

Proposed Rule 3.6 [5-120] “Trial Publicity”

(Draft #5, 12/12/09)

Summary: Proposed Rule 3.6 largely tracks Model Rule 3.6, which regulates lawyer conduct concerning pre-trial publicity. Proposed Rule 3.6 adopts the revised Model Rule with changes intended to facilitate construction of the Rule and to protect client confidentiality. See Introduction. The proposed Rule also retains some of the Discussion to rule 5-120, the current California counterpart to Model Rule 3.6, and most of the Model Rule comment. See Explanation of Changes.

Comparison with ABA Counterpart	
Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

RPC 5-120

Statute

Bus. & Prof. Code §6103.7.

Case law

Gentile v. State Bar of Nevada, (1991) 501 U.S. 1030, 111 S.Ct. 2720, 115 L. Ed.2d 888

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

D.C. Rule 3.6.

Other Primary Factor(s)

The history of adoption of the current Rule 5-120.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Two commenters, including the Santa Clara County Bar Association, believe the Rule should not be adopted.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.6* Trial Publicity

November 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Current Rule 5-120 is the California counterpart to Model Rule 3.6. When adopted in 1995, Rule 5-120 adopted the language in Model Rule 3.6 verbatim; however, the Discussion to the rule differed from the Model Rule. The ABA modified Model Rule 3.6 in 2000.

Proposed Rule 3.6 adopts the revised Model Rule with minor changes to assist in the construction of the Rule and to assure that the Rule does not supersede a lawyer's duty to maintain a client's confidential information. The proposed Rule retains some of the Discussion to current rule 5-120 and retains most of the Model Rule Comments. However, the proposed Rule contains a revised Comment [1], which incorporates concepts in Comments [1] and [3] to the Model Rule and in Comment [1] to the version of the Model Rule adopted by Washington D.C.

Follow public comment, the Commission made three changes to the Rule. See Explanation of Changes for paragraph (b)(6) and Comment [4].

* Proposed Rule 3.6, Draft 5 (12/12/09).

