224 S. Michigan Ave., Chicago, Ill.

from attorneys, especially prosecuting attorneys, the public cannot obtain reliable and trustworthy information from those covering the courts.

1. Speech regarding matters occurring in court has a direct impact on the public's trust in the judicial system.

The Missouri Supreme Court, in the preamble to its Code of Judicial Conduct, recognizes the duty of the courts to the public. "An independent, fair and impartial judiciary is indispensable to our system of justice."[2] Fulfilling this role ensures Missouri citizens that the justice system offers all equal and fair treatment. And for many citizens, their most frequent exposure to the judicial system is within the context of enforcement of the state laws by the criminal division of the court system.[3]

"The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. ... Public vigilance serves us well, for "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.... Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account"." *Gentile v. State Bar of Nevada,* 111 S.Ct. 2720, 2724, 501 U.S. 1030, 1035 (U.S. (Nev.), 1991), citing *In re Oliver,* 333 U.S. 257, 270-271, 68 S.Ct. 499, 506-507, 92 L.Ed. 682 (1948).

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2. Supreme Court Rules, Rule 2, Preamble to the Code of Judicial Conduct, [1].

3 "Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted...." *Richmond Newspapers, Inc. v. Virginia,* 100 S.Ct. 2814, 2826, 448 U.S. 555, 575 (U.S.Va.,1980).

But courts have recognized that this freedom of speech regarding court activities is not unrestricted. The U.S. Supreme Court long ago recognized that speech regarding matters pending in courts may be restricted in order to ensure fair administration of justice because "trials are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper." *Bridges v. California,* 314 U.S. 252, 271 (1941). Supreme Court Rule 4, containing the Rules of Professional Conduct, recognizes in its Preamble that a lawyer "... is an officer of the legal system and a public citizen having special responsibility for the quality of justice."[4] A special burden is placed upon lawyers as they work within this system. In addition to general rules imposed on all lawyers in their performance of duties representing clients, special rules have been created for lawyers who are involved in trial work (Rule 4-3.6) and for those serving as prosecuting attorneys (Rule 4-3.8).

Reporters understand that all lawyers, and especially prosecuting attorneys, operate within the constraints of the Rules of Professional Conduct. Reporters understand the need to protect the judicial system process and the selection and deliberations of juries. But reporters also depend upon attorneys to help them, as lay persons, interpret the actions that occur within court and the nuances of court rulings and judgments, because they are well aware that there are strict rules, specifically including those set out in Supreme Court Rule 2-2.10, which govern public statements by judges.

Reporters turn to prosecuting attorneys, especially, to help them understand actions in criminal trials. From the time a case begins, there are steps in its process that can leave even experienced reporters lost in the complexity of the legal process system. And if

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4 Hereinafter, all references to "Rule __" shall be a reference to the Code of Judicial Conduct or the Rules of Professional Conduct contained within the Supreme Court Rule, more particularly Rule 2 and/or Rule 4.

reporters struggle to understand the process, they have an even harder task to explain to the public, their readers, what is happening in the courts. The public is aware that a crime has occurred, that the defendant is progressing through the court system and that eventually justice will occur. The reporter's job is to cover that process and the eventual outcome, providing readers an understanding of each step and interpreting the result in such a manner that readers can grasp that the outcome is logical and that there has been a fair administration of justice within the system. Not every citizen has time to attend a trial, but many want to know that the system worked and that justice is done. And they depend on their local newspaper or other media to provide that information. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia,* 100 S.Ct. 2814, 2824, 448 U.S. 555, 572 (U.S.Va.,1980).

As recognized in the case cited above, even prior to the founding of this country, it was recognized that public support of the court system would be based upon having open trials. Even then, "people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Richmond,* at 571. Today, reporters serve a key function in bringing this important information to citizens through their newspapers and other media. "...[A]ttendance at court is no longer a widespread pastime ... Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." *Id.,* at 572-3.

2. Rules of Professional Conduct permit statements of information contained in the public record

Clearly, prosecuting attorneys have an obligation to carefully speak about a pending matter when it is still at issue, as more fully set out in Rule 4-3.8. When a court examines the speech of an attorney in the context of judicial proceedings, the court is "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not 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 Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida,* 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946), as cited in *Gentile v. State Bar of Nevada,* 111 S.Ct. 2720, 2726, 501 U.S. 1030, 1038 (U.S.(Nev.), 1991).

Rule 4-3.8 mandates that prosecuting attorneys are required to engage in some limitation of their speech rights, in addition to their other imposed duties related to enforcement of laws. Specifically, in subsection (f), the rule states that:

> 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, [prosecutors shall] 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 4-3.8. Special Responsibilities of a Prosecutor, MO R BAR Rule 4-3.8

(Text in brackets added for clarification).

This rule incorporates the general rule regarding trial publicity contained in Rule 4-3.6 which states in subsection (a), "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Trial Publicity, MO R BAR Rule 4-3.6. **And the Amicus also would emphasize that subsection (b) of that same rule specifically permits a lawyer to state "information contained in a public record;"....**

The amicus acknowledges that there is considerable case law relating to what constitutes a "public record" for general purposes of this Rule. But in the specific matter before this Court, it is undisputed that the correspondence from the third parties, which is a key factor in the actions giving rise to this matter, was part of the court case file and clearly constituted a "public record" for purposes of the underlying case.

