

Lee, Mimi

From: Marlaud, Angela
Sent: Wednesday, November 25, 2009 8:30 AM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwwapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: FW: RRC -Final Agenda Submission - 3.6 [5-120] - III-E - December 11-12, 2009 Revised Agenda Materials
Attachments: RRC - 5-120 [3-6] - Dash, Intro, Redline, Pub Com - COMBO - DFT2.1 (11-24-09).pdf

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Wednesday, November 25, 2009 7:07 AM
To: Marlaud, Angela
Cc: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwwapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: Re: RRC -Final Agenda Submission - 3.6 [5-120] - III-E - December 11-12, 2009 Revised Agenda Materials

Greetings all:

To facilitate consideration of this agenda item, I've attached a single, scaled PDF file that contains the following:

1. Dashboard, Draft 2.1 (11/23/09)ML-SWL-KEM;
2. Introduction, Draft 3 (11/24/09)KEM;
3. Rule, Draft 4 (11/24/09), redline, compared to Public Comment Draft [#3.1] (7/28/08);
4. Public Comment Chart, Draft 2.1 (11/24/09)RD-SWL-KEM.

NOTES FOR THE COMMISSION:

1. Dashboard: I've revised the Summary to conform it to the summaries we have been providing the BOG (i.e., simply identifying possible issues and providing cross-references to the discussion). I also made some formatting changes.
2. Introduction. I made some changes in anticipation that the Commission will agree to the lead drafters' proposed revisions (note that although the other drafters have not had an opportunity to weigh in on the proposed revisions, I believe that they will).

3. Rule, Draft 4, redline. This puts the proposed changes and explanation for the changes in one place.

4. Public Comment Chart. I've re-sorted the chart alphabetically and added entries to the "paragraph/comment" column, and accepted all of the changes in the last column.

If you've already reviewed this agenda item, no worry. The revisions I've made are minor. The only new document that is "material" is item #3.

I'll forward the underlying Word documents to the drafters and staff at a later date.

Please let me know if you have any questions. Thanks,

Kevin

Marlaud, Angela wrote:

From: Lamport, Stanley W. [<mailto:SLamport@coxcastle.com>]

Sent: Monday, November 23, 2009 12:46 PM

To: Marlaud, Angela

Cc: Harry Sondheim; McCurdy, Lauren; Hollins, Audrey; avoogd@stanfordalumni.org; CommissionerJ2@gmail.com; Ellen Peck (E-mail); ignazio.ruvolo@jud.ca.gov; Jerome Sapiro Jr. (E-mail); kemohr@charter.net; Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Work) (E-mail); Kurt Melchior (E-mail); Lee, Mimi; linda.foy@jud.ca.gov; Mark L. Tuft (E-mail); martinez@lbbsslaw.com; Paul W. Vapnek (E-mail); Difuntorum, Randall; rkehr@kscllp.com; snyderlaw@charter.net; Yen, Mary

Subject: RRC -Final Agenda Submission for Agenda Item III-E - Rule 3.9

Attached is a copy of the dashboard and the response to public comment to the Rule. Please include the attachments and this email in the agenda package.

Having reviewed the public Comment, I am recommending two changes, which are as follows:

1. The first factor in Comment [4] would be revised to state: "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 proving or disproving a material fact in issue and presents*** information clearly inadmissible as evidence in the matter."

The recommended change is in response to a Comment from OCBA, which states: "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 made the statement is irrelevant, and the content of the statement along determines whether a potential violation of the Rule exists."

I agree that the first factor in Comment [4] as currently written is ambiguous in terms of its reference to "for the purpose of proving or disproving a material fact in issue." I recommend a change to the Comment to make clear that it is the purpose for which the statement is made that governs the applicability of the Rule.

2. Rule 3.6(b)(6) would be revised to state: "(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 only when dissemination of the statement by public communication is necessary to protect the individual or the public interest.**"

The recommended change is in response to a Comment from LACBA, which states: "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"

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.

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.

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."

