Case Number: PC-2023-02652
Filed in Providence/Bristol County Superior Court
Submitted: 8/16/2023 4:19 PM
Envelope: 4235390
Reviewer: Patricia B.

STATE OF RHODE ISLAND **SUPERIOR COURT**
PROVIDENCE, SC.

STATE OF RHODE ISLAND; **PETER F. NERONHA, in his capacity as Attorney General of the STATE OF RHODE ISLAND; and DR. UTPALA BANDY, in her capacity as Interim Director, RHODE ISLAND DEPARTMENT OF HEALTH** **Plaintiffs,**	:	
v.	:	**C.A. No. PC-2023-02652**
PIONEER INVESTMENTS, L.L.C.; ANURAG SUREKA **Defendants.**	:	

STATE OF RHODE ISLAND'S OBJECTION TO DEFENDANTS', PIONEER INVESTMENTS, LLC AND ANURAG SUREKA'S, MOTION TO DIRECT THE ATTORNEY GENERAL'S OFFICE TO CEASE AND DESIST FROM MAKING FURTHER EXTRAJUDICIAL COMMENTS THAT ARE INFLAMMATORY AND PREJUDICIAL TO DEFENDANTS

NOW COME Peter F. Neronha in his capacity as Attorney General for the State of Rhode Island and Dr. Utpala Bandy in her capacity as Interim Director of the Rhode Island Department of Health (hereinafter referred to collectively as "the State," or "State"), and hereby object to Defendants Pioneer Investments, L.L.C. and Anurag Sureka's (hereinafter collectively "Defendants" or "Pioneer") Motion to Direct the Attorney General's Office to Cease and Desist from Making Further Extrajudicial Comments that are Inflammatory and Prejudicial to Defendants. The State's speech related to this matter, which is protected by the First Amendment, meets the Rhode Island Rules of Professional Conduct and by no means justifies the imposition of a prospective order limiting its speech.

I. FACTUAL BACKGROUND

The State instituted the litigation in this matter on June 6, 2023. On the same day, the Attorney General issued a single press release. The press release in part stated the following:

> Today's action signals that enough is enough when it comes to the alleged misconduct of a major landlord who is placing the health and safety of Rhode Islanders at risk. Let's cut right to it – as alleged, profits are being placed over basic human dignity and that cannot stand.

Press Release, Rhode Island Office of the Attorney General, Attorney General Sues Major Landlord for Violations of State Rental, Lead Hazard, and Consumer Protection Laws (June 6, 2023), https://riag.ri.gov/press-releases/attorney-general-neronha-sues-major-ri-landlord-violations-state-rental-lead-hazard. On August 2, 2023, Defendants filed the instant motion arguing that that the above-referenced speech violated Rule 3.6 of the Rhode Island Rules of Professional Conduct, and demanding the Court "order that the Attorney General's office refrain from making any further extrajudicial comments for public consumption that are inflammatory and/or prejudicial to the Defendants who are entitled to a fair trial on the merits." Def. Mot. at p. 2.

II. ARGUMENT

1. The Defendants' Motion Should be Denied Because the Attorney General's Speech is Within the Bounds of the Rhode Island Rules of Professional Conduct and Protected by the First Amendment.

The speech of Rhode Island attorneys regarding active litigation, including the Attorney General, is governed by Rule 3.6 of the Rhode Island Rules of Professional Conduct. Rule 3.6 is itself subject to the protections afforded all citizens, including attorneys, by the First Amendment to the United States Constitution. An examination of the entirety of Rule 3.6 and First Amendment jurisprudence make clear that the Defendants' Motion must be denied.

Rule 3.6(a) states that:

> (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.

Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 3.6(a). That subsection, however, is not the entirety of the Rule. Subsection (b) of Rule 3.6, which was not referenced in the Defendants' Motion, provides that:

> (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 … [and] (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[.]

Id. at (b). Furthermore, the Rule contains a comments section that clarifies its scope.

The comments to Rule 3.6 demonstrate the difficult balance it attempts to strike "between protecting the right to a fair trial and safeguarding the right of free expression." *Id*. at cmt. 1. The drafters note that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." *Id*. Further, "[t]he public has a right to know about threats to its safety and measures aimed at assuring its security." *Id*. Moreover, the public "has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern[,]" and legal proceedings can have "direct significance in debate and deliberation over questions of public policy." *Id*. In sum, a large swath of pretrial speech is allowable under the Rule.

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) the United States Supreme Court considered a case in which a defense attorney held a press conference approximately six months before a jury trial at which his client was acquitted. The defense attorney held the event upon return of his client's indictment and made statements, among others, that: 1) police officers were in fact

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the perpetrators in the case; 2) government witnesses had only accused the defendant in response to police pressure; and 3) "strongly implied that [a police detective] could be observed in a videotape suffering from symptoms of cocaine use." *Id.* at 1045. Subsequently, the State Bar filed a complaint against the attorney, alleging that statements he made during the press conference violated Nevada Supreme Court Rule 177, that state's version (at that time) of Rhode Island Rule 3.6 (both of which are substantially similar to the American Bar Association's Model Rule of Professional Conduct 3.6). The Court noted that the "'substantial likelihood of material prejudice' standard [in the Rule] is a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Id.* at 1031. And in holding that the First Amendment precluded attorney discipline in the matter, the Supreme Court noted that timing of a statement is a significant factor in determining the seriousness of a threat to a fair trial: "A statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury" but "exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date." *Id*. at 1044. Thus, even if the defense attorney's statements were inflammatory, they were permissible.