Many cases have examined to what extent the prosecuting attorney's First Amendment rights are infringed by this Rule, and how a balancing of those rights is necessary in order to protect a defendant's right to a fair trial. That issue is covered in depth by the parties' briefs, the Amicus is sure. However, the Amicus would point out to the Court that the statements of the prosecuting attorney used by the media in **this** case, as contained in the October 8, 2015, press release, clearly contained only facts supported by documents contained in the public record of the case. These statements clearly fall within the guidelines in Rule 4-3.8 (4), which permit statements relating to "the scheduling or result of any step in litigation." Sometimes such statements are the only notice a member of the media has of an upcoming hearing, given that the Missouri Case.net system now contains only limited

information on docketing matters and reporters are required to physically travel to the courthouse to view a pleading in the file in its entirety.

(The Amicus acknowledges that this is not different than prior to Case.net when there was no online access, but the Amicus also points out that industry economic changes have significantly reduced the number of reporters any media entity today has available to cover various assigned "beats," such as the courthouse, and being physically present at that location becomes harder and harder for reporters who are doing "more with less." The Amicus continues to hope that soon a solution will be found to allow the media the same access to Case.net that lawyers in the state have been given.)

Reporters understand this limitation. Like the public, they realize that prosecuting attorneys are a key source of information about a case, and can be very helpful when traveling to view the court file prior to the hearing is inconvenient. "Criminal justice must be carried out in the courtroom. As Justice Holmes declared in *Patterson v. Colorado,* 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879, 881 (1907), '[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.' The constitutional underpinnings for this concept reside in the Sixth Amendment's right to a fair trial, made applicable to our State through the Fourteenth Amendment." *Attorney Grievance Com'n of Maryland v. Gansler,* 835 A.2d 548, 558, 377 Md. 656, 674 (Md., 2003).

And reporters are eager to talk to prosecuting attorneys about pending cases, in order to fully do their job explaining the charges and the court process to the public, while ensuring that they do not make a mistake in reporting technical information for which reporters do not have the special training required of lawyers to understand. The case cited above notes:

> One outside circumstance that may affect a defendant's right to a fair

> trial and, specifically, his right to an impartial jury, occurs when an attorney makes a publicized, out-of-court statement about the defendant's case. This is particularly true because attorneys occupy a special role as participants in the criminal justice system, and, as a result, the public may view their speech as authoritative and reliable. Attorneys involved in a particular case have greater access to information through discovery, the ability to converse privately with knowledgeable witnesses, and an enhanced understanding of the circumstances and issues. Their unique role and extensive access to information lends a degree of credibility to their speech that an ordinary citizen's speech may not usually possess. Comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public. When such seemingly credible information reaches the ears or eyes of the public, the jury pool may become contaminated, greatly diminishing the court's ability to assemble an impartial jury. The defendant's right to a fair trial, thus, may be compromised. See Joan C. Bohl, Extrajudicial Attorney Speech and Pending Criminal Prosecutions: The Investigatory Commission Meets A.B.A. Model Rule 3.6, 44 Kan. L.Rev. 951, 973–74 (1996) (discussing how attorney speech differs from the speech of other individuals). *Id.,* at 559, 377 Md. at 676.

An example of negative coverage by members of the media can be found in the case of *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), in which unregulated speech and unregulated control of reporters in the courtroom resulted in such chaos that the U.S. Supreme Court ultimately admonished the trial court for its failure to control publicity.

"Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.... [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue until the threat abates, or transfer it to another county not so permeated with publicity... Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but it is highly censurable and worthy of disciplinary measures." *Id.* at 363, 86 S.Ct. at 1522, 16 L.Ed.2d at 620.

Also, *Attorney Grievance,* at 835 A.2d 562, sets out the history of the American Bar Association in working to develop standards to regulate the criminal justice system, resulting in 1968 in the Standards Relating to Fair Trial and Fair Press, a predecessor to the Model Code of Professional Responsibility, adopted in 1969, which contained the "reasonable likelihood" standard. Subsequently, in 1983, a revised model code addressed concerns that this initial effort conflicted with the First Amendment. Missouri adopted its Rule 4-3.6 in 1985, based upon the revised code.

So, the Amicus urges that in reviewing the actions of the Appellant in this matter, recognition be given that the October 8, 2015, statement was within the guidelines of Rule 4-3.8 and that there is a justifiable basis for permitting such statements to the media.

CONCLUSION

For the reasons stated herein, this amicus urges this Court to overturn the Disciplinary Hearing Panel's decision in regard to the press release of October 8, 2015, and find in favor of the Appellant in regard to the allegations in this matter which were filed against that party, and for such other and further relief as is deemed just and proper in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2018, a copy of the foregoing document was served electronically upon the counsel all parties registered in this matter via the Missouri e-Filing system and that the original pleading was signed by the attorney for this Amicus.

Further, the undersigned certifies that the brief above contains 3,472 words (no lines are single spaced), has been scanned for viruses and is virus-free, and complies with the provisions contained in Supreme Court Rule 84.06 (b).

/s/ Jean Maneke
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