I agree that the exception should apply only when it is necessary to disseminate the warning by means of public communication and that it would inappropriate to create a blanket exception for a statement warning of a danger when it would not be necessary to protect the interests at hand.

STAN

Stanley W. Lamport | **Cox, Castle & Nicholson LLP** | 2049 Century Park East, Suite 2800 | Los Angeles, California 90067-3284 | (310) 284-2275 (direct) | (213) 393-2033 (cell) | (310) 277-7889 (fax)

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Kevin E. Mohr
Professor
Western State University College of Law
1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147
714-738-1000 x1147
714-525-2786 (FAX)
kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

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

(Draft #4, 11/24/09)

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

(14 Members Total – votes recorded may be less than 14 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 _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

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

~~February~~-November 2009

(Draft rule ~~revised~~ 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 two changes to the Rule. See Explanation of Changes for paragraph \(b\)\(6\) and Comment \[4\].](#)

* [Proposed Rule 3.6, Draft 4 \(11/24/09\).](#)

Rule 3.6 Trial Publicity

- (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 and only when dissemination of the statement by public communication is necessary to protect the individual or the public interest,¹ and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):

¹ Drafters' Note: The lead drafter recommends this revision of paragraph (b)(6) following receipt of public comment from LACBA, which stated:

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 . . . "

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.

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.

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.

See Public Comment Chart & 11/23/09 Lamport E-mail to Marlaud, #2.

RRC – Rule 3.6 [5-120]
Rule – Draft 4 (11/24/09) – COMPARED TO PCD [#3.1] (7/27/08)
December 11-12, 2009 Meeting, Agenda Item III.E.

- (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.

[3] 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).

RRC – Rule 3.6 [5-120]
Rule – Draft 4 (11/24/09) – COMPARED TO PCD [#3.1] (7/27/08)
December 11-12, 2009 Meeting, Agenda Item III.E.

[4] Whether an extrajudicial statement violates this Rule depends on many factors, including, without limitation: (1) whether the extrajudicial statement ~~presents-is made for the purpose of proving or disproving 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 (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];~~³ and (3) the timing of the statement.

[5] 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.

[6] 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.

[7] See Rule [3.8(f)]⁴ for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

[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.

² **Drafters' Note:** The lead drafter recommends the foregoing changes following receipt of public comment from OCBA, which stated:

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 made the statement is irrelevant, and the content of the statement along determines whether a potential violation of the Rule exists.

See Public Comment Chart & 11/23/09 Lampert E-mail to Marlaud, #1.

³ Brackets around "Rule 3.3" removed because the RRC has recommended the adoption of that Rule, which like this Rule, is part of Batch 4.

⁴ Brackets around "3.8(f)" are being retained pending the RRC's decision concerning paragraph (f) of proposed Rule 3.8, a Batch 5 Rule.

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M		Comment [2]	<p>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 purportedly “on their behalf.” This concern</p>	<p>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.</p>

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 = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [5]	<p>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			<p>The proposed rule has a chilling effect on free speech. The commentary about statements which are not limited to admissible evidence is particularly troublesome. For example, if the</p>	<p>The Commission did not accept the recommendation. Rule 5-120 was adopted in 1995 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</p>

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

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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>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>

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Judge, Michael P. Los Angeles County Public Defender	M		(c)	<p>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.</p> <p>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.</p>	<p>No Response Necessary.</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>
6	Los Angeles County Bar Association, Professional Responsibility and Ethics	M		(b)(6)	Proposed Rule 3.6(b)(6) permits counsel to issue “a warning of danger concerning the behavior of a person involved, when there	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

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
	Committee				<p>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>	<p>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.”</p>
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</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>

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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 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</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> <p>No change made. Because of the fact specific</p>

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

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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.	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.
3	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. 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 1 st 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	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 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

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

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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>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>

File List - Public Comments – Batch 4 – Proposed Rule 3.6

D-2009-268 COPRAC [3.6]

D-2009-271 Gerald Genard [3.6]

D-2009-276e Ross Simmon SDCBA Legal Ethics Comm [3.6]

D-2009-283d Orange County Bar [3.6]

D-2009-286d James Ham LACBA [3.6]

D-2009-287e Santa Clara County Bar [3.6]



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2107

September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.6 – Trial Publicity

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.6 and offers the following comments.

