

## Trial Publicity and Rules of Professional Ethics

There are many approaches prosecutors can take when choosing to communicate with the public. Regardless of your approach, we recommend you always abide by the American Bar Associations Rules of Ethics when communicating with the public. In addition to the ABA, each state has its own rules that should also be followed. Be sure to understand the rules you and your office must follow, prior to communicating with the media or public.

### ABA Rule 3.6 Trial Publicity

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- (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.
- (b) Notwithstanding paragraph (a), a lawyer may state:
  - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
  - (2) information contained in a public record;
  - (3) that an investigation of a matter is in progress;
  - (4) the scheduling or result of any step in litigation;
  - (5) a request for assistance in obtaining evidence and information necessary thereto;
  - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
  - (7) in a criminal case, in addition to subparagraphs (1) through (6):
    - (i) the identity, residence, occupation and family status of the accused;
    - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and
    - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- © Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

## ABA 2-14.2 Balancing Interests

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The prosecutor should strive to protect both the rights of the individual accused of a crime and the needs of citizens to be informed about public dangers and the conduct of their government. The prosecutor may provide sufficient information to the public so that citizens may be aware that the alleged perpetrator of a crime has been arrested and that there exists sufficient competent evidence with which to proceed with prosecution. Subject to Standard 2-14.4 and applicable rules of ethical conduct, information may be released by the prosecution if such release will aid the law enforcement process, promote public safety, dispel widespread concern or unrest, or promote confidence in the criminal justice system. The prosecutor should refrain from making extrajudicial comments before or during trial that promote no legitimate law enforcement purpose and that serve solely to heighten public condemnation of the accused.

### Example of the St. Louis Circuit Attorney Media Policy under the leadership of Jennifer M. Joyce

The right of a criminal defendant to receive a fair trial and the right of the press to publish information about a defendant or criminal act are both guaranteed by the U.S. Constitution. Both are valuable and important rights. These two safeguards, however, can conflict when pretrial publicity has the potential to prejudice a potential jury pool, and ultimately deprive a defendant, a victim or the people of a fair and just trial.

There has been ongoing frustration within some of the media over my policy not to discuss in detail specific facts surrounding criminal cases that are pending or under investigation. To some, it may appear as though I'm not demonstrating openness with the public. Since this couldn't be further from the truth, I think it's important for the public to understand the reasoning behind my media policy.

As a member of the Missouri Bar, as an officer of the courts, and to retain my law license and serve the people of the City of St. Louis as their Circuit Attorney, I am legally and ethically bound to abide by all of the rules of the Missouri Supreme Court and the laws of the State of Missouri.

There are two specific rules mandated by the Missouri Supreme Court that provide guidelines on what information I am legally allowed to share with the media and with the public. These rules have been specifically implemented to preserve a defendant's, a victim's and the public's right to a fair and just trial.

Both of these rules are included below for the community's clarification. The first rule 4-3.6 -- must be followed by ALL lawyers in the State of Missouri. The second rule 4-3.8 applies to all prosecutors in the State of Missouri.

**RULES OF PROFESSIONAL CONDUCT, MISSOURI BAR AND JUDICIARY 4-3.6. Trial Publicity (Rules all Missouri lawyers must follow)** 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. b) Notwithstanding Rule 4-3.6(a), a lawyer may state: 1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved; 2) information contained in a public record; 3) that an investigation of a matter is in progress; 4) the scheduling or result of any step in litigation; 5) a request for assistance in obtaining evidence and information necessary thereto; 6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and 7) in a criminal case, in addition to Rule 4-3.6(b)(1) to (b)(6): i. the identity, residence, occupation, and family status of the accused; ii. if the accused has not been apprehended, information necessary to aid in apprehension of that

person; iii. the fact, time, and place of arrest; and iv. the identity of investigating and arresting officers or agencies and the length of the investigation.

**c) Notwithstanding Rule 4-3.6(a)**, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this Rule 4-3.6(c) shall be limited to such information as is necessary to mitigate the recent adverse publicity. d) No lawyer associated in a firm or government agency with a lawyer subject to Rule 4-3.6(a) shall make a statement prohibited by Rule 4-3.6(a).

**4-3.8. Special Responsibilities of a Prosecutor (Rules for prosecutor's only)** The prosecutor in a criminal case shall: a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: 1) the information sought is not protected from disclosure by any applicable privilege; 2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and 3) there is no other feasible alternative to obtain the information; 4) 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 4-3.8.