<p align="center"><u>ABA Model Rule</u> Rule 3.6 Trial Publicity</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.6 Trial Publicity</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(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 <u>(i)</u> be disseminated by means of public communication and will <u>(ii)</u> have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.</p>	<p>In the course of the Commission's deliberations, there was some confusion over whether the "knows or reasonably should know" standard applied to both the means of dissemination and the likelihood of material prejudice or only to the means of dissemination. Comment [3] to the Model Rule states that the knowledge standard applies to both, but the language in the paragraph is not as clear as the Comment. To assure that the Rule would not be misread and clarify that the knowledge standard applies to both, the Commission voted to add the roman numerals.</p>
<p>(b) Notwithstanding paragraph (a), a lawyer may state:</p> <ol style="list-style-type: none"> (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 	<p>(b) Notwithstanding paragraph (a), <u>and to the extent permitted by [Rule 1.6],</u> a lawyer may state:</p> <ol style="list-style-type: none"> (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 	<p>A number of states have adopted revisions to Model Rule 3.6. The Commission reviewed all of the variations. One such variation is in the Ohio version of the rule, which added the words in the beginning of paragraph (b) "and if permitted by Rule 1.6..." The Commission adopted a variation of the Ohio language in order to assure that paragraph (b) would not be considered an exception to a lawyer's overriding duty to maintain a client's confidential information. The Commission felt that adding this language was particularly necessary because some of the subparagraphs of paragraph (b) refer to categories of information that could constitute client confidential information.</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 3.6 Trial Publicity</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>thereto;</p> <p>(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</p> <p>(7) in a criminal case, in addition to subparagraphs (1) through (6):</p> <p style="padding-left: 40px;">(i) the identity, residence, occupation and family status of the accused;</p> <p style="padding-left: 40px;">(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;</p> <p style="padding-left: 40px;">(iii) the fact, time and place of arrest; and</p> <p style="padding-left: 40px;">(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.</p>	<p>evidence and information necessary thereto;</p> <p>(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 <u>but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public</u>; and</p> <p>(7) in a criminal case, in addition to subparagraphs (1) through (6):</p> <p style="padding-left: 40px;">(i) the identity, residence, occupation and family status of the accused;</p> <p style="padding-left: 40px;">(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;</p> <p style="padding-left: 40px;">(iii) the fact, time and place of arrest; and</p> <p style="padding-left: 40px;">(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.</p>	<p>Paragraph (b)(6) was revised to make clear that the exception applies only to the extent the dissemination is reasonably necessary to protect an individual or the public. In addition, the reference to “public interest” was changed to “public” to more clearly focus the exception on protecting health and safety.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.6 Trial Publicity</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) 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.</p>	<p>(c) 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.</p>	
<p>(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).</p>	<p>(d) No lawyer associated in a <u>law</u> firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).</p>	<p>The Commission changed the reference from "firm" to "law firm" to conform the terminology the Commission has proposed for use throughout the Rules. The purpose of the change here is to distinguish between lawyers engaged in the practice of law in a law firm from lawyers engaged in business associations that do not entail the practice of law, where application of the Rule would be inappropriate.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.</p>	<p>[1] This Rule prohibits a lawyer who is difficult participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. Preserving <u>On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving</u> the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right<u>Rule applies only to know about threats to its</u></p>	<p>Rule 3.6 reflects a balancing of concerns that the practitioner needs to understand in order to apply the Rule. That balancing of policies needs to be addressed succinctly in the introduction to the Comment. The Commission concluded that Comment [1] to the Model Rule is too theoretical and does not spell out the balance clearly. The Commission found that the D.C. Comment did a much better job of framing the considerations that underlie the Rule; however, the Commission felt that the D.C. Comment did not pick up concepts in Comment [3] to the Model Rule that also are pertinent.</p> <p>The proposed Comment is intended to put all of the governing concepts together in one place. It does this by combining the elements of Comment [1] as adopted by the Washington D.C. Bar and Comments [1] and [3] to the Model Rule. The first sentence is derived from the first sentence of Comment [3] to the Model Rule. The second sentence is based on Comment [1] to the Model Rule and Comment [1] to the Washington D.C. rule. The third sentence is a modified version from the Washington D.C. rule. The only difference is that the D.C. comment states that publicity should not be allowed to “influence the fair administration of justice.” The proposed Comment changes that reference to “adversely affect the fair administration of justice,” which the Commission concluded more closely tracks the intent of the Rule. The fourth sentence is taken from the D.C. Comment. The fifth sentence is based on the D.C. Comment. The sixth and seventh sentences are taken from Comment [3] to the Model Rule.</p>