We support the adoption of the proposed Rule and would like to offer our suggestions for a substantive change in Comment [2] and the retention of Comment [5] from the ABA Model Rule.

First, regarding Comment [2], we have concerns about the statement that 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 lawyers who may unknowingly have people speaking "on their behalf." We agree with the rationale for the 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 purportedly "on their behalf." This concern could be cured by revising the proposed comment to state that paragraph (a) "applies to statements made, *authorized, or ratified* by the lawyer." (Proposed addition emphasized).

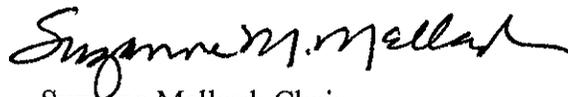
Our second suggestion is with respect to the Commission's decision to delete ABA Comment [5]. We believe this Comment provides important guidance for legal practitioners and therefore we recommend that the Commission retain Comment [5]. The Commission's explanation of

Mr. Sondheim
September 10, 2009
Page 2

changes 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.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,



Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on one Rule per form submission and that you choose the proposed Rule from the drop-down box below.
All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

* Rule

Agree/disagree

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

COMMENTS

The proposed rule has a chilling effect on free speech. The commentary about 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.

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* Date

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File :

D-2009-271 Gerald Genard [3.6].pdf

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SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): Ross G. Simmons

Old Rule No./Title: 5-120 Trial Publicity

Proposed New Rule No./ Title: 3.6 Trial Publicity

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.
Yes [] No []

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.
Yes [] No []

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.
Yes [] No []

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

See Attached.

CONCLUSIONS (pick one):

[] We approve the new rule in its entirety.

[] We approve the new rule with modifications.*

[] We disapprove the new rule and support keeping the old rule.

[] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

Continuation Pages; Simmons Comments
Proposed Rule 3.6 Trial Publicity
Batch #4, Proposed Amendments to CRPC

Summary:

In the attached, I have proposed that the LEC approve of Proposed Rule 3.6 as presented. In short, Proposed Rule 3.6 adopts its ABA Model Rule counterpart with only minor corrections that, in fact, aid interpretation. It also clarifies, more as a reminder than as substantively necessary to the rule, that confidences are to be maintained.

Most of the Comments of the ABA Model Rules likewise are a part of Proposed Rule 3.6, although certain sections were replaced with better drafted counterparts adopted by the District of Columbia bar, and there is a clarifying section retained from former CRPC 5-120.

General Comment:

The materials provided in support of this public comment for Batch 4 are vastly superior to any previously received. It was extremely helpful to my review to understand the Commission's process and considerations from which the proposal was derived. I have many, personal and substantive issues with this rule, all of which were resolved by the materials provided.

Comments:

In my view, Proposed Rule 3.6 is the correct course. I so conclude without labored analysis of the provisions of the Proposed Rule, because it is essentially Model Rule 3.6, except with grammatical nips and tucks, interpretationally better. One can quarrel with the propriety of the rule and the wisdom of its enactment itself (as I do), and yet that is a historical matter no longer of substantive moment.

(Having said that, I was pleased to see that there was discussion of its possible elimination, if nothing more than for the purposes of that consideration being a part of this proposal's "legislative intent." I agree with the Commission, though, that because of the circumstances giving rise to its initial adoption, as well as the charge of the Commission more generally, mere repeal would not be a sensible, productive approach to former CRPC 5-120.)

CRPC 5-120 suffered through a tortured conception. First, it was crafted in California only following a legislative mandate, in the context of the State Bar Act, that such a rule be adopted (anecdotally most likely as a reaction to the media surrounding the then-recently concluded O.J. Simpson prosecution, although the efficacy of this rule or any rule in that setting remains objectively unclear). In fact, when CRPC 5-120 in its initial form was originally given to the California Supreme Court for adoption consideration, the Board of Governors of the State Bar of California urged the Court to reject it, the statute having otherwise been satisfied solely by its presentation.

