

Know what areas of a case attorneys can discuss

A funny thing about being in a lawsuit is that in some ways you can be subjected to fewer First Amendment protections. This comes to mind after last month the U.S. Supreme Court denied Missouri Attorney General Andrew Bailey's long-shot bid to block a gag order imposed by the New York state court on former President Donald Trump preventing Trump from speaking about members of the courtroom to the press.

How could a trial judge stop anyone, much less a candidate for President of the United States, from speaking about a matter? It's derived from the plenary power of the courts to safeguard the fairness of a trial and the integrity of legal proceedings.

In a real sense, the First Amendment's right to free speech bumps into the Sixth Amendment's rights to a fair trial. In Missouri, it's the collision between the state constitution's Article I, Section 8 protecting free speech and its Sections 18(a) and 22(a) providing fair trial rights.

I recall my days as a reporter feeling flummoxed by a prosecutor's professed inability to provide information. Even reassuring her that I was ethically bound to represent them faithfully, her reluctance to speak mystified me.

Years later, I realized why. I was on the other side, responding to questions from reporters about civil cases I had been working, knowing I would have to answer to my judge if I crossed any lines.

Although not a "gag order" per se, in Missouri and elsewhere, lawyers' conduct is conscribed to some extent by standing court rules such as Missouri Supreme Court Rule 4-3.6(a), which forbids a "lawyer who is participating in the investigation or litigation of a matter" from making "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."

The same rule though provides effectively eight areas a lawyer may speak about, regardless of the rule's proscription against speech. The most useful, from a reporter's perspective, would be: (1) the nature of the claim or defense and (2) information already in a public record. A lawyer is also able to talk about the litigation process and progress.

And in criminal cases, a prosecutor may identify the accused by name, residence, occupation and family status, as well as provide information regarding an arrest.

These exceptions actually give a lawyer considerable leeway to speak to the press.

A reporter might even reassure the young prosecutor that these categories exist, and that the Rule recognizes that it "is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression" and that the public "has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern."



Areas a lawyer may speak about a case:

(1) the nature of the claim or defense;

(2) information already in a public record;

(3) that an investigation is in progress;

(4) scheduling of litigation matters;

(5) a request for assistance in obtaining evidence or information;

(6) a warning of danger where substantial harm is likely;

(7) in a criminal case, the identity, residence, occupation and family status of the accused, information necessary to help apprehend the accused, the fact, time and place of arrest, and the identity of investigating or arresting officers and agencies and the length of the investigation.

(8) respond to undue prejudice of recent publicity not of the lawyer's own making.