<p align="center">ABA Model Rule Rule 3.6 Trial Publicity Comment</p>	<p align="center">Commission's Proposed Rule Rule 3.6 Trial Publicity Comment</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
	<p>safety and measures aimed at assuring its security. It also has a legitimate interest <u>lawyers who are, or who have been involved</u> in the conduct <u>investigation or litigation</u> of judicial proceedings <u>a case</u>, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy <u>their associates</u>.</p>	
<p>[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.</p>	<p>[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.</p>	<p>Comment [2] to the Model Rule was moved to Comment [8]. The Commission concluded that the Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.</p>
<p>[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.</p>	<p>[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.</p>	<p>Model Rule Comment [3] is incorporated into Comment [1]</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Commission’s Proposed Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] Paragraph (b) identifies specific matters about which a lawyer’s statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).</p>	<p>[42] Paragraph (b) identifies specific matters about which a lawyer’s statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).</p>	<p>Comment [2] adopts Model Rule Comment [4].</p>
	<p>[3] <u>Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or Rule 3.3; and (3) the timing of the statement.</u></p>	<p>Comment [3] is a modified version of the second paragraph of the Discussion to current Rule 5-120. It is proposed in place of Comment [5] to the Model Rule. The Discussion to the current rule includes a fourth factor which states, “whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings).” The Commission deleted this factor, because the subject matter is now covered by proposed Rule 3.4.</p> <p>The Commission also revised the first factor to insert the phrase “for the purpose of influencing a trier of fact about” in place of the phrase “for the purpose of proving or disproving a material fact in issue.” The change was made to clarify that the focus of the Rule is on improper attempts to influence the trier of fact. In response to public comment, the Commission moved the reference from the end of the clause to clarify that the attempt to influence the trier of fact relates to the purpose of the statement.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Commission’s Proposed Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:</p>	<p>[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:</p>	<p>Model Rule Comment [5] was not included in current California rule 5-120, when it was originally proposed to the Supreme Court. The Commission unanimously decided not to include the Comment in proposed Rule 3.6. Comment [5] is problematic in that it refers to subjects that “are more likely to have a material prejudicial effect on a proceeding;” however, the statements would be permissible under the proposed Rule in some circumstances. The Comment does not address when the subjects would not prejudice a proceeding. It does not give the practitioner any guidance regarding when it would be permissible to discuss the subjects. As a result, the Comment tends to chill speech in situations where the Model Rule would not prohibit it. The Commission believes that proposed Comment [3] better addresses the issues by providing simple criteria for determining when the proposed Rule applies, while, at the same time, recognizing that there may be other factors.</p>
<p>(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;</p> <p>(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;</p>	<p>(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;</p> <p>(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;</p>	

<p align="center">ABA Model Rule Rule 3.6 Trial Publicity Comment</p>	<p align="center">Commission's Proposed Rule Rule 3.6 Trial Publicity Comment</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>(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;</p> <p>(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;</p> <p>(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or</p> <p>(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.</p>	<p>(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;</p> <p>(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;</p> <p>(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or</p> <p>(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.</p>	
<p>[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule</p>	<p>[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule</p>	<p>Comment [4] adopts Model Rule Comment [6].</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Commission’s Proposed Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.</p>	<p>will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.</p>	
<p>[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party’s lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer’s client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.</p>	<p>[75] Finally<u>Under paragraph (c)</u>, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party’s lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer’s client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening<u>lessen</u> any resulting adverse impact on the adjudicative proceeding. Such responsive statements should<u>must</u> be limited to contain only<u>such</u> information as is necessary to mitigate undue prejudice created by the statements made by<u>of</u> others.</p>	<p>These changes were made to conform the Comment to the proposed Rule. The reference to paragraph (c) is intended to orient the reader to the portion of the proposed Rule to which it pertains. It conforms to the form the Commission has adopted for other Rules. The Commission deleted the words “have the salutary effect of lessening” and replace them with the word “lessen.” The Commission concluded that the deleted language could be read as promoting responsive statements and that a less supportive tone was more appropriate. The word “must” was substituted for the word “should” to conform to the text of paragraph (c) of the proposed Rule. The Model Rule Comment is inconsistent with paragraph (c). Since the text of the Rule governs over the Comment, the Commission concluded that the Comment language should be revised in order to avoid misleading lawyers who rely on the Comment, without realizing that it is inconsistent with the proposed Rule.</p>
<p>[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.</p>	<p>[86] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.</p>	<p>Comment [6] adopts Model Rule Comment [8].</p>
	<p>[7] <u>Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with</u></p>	<p>This Comment [7] is Comment [2] to the Model Rule that was moved to the end of the Comments. The Commission concluded that Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.6 Trial Publicity Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>such rules.</p>	
	<p>[8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.</p>	<p>This Comment is Comment [2] to the Model Rule that was moved to the end of the Comments. The Commission concluded that Model Rule Comment [2] is out of place and does not flow logically with the comments that precede and follow it.</p>

Rule 3.6 Trial Publicity

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), and to the extent permitted by ~~Rule 1.6~~, 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~~ but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; 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.
- (c) 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 law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

- [1] This Rule prohibits a lawyer who is participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of

materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. The Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[2] ~~Paragraph (a) applies to statements made by or on behalf of the lawyer.~~

[32] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[43] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter ~~for the purpose of proving or disproving a~~

~~material fact in issue~~; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d) or ~~Rule 3.3~~; and (3) the timing of the statement.