For better or worse, the Court ignored the Board and adopted CRPC 5-120. Oddly, though, the Court did not adopt the rule as proposed by the Board, but instead unartfully (1) adopted the then-applicable Model Rule 3.6, substantively different than that proposed by the Board, but (2) retained the rule comments prepared by the Board, but otherwise inapplicable to Model Rule 3.6.

The result is that present CRPC 5-120 is simply not a cohesive, well-crafted rule, and is worthy of little more than disregard. The Commission has taken a prudent tack in doing so, by selecting current Model Rule 3.6 as its starting place.

Model Rule 3.6 (or more precisely, its substantially similar predecessor) has independent, threshold-allure in its own right, having been subject to judicial review in the context of Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). Although the Gentile analysis is an unusual, at times curious presentation, imperfect or otherwise, there is some benefit in having judicial guidance in navigating among the important interests implicated by trial publicity, those of the free speech of the participants, the public's right to information, and the integrity of the judicial system.

There are a number of substantive elements of Model Rule 3.6 that one could analytically explore (such as the standard of review in determining culpability, the merits and wording of its "safe harbors," etc.), and in fact, the form of this rule varies widely as adopted state-by-state. The Commission, wisely in my view, chose not to. If nothing else, deviating substantively from Model Rule 3.6 has the effect of needlessly meandering away from precedential benefit of Gentile, such as it is. But further, to me the desirability of Proposed Rule 3.6 is found in the Commission's charge itself, that being to "[e]liminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues."

Hence, struggling through the minutiae of Model Rule 3.6 is just that, and of extraordinarily little consequence. Although intellectually interesting, it is not germane in this context, in my view. This strategy is correct regardless of the substantive provisions of Model Rule 3.6, which the Commission proposes be adopted wholesale with only nonsubstantive improvement. I respectfully agree that this is as it should be.

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7

Aggregate Settlements [3-310(D)]

Rule 1.15

Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

Rule 3.3

Candor Toward the Tribunal [5-200]

Rule 3.6

Trial Publicity [5-120]

Rule 3.7

Lawyer as Witness [5-210]

Rule 6.3

Membership in Legal Services Organization [n/a]

Rule 6.4

Law Reform Activities Affecting Client Interests [n/a]

*Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213*

MEMORANDUM

Date: September 4, 2009

To: Special Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association (“OCBA”)

Re: **Proposed Rule 3.6 – Trial Publicity**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

The OCBA believes that Proposed Rule 3.6 regarding trial publicity is well-written and generally clarifies the rule in a very helpful way. The OCBA’s only suggestion concerning Proposed Rule 3.6 relates to Comment [4], which the OCBA believes could be revised to give greater and more specific guidance to lawyers with respect to the types of extrajudicial statements that may violate the Rule.

First, because the three factors listed in Comment [4] are not exclusive, it leaves attorneys to guess at the other factors that may or may not constitute a violation of Rule 3.6. 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.

Second, 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 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.

Finally, 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.



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

MAILING ADDRESS:
P O Box 55020
Los Angeles CA 90055-2020
TELEPHONE: 213.627.2727
FACSIMILE: 213.833.6717
WEB SITE: www.lacba.org

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October 23, 2009

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, Calif 94105

RE: Rule 3.6 – Trial Publicity

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 3.6:

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...”

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.

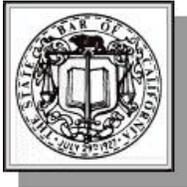
Section (6) should require a counsel who raises an alarm about a participant in the judicial process to have a reasonable basis for the belief that the person’s behavior presents a threat to public safety.

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.

Thank you for the opportunity to comment.

Sincerely yours,

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation Commenting on behalf of an organization

Yes
 No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- | | | |
|---------------------------------------|----------------------------------|--|
| Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a] |
| Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a] |
| Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules) |

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

This is an unnecessary rule and constitutionally infirm in that it attempts to prohibit speech that is protected by the 1st Amendment. 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.

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D-2009-287e Santa Clara County Bar [3.6].pdf

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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.