Judges, Gag Orders and Free Speech: Where Are the Boundaries?

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To the Forum:

I am an attorney defending my client in a bench trial against allegations of fraud. My client is a well-known public figure, so the case has been closely monitored by the media. My client has been very vocal about his concerns that the judge and his staff are biased against him. And I have to say, I agree with him.

Given my client's status, everyone in the courtroom knew who he was before he ever stepped foot before the judiciary – including the judge's clerk. Throughout the trial, the clerk could be seen shaking his head in disapproval. During my client's testimony, the clerk glanced at the judge numerous times with the same disapproving look and furiously took notes that he passed along to the judge. The judge passed notes back to the clerk as well.

This behavior unnerved my client, who suspected that the clerk was biased against him. After an eventful day of trial, my client posted on his social media page to his millions of followers, questioning the clerk and judge's impartiality and saying that he felt he was not receiving a fair trial. One of the defense attorneys on my team reposted our client's post to his own social media page. This instantly made news headlines.

When we appeared in court the next day, my team argued to the judge that his and the clerk's conduct was improper as the judge appeared to be consulting with the clerk during the proceedings by passing notes.

By the end of the day, the judge issued a gag order preventing my client and the rest of our team of defense attorneys from publicly commenting on the judge and his staff. The judge reasoned that the order is being issued to protect his office and staff from further threats of violence that have resulted from, in his words, "the public bashing of the judiciary" on my client's social media account.

My question is, does this infringe my client's and fellow defense attorneys' First Amendment rights? Can a judge prohibit litigants and attorneys from criticizing the judiciary outside of the courtroom?

Sincerely,
Sy Lenced

Dear Mr. Lenced,

The right to critique public officials is one of our most fundamental constitutional rights. But for attorneys, it is a right that has certain limitations. Attorneys cannot engage in conduct that threatens the integrity of the judicial system.[1] The Rules of Professional Conduct broadly govern the behavior of lawyers both in and out of court. The client's rights are not circumscribed by the RPC as the RPC applies only to attorneys; thus, this Forum addresses only the attorney's conduct. In *United States v. Salameh,* the court noted that an attorney's speech "may be subjected to greater limitations than could constitu-

tionally be imposed on other citizens or on the press" when participating in judicial proceedings.[2]

It is important to note that while the RPCs do limit a lawyer's conduct to an extent, "attorneys . . . do not lose their constitutional rights at the courthouse door."[3] The First Department has stated, though, that "an attorney who makes 'false, scandalous or other improper attacks' upon a judicial officer is subject to discipline."[4] In contrast, the Second Department has expressed the view that "while attorneys have a professional responsibility to protect the fairness and integrity of the judicial process, this does not mean that lawyers surrender their First Amendment rights as they exit the courtroom."[5]

Rule 3.6 addresses trial publicity and prohibits a lawyer "who is participating in or has participated in a criminal or civil 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." Comments to Rule 3.6 acknowledge the difficult balance between "protecting the right to a fair trial and safeguarding the right of free expression." The comments explain that in certain situations it is necessary to prevent the dissemination of information regarding legal proceedings to prevent prejudice against either party. On the other hand, though, the public "has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern." Judges do have authority to limit attorneys' ability to speak about proceedings outside of the courtroom if there is the "substantial likelihood" that it will materially prejudice the proceedings, but this is still subject to First Amendment requirements.[6]

Here, while the defense attorney did not make the statement himself, reposting another's post is essentially the same and is considered by many to be akin to implied support for the original content. The defense attorney's repost could be considered an "extrajudicial statement" for purposes of Rule 3.6. Additionally, given the public-figure status of the client, the lawyer likely knew – or at least reasonably should have known – that reposting his client's claims against the judiciary would be disseminated by means of public communication (i.e., social media).

As to whether the post would have a substantial likelihood of materially prejudicing the proceedings, there is an obvious difference between jury and bench trials. Here, there is no jury at risk of being influenced, and while a judge may be less affected by public criticism, there is a possibility it could impact witnesses' willingness to testify for fear of public intimidation or scrutiny. In the age of social media, it is easy for someone with a high volume of loyal followers to pit them against specific individuals or groups of people – which has the added potential of becoming dangerous. As the comments to Rule 3.6 suggest, the impact of the social media statements in these proceedings specifically may not be outweighed by the necessity to safeguard the right of free expression.