[54] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[65] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.

[76] See Rule ~~{3.8(f)}~~ for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

[7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with such rules.

[8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

Rule 5-1203.6 Trial Publicity

(Comparison of the Current Proposed Rule to Current California Rule)

- (a) ~~(A)~~ A memberlawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will (i) be disseminated by means of public communication ~~if the member knows or reasonably should know that it will~~ and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) ~~(B)~~ Notwithstanding paragraph (Aa), and to the extent permitted by Rule 1.6, a memberlawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) ~~the~~ information contained in a public record;
 - (3) that an investigation of ~~the~~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 but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
- ~~(a)~~(i) the identity, residence, occupation, and family status of the accused;
 - ~~(b)~~(ii) if the accused has not been apprehended, ~~the~~ information necessary to aid in apprehension of that person;
 - ~~(c)~~(iii) the fact, time, and place of arrest; and
 - ~~(d)~~(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) ~~(C)~~ Notwithstanding paragraph (Aa), a memberlawyer may make a statement that a reasonable memberlawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the memberlawyer or the member's 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 law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Discussion:

~~Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.~~

COMMENT

- [1] This Rule prohibits a lawyer who is participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. The Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.
- [2] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects

upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

- [3] Whether an extrajudicial statement violates ~~rule 5-120~~this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter ~~for the purpose of proving or disproving a material fact in issue~~; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); ~~(3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings)~~Rule 3.3; and (4) the timing of the statement.

~~Paragraph (A) is intended to apply to statements made by or on behalf of the member.~~

~~Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets. (Added by order of the Supreme Court, operative October 1, 1995.)~~

- [4] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The

Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

- [5] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.
- [6] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.
- [7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with such rules.
- [8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

Rule 3.6 Trial Publicity
(Commission’s Proposed Rule – Clean Version)

- (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 (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), and to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e), 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 but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; 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.
- (c) 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 law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

- [1] This Rule prohibits a lawyer who is participating or has participated in an adjudicative proceeding from making public statements that the lawyer knows or should know will have a substantial likelihood of

materially prejudicing the adjudicative proceeding. The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to adversely affect the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Although a lawyer involved in the litigation is often in an advantageous position to further these legitimate objectives, preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated prior to trial, particularly where trial by jury is involved. The Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

- [2] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).
- [3] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement is made for the purpose of influencing a trier of fact about a material fact in issue and presents information clearly inadmissible as evidence in the matter; (2) whether the extrajudicial statement presents information the lawyer knows is false, deceptive, or the use of which would violate Rule 3.3 or Business and Professions Code section 6068(d); and (3) the timing of the statement.

- [4] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.
- [5] Under paragraph (c), extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Such responsive statements must be limited to information necessary to mitigate undue prejudice created by statements of others.
- [6] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.
- [7] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule [3.4(f)], which requires compliance with such rules.
- [8] Special rules of confidentiality may govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other matters. See Rule 3.4(f), which requires compliance with such rules.

Rule 3.6: Trial Publicity

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2008 Ed.) by Steven Gillers and Roy D. Simon. The text relevant to proposed Rule 1.8 is highlighted)

Alabama. In the rules effective June 2008, Rule 3.8(a) provides as follows:

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Alabama Rule 3.8(b) provides that a statement referred to in Rule 3.8(a) ordinarily is likely to have a materially prejudicial effect if it refers to "a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration" and the statement relates to one of the subjects listed in Comment 5 to ABA Model Rule 3.6 (which Alabama moves to the text of the rule). Alabama omits Rule 3.6(d).

California: Rule 5-120 tracks the pre-2002 version of ABA Model Rule 3.6 nearly verbatim, except that California omits subparagraph (d).

