

[CAPTION]

MOTION TO DISMISS (PUBLIC COMMENTS)

The Defendant, by counsel, respectfully requests that the charges against him be dismissed. In support of this Motion, the Defendant states the following:

1. Defendant has been charged with [insert offense(s)].

2. Pursuant to Article 1 Section 13 of the Constitution of the State of Indiana, in all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury in the county in which the offense shall have been committed. (Emphasis added.)

3. Rule 3.6 of the Indiana Rules of Professional Conduct provides in part:

(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.

...

(d) A statement referred to in paragraph (a) will be rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is

included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

4. Pursuant to Rule 3.8(f) of the Indiana Rules of Professional Conduct, the Prosecutor in a criminal case shall:

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 3.6 or this Rule.

5. This cause has received extensive treatment in the local news media. The media accounts concerning this cause have contained an undue number of extra judicial statements by law enforcement personnel and the prosecuting attorney. These extrajudicial statements have related to the Defendant's criminal record, the identity or nature of physical evidence, and to the fact that Defendant allegedly confessed to the offenses. Additionally, reports of the Defendant's arrest did not contain the caveat requested by Rule 3.6(d)(6) that the charge is merely an accusation and that the Defendant is presumed innocent until and unless proven guilty.

6. An example of the media reports containing the extra judicial statements are hereby incorporated and referenced as Exhibit A. Several examples are as follows:

[LIST EXAMPLES]

7 The above examples are clear violations of the Indiana Rules of Professional Conduct. As a result of these violations, the Defendant's constitutional right to an impartial jury in the county in which the offense allegedly occurred has been violated.

8. Since the Defendant's constitutional rights were violated by the purposeful, or grossly negligent, violation of Indiana Rules regarding pretrial publicity, by the Prosecutor's office and law enforcement personnel, the charges against the Defendant must be dismissed.

WHEREFORE, the Defendant, by counsel, respectfully requests that the charges against him be dismissed, and for all other relief just and proper in the premises.

(Signature)

REFERENCES

Ind. Code 35-34-1-8 (motion to dismiss by Defendant; requisites; affidavits; documentary evidence; disposition; procedures)

Ind. Code 35-34-1-4(a)(11) (court may grant motion to dismiss on any other ground that is a basis for dismissal as a matter of law and at any time).

Indiana Rule of Criminal Procedure, Rule 3 (memorandum to be filed with motion to dismiss)

CASE LAW

Murphy v. State, 499 N.E.2d 1077, 1082-83 (Ind. 1986) (a trial court may order a continuance, exclude the undisclosed evidence from admission in the trial, or even dismiss the charges based on the prosecutor's pre-trial misconduct).

In re Litz, 721 N.E.2d 258 (Ind. 1999) (attorney reprimanded and admonished for writing letter to newspaper, criticizing prosecutor's decision to retry a client and declaring that the client was innocent; the letter "created a substantial likelihood of materially prejudicing the client's case" in violation of former Rule 3.6(a)). But see Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (U.S. Supreme Court invalidated part of Nevada's Rule 177, similar to Indiana's Rule 3.6, on vagueness grounds.)

In re Brizzi, 962 N.E.2d 1240 (Ind. 2012) (Prosecutor engaged in misconduct by making public statements that he knew or should have known would have a substantial likelihood of materially prejudicing adjudicative proceedings and a substantial likelihood of heightening public condemnation of criminal defendants in violation of Rules of Professional Conduct 3.6(a) and 3.8(f). Rules do not require a finding of actual prejudice to defendants, but rather a substantial likelihood of heightened public condemnation of the accused. Here, press release re: murder case did not include the required explanation that a charge is merely an accusation and the defendant is presumed innocent until proven guilty. Rule 3.6(b)(2) permits statements re: "information contained in a public record," but not prosecutor's own opinion about evidence or defendant's guilt. Also not likely probable cause affidavits or repeating information in media accounts. There was no evidence that any of Respondent's statements were meant to serve such law enforcement purposes as protecting potential victims or apprehending suspected perpetrators still at large. In performing his important responsibility of apprising the public of activities in his office, Respondent stepped well beyond the bounds permitted by Rules 3.6 and 3.8).

Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (prosecutors do not enjoy absolute immunity in actions brought under 42 USC 1983 for damages arising from extrajudicial statements made by prosecutor). See Sims v. Barnes, 689 N.E.2d 734 (Ind.Ct.App. 1997) (prosecutors enjoy absolute immunity from defamation liability only when their statements to the press inform public about a case pending in their office).