

Rule 3.6 [5-120] Trial Publicity
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – 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), but only to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e), 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, general area of residence, and occupation of the accused;
 - (ii) if the accused has not been apprehended, the 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] Whether an extrajudicial statement violates this Rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code § 6068(d) or Rule 3.3; (iii) 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, (see Rule 3.4(f) and Business and Professions Code § 6068(a), which require compliance with such obligations); and (iv) the timing of the statement.

[2] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.6
(Current Rule 5-120)
Trial Publicity**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 5-120 (Trial Publicity) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 3.6 (Trial Publicity). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 3.6 (Trial Publicity). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 3.6 in context within the Rules of Professional Conduct.

Proposed rule 3.6 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

Proposed rule 3.6 carries forward the substance of current rule 5-120. The few significant changes to the current rule include the following. In paragraph (a), the “knows or reasonably should know standard” is moved in front of two roman numerals that were added to clarify the knowledge standard is applicable to both the means of dissemination and the likelihood of material prejudice. Paragraph (b) has been amended to place an outright condition that the subparagraphs of paragraph (b) are limited by the lawyer’s duty of confidentiality. The change was made to avoid a misinterpretation that the rule’s language provides an exception to the lawyer’s overriding duty to maintain a client’s confidential information. In paragraph (b)(6), language has been added to emphasize that the anticipated harm triggering this permissive category of information is harm to an individual or the public, and that dissemination of this information is limited to what is reasonably necessary to protect the individual or the public. This change also conforms paragraph (b)(6) to the limitation in current rule 3-100(D) [proposed rule 1.6(d)], which requires an attorney’s disclosure of information must be no more than is necessary to prevent the harm. Paragraph (b)(7)(i) has been amended by deleting “family status” and adding reference to “general area of” residence and occupation. This change was made in order to balance an accused right to privacy while also providing enough information so that the accused is not either misidentified, or confused with someone else. Finally, paragraph (d) was added to extend compliance with the rule to other lawyers who are associated with the individual lawyer who is covered by paragraph (a).

There are two comments to the rule. Comment [1] adds cross references to relevant rules and adds clarifying changes to the language found in the second paragraph of the Discussion section of current rule. In comment [2], a cross reference is added to the special duties of prosecutors in proposed rule 3.8(f). Also, comment [2] retains language found in the current rule’s Discussion section which expressly states that the rule applies equally to prosecutors and criminal defense counsel.

Rule 3.6 [5-120] Trial Publicity
(Redline Comparison of the Proposed Rule to Current California Rule)

- (Aa) A ~~member~~lawyer 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.
- (Bb) Notwithstanding paragraph (Aa), ~~a member~~but only to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e), lawyer 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) the identity, general area of residence, and occupation, ~~and family status~~ of the accused;
 - (b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (Cc) Notwithstanding paragraph (Aa), a ~~member~~lawyer may make a statement that a reasonable* ~~member~~lawyer would believe is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the ~~member~~lawyer 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).

DiscussionComment

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

[1] Whether an extrajudicial statement violates ~~rule 5-120~~this Rule depends on many factors, including: (i)~~1~~2 whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii)~~2~~2 whether the extrajudicial statement presents information the ~~member~~lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code ~~section~~§ 6068(d) or Rule 3.3; (iii)~~3~~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,~~ (see Rule 3.4(f) and Business and Professions Code § 6068(a), which require compliance with such obligations); and (iv)~~4~~4 the timing of the statement.

[2] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

~~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.~~