District of Columbia: Rule 3.6 consists of only one sentence: "A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a

serious and imminent threat of material prejudice to the proceeding."

Florida: Rule 3.6(a) omits the ABA phrase "who is participating or has participated in the investigation or litigation of a matter" and provides that a lawyer shall not make an extrajudicial statement that a "reasonable person" would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding "due to its creation of an imminent and substantial detrimental effect on that proceeding." Florida deletes ABA Model Rule 3.6(b), (c), and (d), and substitutes the following Rule 3.6(b):

Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

Georgia: Rule 3.6(a), (c), and (d) tracks the pre-2002 version of ABA Model Rule 3.6 verbatim, but Georgia has relegated Rule 3.6(b) to a new paragraph 5B of the Comment, which notes that there are "certain subjects which are more

likely than not to have no material prejudicial effect on a proceeding." The Comment then lists all of the items in ABA Model Rule 3.6(b) as examples of things that a lawyer may "usually" state.

Illinois: Rule 3.6(a) prohibits an extrajudicial statement if the lawyer "knows or reasonably should know that it would pose a serious and imminent threat to the fairness of an adjudicative proceeding." The remainder of the rule then borrows heavily from both DR 7-107 of the ABA Model Code of Professional Responsibility and ABA Model Rule 3.6(b)-(d), but Illinois adds some language found in neither DR 7-107 nor ABA Model Rule 3.6.

Iowa: In Rule 3.6, Iowa adds a paragraph (e) that provides: "Any communication made under paragraph (b) that includes information that a defendant will be or has been charged with a crime must also include a statement explaining that a criminal charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty."

Michigan: places the text of Rule 3.6(b) in the Comment and omits the balance of the rule.

Minnesota: shortens Rule 3.6(a) and deletes ABA Model Rule 3.6(b)-(d) entirely.

New Jersey: deletes ABA Model Rule 3.6(d).

New York: DR 7-107(A) provides that a lawyer participating in "or associated with a criminal or civil matter, or associated in a law firm or government agency with a lawyer participating in or associated with a criminal or civil matter," shall not make an extrajudicial statement that a "reasonable person" would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing

an adjudicative proceeding in that matter. New York also incorporates Rule 3.6(c) nearly verbatim into DR 7-107(A), but deletes the word "undue" before "prejudicial effect."

DR 7-107(B) then provides that a statement "ordinarily is likely to prejudice materially an adjudicative proceeding" when it relates to any of the six enumerated items set forth in Comment 5 to ABA Model Rule 3.6, which DR 7-107(B)(l)-(6) tracks verbatim.

DR 7-107 (C) provides that if a statement complies with DR 7-107 (A), a lawyer "involved with the investigation or litigation of a matter" may state "without elaboration" the items enumerated in ABA Model Rule 3.6(b), which New York tracks verbatim, except that DR 7-107(C)(l) refers only to "the general nature of the claim or defense" DR 7-107(C)(7)(a) adds the word "age," and DR 7-107(C)(7)(c) permits a lawyer to state not only the "fact, time and place of arrest" but also "resistance, pursuit, use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission, or statement." New York omits Rule 3.6(d).

North Carolina: adds a new Rule 3.6(e), which provides that Rule 3.6 does not "preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies."

Ohio: Rule 3.6(b) makes clear that a lawyer may not engage in trial publicity if doing so would violate a duty of confidentiality under Rule 1.6.

Oklahoma: subordinates Rule 3.6(b) to a Comment and replaces ABA Model Rule 3.6(a) with the following paragraph:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an

extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.

Oregon: Rule 3.6(c) provides that notwithstanding paragraph (a), a lawyer may: "(1) reply to charges of misconduct publicly made against the lawyer; or (2) participate in the proceedings of legislative, administrative or other investigative bodies." Oregon also adds a new Rule 3.6(e) requiring a lawyer to "exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule."