In the disciplinary proceeding of *Matter of Giuliani*,[7] the court found that the RPCs, generally, "concern conduct both inside and outside of the courtroom" and applied different RPCs to statements depending on where they were made. In that case, Giuliani faced sanctions for "demonstrably false and misleading statements" made to "courts, lawmakers and the public at large" in his representation of former President Donald Trump. As we are not here faced with in-court statements, we look to the *Giuliani* case for guidance only with respect to out-of-court statements. Rule 4.1 provides that a lawyer shall not knowingly make false statements of fact or law to a third person. Rule 8.4 provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

In *Giuliani*, the court found that, in violation of Rule 4.1, the attorney knowingly made false misstatements of law and fact "to third parties consisting of over 3,700 members of the press and the public" who had dialed in to observe the proceedings. The court gave weight to the fact that these misstatements were made not just to one third party but thousands. The court also found that misstatements regarding the fraud claim also violated RPC 8.4(c) as they constituted conduct involving dishonesty and misrepresentation which is prohibited by this rule.

Furthermore, the court found that Giuliani violated both rules multiple times over when making statements regarding the 2020 presidential election results. The court cited what it viewed as "numerous false and misleading statements regarding the Georgia presidential election results" to lawmakers and the public at large, adding that he repeatedly said "that dead people 'voted' in Philadelphia in order to discredit the results of the vote in that city," and that "false and misleading statements that 'illegal aliens' had voted in Arizona during the 2020 presidential election." The court found that these false statements were made knowingly and with an intent to misrepresent the results of the election, thus violating Rules 3.3 (which governs the misrepresentations of fact and law that Giuliani made before the tribunal, specifically), 4.1 and 8.4.

However, it is important to distinguish between an attorney's misstatements of fact and merely sharing an opinion. *Giuliani* involved multiple misrepresentations of fact regarding the election results. Here, the defense attorney asserted a true statement of fact outside of the courtroom – that the judge and law clerk were passing notes to each other – and then expressed the opinion that the judge was biased and that his client was not receiving a fair trial.

In a civil matter involving former President Trump, a gag order was issued there because he took to social media to make a derogatory comment and allegations about the judge's law clerk. The judge issued a second gag order that extended to all lawyers working on the trial prohibiting them from making public statements inside or outside the courtroom "that refer to any confidential communications, in any form, between my staff and me."[8] While an appeals court judge temporarily suspended the gag order for potential First Amendment implications, the gag order was reinstated two weeks later by a four-judge panel.[9] It was decided that the gag order was necessary to protect the judge and his staff after their office experienced an increase in threatening messages and harassment.[10]

Based on this holding, it appears that not only did the judge have authority to limit the speech of the attorneys, but also had the authority to limit the speech of the litigant/defendant, Trump, because they threatened the safety of the judge and his staff. It appears that in this case, the judge adhered to basic principles of First Amendment law: freedom of speech and expression is not unlimited, and the government may impose limits when concerns for public safety arise. However, a high bar must be met in any scenario where freedom of speech and expression might be limited to justify such limitation.

The court in *Salameh* maintained that an order that "prohibits the utterance or publication of particular information or commentary imposes a 'prior restraint' on speech" and is thus subject to strict scrutiny. While the court noted that attorneys may be subject to greater limitations on speech, it also emphasized that such limitations "should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." The court held that the restriction placed on the attorney by the judge was not narrowly tailored, but rather was a "blanket provision" encompassing *any* statement that had *anything* to do with the case or "may have something to do with the case," and the gag order was vacated.

A prior restraint on speech is subject to First Amendment due process. In *Carroll v. President & Comm'rs of Princess Anne*, the court found that an "order" issued "in the area of First Amendment rights" must be "precise" and narrowly tailored to achieve the "pin-pointed objective" of the needs of the case.[11] The Supreme Court looks at any type of prior restraint on speech "bearing a heavy presumption against its constitutional validity."[12] In *Near v. Minnesota*, the Supreme Court held that prior restraint may be allowed in *exceptional* cases, such as when the nation is at war or when the speech would incite violence.[13]

It has long been established that the First Amendment does not protect speech that is intended and likely to incite *imminent* lawless action.[14] This is known as the *Brandenburg* test, established by the Supreme Court in *Brandenburg v. Ohio* in 1969, and has been reaffirmed in many cases since.[15] The *Brandenburg* test sets a high bar to meet, and it may be difficult for a judge to find that your client and the defense attorney intended to incite imminent lawless action when they posted their critiques on social media. However, it could be argued that this post was likely to incite imminent lawless action given your client's notability and number of followers who would see the post. Still, if the defense attorney's intent to incite such lawless action in his re-post cannot be demonstrated, then the speech may be protected by the First Amendment.

Another limit to First Amendment protection is that statements about public officials that were known by the speaker to be false or made with "reckless disregard of whether [the statement] was false or not" are not protected speech.[16] Similar to the *Brandenburg* test, the court in *New York Times Co. v. Sullivan* set a high bar to punish someone for such speech, requiring that the public official against whom the statements were made must prove that the false statements were made with actual malice.