Even subjective, deprecating statements on the eve of or during trial may be permissible. During the trial phase of the litigation in *State v. Lead Industries Ass'n, Inc. et al.*, 951 A.2d 428 (R.I. 2008), the Attorney General was held in civil contempt for statements made immediately before, during, and after trial. *Id.* at 459-62. Among other things, the Attorney General was quoted in the media to have said that, "'This discovery is just part of the despicable legal moves the company lawyers are willing to make to slow down justice.'" *Id.* at 459. Then, after a day of heated trial testimony, the Attorney General gave a press statement that, "'We want to continue our search

for justice before this jury and not give in to those who would spin and twist the facts[.]'" *Id*. at 460. Further, after the jury's verdict but before it had deliberated on punitive damages, the Attorney General in a posting on his website thanked the jurors "'for their service, their attention to the facts and evidence that led them to this moment, and their courage in rendering a historic verdict that, ultimately, will help make Rhode Island a safer and better place to live[,]'" and labeled the defendant lead paint companies "'duck and run'" defendants. *Id.* at 462. The Rhode Island Supreme Court famously reversed the Superior Court's imposition of liability on the lead paint companies, holding that "the General Assembly has recognized defendants' lack of control and inability to abate the alleged nuisance because it has placed the burden on landlords and property owners to make their properties lead-safe." *Id.* at 435-36. Perhaps less remembered is that the Supreme Court likewise reversed the trial court's findings of contempt against the Attorney General for the aforementioned public statements, finding upon an "independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression" that the Attorney General's statements did not violate Rule 3.6 and constituted constitutionally-protected speech. *Id.* at 464.

It should be further noted that *Lead Industries*, unlike *Gentile*, concerned a gag order that intended to prospectively limit speech – a *prior restraint* on speech. "There is a strong presumption that prior restraints on speech are unconstitutional." *Sindi v. El-Moslimany*, 896 F.3d 1, 31 (1st Cir. 2018). Those wishing for such an extraordinary measure bear a heavy burden, as a prior restraint on speech is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association et al. v. Hugh Stuart, Judge, et al.* 427 U.S. 539, 559 (1976). While courts are divided as to the appropriate level of scrutiny such gag orders are due in the context of attorney communications, there is no doubt that gag orders are appropriate remedies

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only in extraordinary circumstances when attorneys make materially prejudicial statements, generally on the eve of trial. *Supra; see generally WXIA-TV v. State*, 303 Ga. 428, 434-440 (Ga. 2018) (vacating a gag order).

Here, Rule 3.6 and the First Amendment to the U.S. Constitution demand that the Defendants' Motion be denied. First, Rule 3.6(b) specifically allows the attorneys to state allegations and information contained in a public record, including a public court filing. Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 3.6(b). The specific quotation with which Defendants take issue states *twice* in two sentences that the complained of conduct related to allegations only: "alleged misconduct" and conduct "as alleged[.]" *See*. Def. Mot. at 2. Moreover, the Attorney General's Complaint in this matter indeed alleges that the Defendants have placed the health and safety of tenants at risk. *See, e.g.,* Compl. ¶¶ 1 ("Pioneer's unlawful actions degrade neighborhoods and create and exploit market advantages by skirting important health and safety laws that law-abiding landlords follow"); 2 ("Pioneer's rental units are often poorly maintained, shoddily repaired, and consistently fail to conform to Rhode Island state law and municipal codes"); and 4 ("Pioneer's failure to obtain or maintain lead-safe certifications exacerbates the already-significant public health concern of lead poisoning by risking their hundreds of consumer-tenants' potential unwitting poisoning"). And the public assuredly "has a right to know about threats to its safety and measures aimed at assuring its security." Rule 3.6 cmt. 1. The Attorney General's press release synthesized the allegations contained in the Complaint and alerted the public about a potential threat to its safety, as allowed by Rule 3.6.

The timing of the Attorney General's press release is further dispositive of the Defendants' Motion. In this civil matter a trial date has not even been contemplated, but doubtless will occur more than six months from the date of the press release at issue. Assuming a jury trial is held at

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all, by that time the content of the press release will have "fad[ed] from memory long before the trial date." *Gentile*, 501 U.S.at 1044. And even if there were more comments made in this case, even subjective, deprecating comments well beyond those in the referenced press release *made during trial* have been upheld by the Rhode Island Supreme Court because of the seriousness of a "forbidden intrusion on the field of free expression." *Lead Industries Ass'n, Inc.*, 951 A.2d at 464. The Attorney General's press release in this matter was entirely permissible under Rule 3.6 and in no way justifies the extraordinary remedy of a gag order by the Court, which could not possibly survive "the most exacting scrutiny demanded by our First Amendment jurisprudence." *Sindi v. El-Moslimany*, 896 F.3d 1, 32 (1st Cir. 2018).

III. Conclusion

The Attorney General's press release in this matter was within the bounds of Rule 3.6 of the Rhode Island Rules of Professional Conduct and the United States Constitution, does not justify the imposition of an order limiting the Attorney General's speech in this matter, and such an order, if entered, would be subject to reversal under applicable case law.

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Respectfully submitted,

STATE OF RHODE ISLAND;

PETER F. NERONHA
ATTORNEY GENERAL;

DR. UTPALA BANDY
DEPARTMENT OF HEALTH

By Their Attorney:

PETER F. NERONHA
ATTORNEY GENERAL

/s/ Keith Hoffmann
/s/ Riley O'Brien
KEITH HOFFMANN (Bar No. 9874)
RILEY O'BRIEN (Bar No. 10575)
OFFICE OF THE ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
Tel: (401) 274-4400
Fax: (401) 222-2995
robrien@riag.ri.gov

CERTIFICATION

I hereby certify that, on the 16th day of August, 2023, I filed and served this document through the electronic filing system on the attorneys of record. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/Keith Hoffmann