Texas: Rule 3.07(a) begins "[i]n the course of representing a client" in place of the ABA phrase "[a] lawyer who is participating or has participated in the investigation or litigation of a matter," then tracks ABA Model Rule 3.6(a) verbatim, but Texas, at the end of Rule 3.07(a), adds that a lawyer "shall not counsel or assist another person to make such a statement."

Texas Rule 3.07(b) provides that a lawyer "ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent," by making an extrajudicial statement described in Rule 3.07 (a) if the statement refers to five specified categories of information, which track verbatim the items listed in Comment 5 to ABA Model Rule 3.6-except that Texas omits from this list 14(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."

Texas Rule 3.07(c) generally tracks ABA Model Rule 3.6(b), with slight variations. Texas omits ABA Model Rule 3.6(c) and (d).

Virginia: Rule 3.6 provides as follows:

(a) A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows or should know will have a substantial likelihood of interfering with the fairness of the trial by a jury.

(b) A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.

Washington: adds an Appendix to the Rules of Professional Conduct that adds "Guidelines" for applying Rule 3.6.

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = __ Agree = 1
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M		Comment [2]	We have concerns about Comment [2] which states paragraph (a) “applies to statements made by or on behalf of the lawyer.” This comment is not in the ABA Rule and we believe it may cause problems for lawyer who may unknowingly have people speaking “on their behalf.” We agree with the rationale for inclusion of this comment – to prevent lawyers from attempting to do indirectly what they cannot do directly under the proposed Rule. The problem with this language arises when non-lawyers are commenting on a lawyer’s case without the lawyer’s consent and often without his or her knowledge. This scenario comes up quite frequently in criminal cases, where it is not unusual for prosecutors to turn on the television and see a community spokesperson or a law enforcement official purporting to comment “on behalf of” the prosecutor. We would all agree it would be unfair to subject lawyers to potential discipline when they truly did not authorize or have knowledge of statements made	Change not made. The Commission does not believe that the phrase “by or on behalf of” the lawyer is unclear. The phrase refers to situations where the lawyer allows another person to make statements for the lawyer that would be subject to the Rule. The language COPRAC proposes would narrow the Rule to situations where the lawyer actually authorizes or ratifies the particular statement. However, the Rule is intended to apply without regard to whether the lawyer authorized the specific statement. Under the Rule, if a lawyer has placed someone in the role of speaking on behalf of the lawyer, the lawyer has the responsibility to assure that that person complies with the Rule.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = __ **Agree =** 1
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [5]	<p>purportedly “on their behalf.” This concern could be cured by revising the proposed comment to state that paragraph (a) “applies to statements made, <i>authorized, or ratified</i> by the lawyer.” (Proposed addition emphasized).</p> <p>We believe ABA Comment [5] provides important guidance for legal practitioners and therefore we recommend that the Commission retain Comment [5]. The Commission’s explanation of changes to the section states that Comment [5] refers to subjects that “are more likely to have a material prejudicial effect on a proceeding.” ABA Model Rule Comment [5] uses the language “more likely than not” to describe a list of potentially prejudicial statements that we believe is instructive to practitioners, some of whom may not be familiar with the likely effects of the types of statements listed.</p>	<p>Change not made. The Commission continues to believe that ABA Model Rule Comment [5] does not give clear guidance. The subjects that “are more likely than not to have a material prejudicial effect on a proceeding;” are not subjects that always will prejudice an adjudicatory proceeding. Depending on a number of factors, including those listed in Comment [4], there likely are circumstances where the statements would not violate the Rule. However, Model Rule Comment [5] would create a presumption of a violation that the lawyer making the statement would have the burden to rebut. The Commission does not believe that a lawyer who has made a statement that does not violate the Rule should have such a burden. By focusing on the content of the statement, rather than the factors that determine when the Rule applies, the Comment tends to chill speech in situations where the Model Rule would not prohibit it.</p>
2	Genard, Gerald H.	D			The proposed rule has a chilling effect on free speech. The commentary about	The Commission did not accept the recommendation. Rule 5-120 was adopted in 1995