In this case, your client claimed that the law clerk and judge were biased against him. It may be argued that your client made this statement without any regard for whether it was true that the law clerk and judge were biased. However, given the nature of the statement itself, it is difficult to see where the line between an opinion

and fact may be drawn. If we were to assume that the law clerk and judge were not biased, your client's statements that they were – whether he knew this for a fact or not – may not be protected by the First Amendment. Considering that he made such a statement on his widely followed social media platforms, intending for the statement to reach a broad audience, the judge and law clerk might have a good case to make that your client made such a statement with "reckless disregard of whether it was false or not." However, the statement that the judge and his clerk were biased would be considered by most to be one of opinion, not fact.

In light of the case involving the gag order against President Trump, it appears that the bigger concern when it comes to public criticism against the judiciary on such a grand scale is the safety of the judge and his staff. Furthermore, the gag order in Trump differed from that in *Salameh* in that it restricted only speech "referring to confidential communications" between the judge and his staff.[17] The gag order would likely be considered overbroad if, like in *Salameh*, the judge prohibited Trump from saying anything at all about the case and judge publicly. Here, the gag order appears to be much broader than the one issued and upheld against Trump as it restricts your client and the defense attorneys from making *any* kind of public comment at all about the judge and his staff. This gag order is more akin to that in *Salameh,* which was found to be an unconstitutional prior restraint on speech.

Many cases and legal scholars have grappled with the balance between protection of First Amendment rights when it comes to criticizing public officials and upholding the integrity of legal proceedings. For lawyers, the RPC provide some clarity in Rules 3.3 and 3.6 by requiring them to avoid making statements that would prejudice the court proceedings they participate in. As we have seen in the latest cases against former President Trump, while the RPC do not necessarily govern litigants and individuals, it appears that judges do still have some authority to limit speech critiquing the judiciary in circumstances where the speech may create an environment unsafe for the judge, court staff and the parties involved.

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QUESTION FOR THE NEXT FORUM

To the Forum:

I am a managing partner at a 30-lawyer firm. For several years we have allowed clients to pay us by credit card as an accommodation to facilitate payment of advance retainers and legal fees. Our accountants have reminded me that the credit card companies charge processing fees that reduce the amount paid to us. They have suggested that the processing fees should be added to our invoices so that we can recoup that expense and get full payment of our fees. I assume there is nothing improper about attorneys allowing clients to pay by credit card but have concerns about the propriety of passing on processing and service fees to clients. I have read about various changes in the law but, frankly, I am not sure how the rules apply to lawyers.

Is it lawful for a law firm to charge clients for processing fees imposed by the credit card companies? Are there ethical rules that apply?

Sincerely,
M. Fee Concerned

Endnotes

1. *United States v. Salameh*, 992 F.2d 445 (1993).
2. *Id.*
3. *Levine v. United States Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).
4. *Matter of Wisehart*, 721 N.Y.S.2d 365 (2001).
5. *National Broadcasting Co. v. Cooperman*, 116 A.D.2d 282 (2d Dep't 1986).
6. *United States v. Salameh*, 992 F.2d 445 (1993).
7. 197 A.D.3d 1 (1st Dep't 2021).
8. https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=2yAOg8Zx5CTVK5fRESuAVA==.
9. *Id.*
10. Michael R. Sisak, *Appeals Court Again Upholds Gag Order Barring Trump From Commenting About Judge's Staff*, PBS, Dec. 14, 2023, https://www.pbs.org/newshour/politics/appeals-court-again-upholds-gag-order-barring-trump-from-commenting-about-judges-staff.
11. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1986).
12. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).
13. *Near v. Minnesota*, 283 U.S. 697 (1931).
14. *What Does Free Speech Mean?,* U.S. Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does.
15. *Advocacy of Legal Action*, Cornell Law School, June 2022, https://www.law.cornell.edu/wex/advocacy_of_illegal_action.
16. *Freedom of Expression*, ACLU, March 1, 2002, https://www.aclu.org/documents/freedom-expression.
17. It may be arguable whether the notes passed between the judge and his staff were confidential communications. While the content of the notes may be considered confidential, the act of passing them likely would not be, as the attorneys, the parties and the whole courtroom could clearly see that the law clerk had passed a note to the judge. The U.S. Supreme Court said in *Craig v. Harney*, 331 US 367, 374 (1947), "A trial is a public event. What transpires in the court room is public property." So the passing of notes between the judge and his law clerk could not possibly have been confidential. What the notes said might be confidential, so long as not seen by anyone other than the judge and court staff.