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = __ **Agree =** 1
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>statements which are not limited to admissible evidence is particularly troublesome. For example, if the speaker's opinion is that a trial is politically motivated or that corrupt governmental practices are being swept under the rug, a speaker should be entitled to voice that opinion for the benefit of the public even though there may be an inability to produce admissible evidence to support the opinion due to relevancy or otherwise. California procedural rules allow trial and appellate courts to decide many matters without written opinions and justifications. This, in itself, is bad enough because of the possibility of abuse, but to threaten discipline to a lawyer who tries to expose a potential case of abuse is contrary to the core of free speech and to the fundamental requirement of a free society.</p>	<p>in response to SB 254, which enacted Bus. & Prof. Code §6103.7. The statute directed the State Bar to submit to the Supreme Court a rule governing trial publicity and extrajudicial statements made by attorneys concerning adjudicatory proceedings. The statute contains legislative findings referencing extraordinary media coverage of "recent legal proceedings." The statute directed the Bar to review and consider Model Rule 3.6. Current Rule 5-120 was adopted in response to that legislative mandate. Proposed Rule 3.6 is a continuation of the existing Rule with modifications to account for changes in the ABA Model Rule.</p> <p>In light of the history leading up to the adoption of the current Rule, the Commission does not believe it would be appropriate to delete the Rule.</p> <p>In addition, as Comment [1] notes, Rule 3.6 attempts to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. The Rule is focused only on statements that a lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding in a matter in which the lawyer is participating or has participated. The standard is reasonably focused on prohibiting statements that would interfere with the administration of justice on the part of lawyers who</p>

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = __ **Agree = 1**
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						are involved in the matter.
3	Judge, Michael P. Los Angeles County Public Defender	M		(c) Comment [5]	The Proposed Rule seems fair and allows the defense leeway under Rule 3.6, subdivision (c), to make statements when necessary to protect a client from the prejudicial effect of recent adverse publicity. The Commission, however, does not include ABA Comment [5] which sets forth some examples of subjects more likely than not to prejudice a proceeding. I believe Comment [5] should be restored.	No Response Necessary. Change not made. The Commission continues to believe that ABA Model Rule Comment [5] does not give clear guidance. The subjects that “are more likely than not to have a material prejudicial effect on a proceeding;” are not subjects that always will prejudice an adjudicatory proceeding. Depending on a number of factors, including those listed in Comment [4], there likely are circumstances where the statements would not violate the Rule. However, Model Rule Comment [5] would create a presumption of a violation that the lawyer making the statement would have the burden to rebut. The Commission does not believe that a lawyer who has made a statement that does not violate the Rule should have such a burden. By focusing on the content of the statement, rather than the factors that determine when the Rule applies, the Comment tends to chill speech in situations where the Model

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = __ Agree = 1
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Rule would not prohibit it.
4	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		(b)(6)	<p>Proposed Rule 3.6(b)(6) permits counsel to issue “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 . . . “</p> <p>Under some circumstances, Section (6) could be used by counsel to influence public opinion when a jury proceeding is or could be convened in the matter.</p> <p>Section (6) should require a counsel who raises an alarm about a participant in the judicial process to have a reasonable basis for the belief that the person’s behavior presents a threat to public safety.</p> <p>Moreover, if the danger is limited to an individual, and not reasonably expected to affect the public interest, the warning should be, as best as possible, calculated to reach the ears of the relevant party only. The warning from counsel should not be issued to the public at large, when the public at large is not under a reasonable threat.</p>	Rule revised to state: “(6) a warning of danger concerning behavior of a person involved only when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest and only when dissemination of the statement by public communication is necessary to protect the individual or public interest. ”

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = __ Agree = 1
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Orange County Bar Association	M		Comment [4]	<p>Because the stated purpose of Comment [4] is to provide clearer guidance and avoid a chilling effect on permissible speech, the OCBA believes that broad language referring to “many” factors followed by only three narrow examples would inhibit lawful speech. Consequently, the OCBA believes the Comment should be revised to include as many additional factors as possible.</p> <p>Factor (1) in Comment [4] may be unclear as to which portion of the sentence the phrase “for the purpose of proving or disproving a material fact in issue” is intended to modify. This affects the meaning of the factor as a whole. If, on the one hand, the Comment is intended to refer to the speaker’s intent in making the extrajudicial statement – i.e., he or she presented it “for the purpose of proving or disproving a material fact in issue,” that has one meaning. If, on the other hand, “for the purpose of proving or disproving a material fact in issue” only modifies “clearly inadmissible as evidence in the matter,” then the factor has a different meaning in which the attorney’s intent in making the statement is irrelevant, and the content of</p>	<p>No change made. The commenter does not suggest any additional factors. Because of the fact specific nature of the inquiry the Rule requires, the Commission does not believe that additional factors can be identified at this time.</p> <p>Comment [4] is revised to read: “(1) whether the extrajudicial statement <i>is made for the purpose of proving or disproving a material fact in issue and presents information clearly admissible as evidence in the matter.</i>”</p>

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = __ Agree = 1
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>the statement alone determines whether a potential violation of the Rule exists. Further, there needs to be an allowance for those instances in which public disclosure of a settlement agreement is required, although inadmissible as evidence in the matter.</p> <p>Factor (3), “the timing of the statement,” is vague, providing no guidance as to what “timing” would or would not determine whether an extrajudicial statement violated the Rule. For example, is the Commission more concerned with statements made before jury selection, after the commencement of trial, during jury deliberations, or at some other phase? The OCBA recommends that factor (3) be clarified to define the specific timing the Commission intended to designate as a factor in a violation of this Rule.</p>	<p>No change made. Because of the fact specific nature of the inquiry the Rule requires, the Commission does not believe that it is possible to be more specific about timing as a factor. In what way time affects a determination of a violation will depend on looking at the totality of the circumstances and determining whether the statement will have a substantial likelihood of materially prejudicing an adjudicatory proceeding at the time it was made.</p>
6	San Diego County Bar Association Legal Ethics Committee	A			Approve of the new rule in its entirety.	No action required.
7	Santa Clara County Bar Association	D			This is an unnecessary rule and constitutionally infirm in that it attempts to prohibit speech that is protected by the 1 st Amendment.	The Commission did not accept the recommendation. Rule 5-120 was adopted in 1995 in response Business. & Professions Code §6103.7. The statute directed the State Bar to submit to the

**Rule 3.6 Trial Publicity.
[Sorted by Commenter]**

TOTAL = __ **Agree =** 1
Disagree = 2
Modify = 4
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Much of the conduct/speech that this rule attempts to proscribe is actually covered by other rules which are set in contexts that do not violate the 1st Amendment. For example, an attorney may not misrepresent the facts of a case or engage in conduct such as deceit, deception or fraud that undermines the ability of a litigant to receive a fair trial. The SCCBA understands that the California Supreme Court has previously adopted a rule substantially similar to proposed Rule 3.6. Notwithstanding that, this rule should be deleted.</p>	<p>Supreme Court a rule governing trial publicity and extrajudicial statements made by attorneys concerning adjudicatory proceedings. The statute contains legislative findings referencing extraordinary media coverage of “recent legal proceedings.” The statute directed the Bar to review and consider Model Rule 3.6. Current Rule 5-120 was adopted in response to that legislative mandate. Proposed Rule 3.6 is a continuation of the existing Rule with modifications to account for changes in the ABA Model Rule.</p> <p>In light of the history leading up to the adoption of the current Rule, the Commission does not believe it would be appropriate to delete the Rule.</p> <p>In addition, as Comment [1] notes, Rule 3.6 attempts to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. The Rule is focused only on statements that a lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding in a matter in which the lawyer is participating or has participated. The standard is reasonably focused on prohibiting statements that would interfere with the administration of justice on the part of lawyers who are involved in the matter.</p>