

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-120 [3.6]

Lead Drafter: Clopton
Co-Drafters: Bleich, Cardona, Croker
Meeting Date: May 6 – 7, 2016

I. CURRENT CALIFORNIA RULE 5-120

Rule 5-120 Trial Publicity

- (A) A member 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 be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (B) Notwithstanding paragraph (A), a member 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 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 the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, residence, 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.
- (C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

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Discussion

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

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) 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; (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); 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.

II. DRAFTING TEAM’S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 3.6 (CLEAN)

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), 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;

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- (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 and occupation of the accused;]¹
 - (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.

Subparagraphs (b)(1) to (7) are not 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).

- (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, 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

¹ The bracketed language is presented as an open issue, see section IX, below.

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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 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, (see Rule 3.4(f) and Business and Professions Code § 6068(a), which require compliance with such obligations); and (4) the timing of the statement.

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

IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-120)

Rule ~~3.65-120~~ Trial Publicity

- (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

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(7) in a criminal case, in addition to subparagraphs (1) through (6):

[(a)i] the identity, ~~residence, and~~ 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.

Subparagraphs (b)(1) to (7) are not 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).

(C)c Notwithstanding paragraph (A)a, 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).

~~Discussion~~Comment

~~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, 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~~lawyer 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,~~ (see Rule 3.4(f) and Business and Professions Code § 6068(a), which require compliance with such obligations); and (4) the timing of the statement.

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

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~~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.~~

V. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE:**

[Insert summary of comments.]

- **RUSSELL WEINER, OCTC, 6/15/2010:**

Rule 3.6. Trial Publicity.

1. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comment 8 is identical to Comment 7 and should, therefore, be stricken.

- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Pennsylvania Rule 3.6** is identical to Model Rule 3.6:

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 be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of the matter is in progress ;
- (4) the scheduling or result of any step in litigation;

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- (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
- (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 firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Model Rule 3.6 is the ABA counterpart to rule 5-120. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.6: Trial Publicity," revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_6.authcheckdam.pdf
- Twenty-four jurisdictions have adopted Model Rule 3.6 verbatim.² Ten jurisdictions have adopted a slightly modified version of Model Rule 3.6.³ Seventeen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.6.⁴

² The twenty-four jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, Nebraska, Nevada, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

³ The ten jurisdictions are: California, Illinois, Indiana, Iowa, Massachusetts, North Carolina, Ohio, Oregon, Vermont, and Wisconsin.

⁴ The seventeen jurisdictions are: Alabama, Connecticut, District of Columbia, Florida, Georgia, Maine, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Texas, Virginia, and Washington.

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VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. In paragraph (a), clarify the applicability of the knowledge standard to both clauses of the rule. Paragraph (a) continues to incorporate the “knows or reasonably should know” standard. The proposed rule adds roman numerals to assure that the rule will not be misread, and to clarify that the knowledge standard is applicable to both the means of dissemination and the likelihood of material prejudice.
 - Pros: In accordance with the Commission’s Charter, this change eliminates a possible ambiguity in the language of the current rule (and in Model Rule 3.6) and promotes lawyer understanding and compliance.
 - Cons: The existing language may not be deficient as there are no published disciplinary cases in California interpreting current paragraph (A).
2. In paragraph (b), condition permitted statements on compliance with the duty of confidentiality. The subparagraphs of paragraph (b) identify categories of information that may be publicly disseminated. However, some of the specific categories could include information protected by the duty of confidentiality. For example, subparagraph(b)(1) refers to “the identity of persons involved” and depending on the circumstances and timing of the particular case, this information might be protected by the duty of confidentiality.
 - Pros: Absent this change, the current language might be misinterpreted as an exception to a lawyer’s overriding duty to maintain a client’s confidential information.
 - Cons: The categories of information listed in the subparagraphs of paragraph (b) generally appear to be public information (see, e.g., subparagraph (b)(2) referring to “the information contained in a public record”). In addition, lawyers should be expected to honor client confidentiality and not ascribe implied rule exceptions to a duty that resides in a statute rather than the rules.
3. In paragraph (b)(6), add language emphasizing 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 deletes the term “public interest.” This change also conforms subparagraph (b)(6) to the limitation in rule 3-100(D) [proposed Rule 1.6(d)] (limiting disclosure to information “no more than necessary”).
 - Pros: In accordance with the Commission’s Charter, this revision eliminates an ambiguous reference to the “public interest.” It places an emphasis on protecting health and safety rather than vague, unspecified interests of the public.
 - Cons: If the precatory language of paragraph (b) is revised to refer to the duty of confidentiality, then the change in subparagraph (b)(6) is unnecessary and redundant because the only express exception to confidentiality is disclosure of information reasonably necessary to prevent a threat of death or great bodily harm (current rule 3-100 and Business and Professions code § 6068(e)(2)).

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4. At the end of paragraph (b), add a sentence clarifying that the listed categories of information are not exclusive. Unlike the current rule, the proposed rule would include an explicit statement that the list of information included within the permissive exception is not a comprehensive list.
 - Pros: This change clarifies the structure of the rule where paragraph (a) states a general prohibition and paragraphs (b) and (c) set forth permissive safe harbors. Because the categories of information in paragraph (b) are not intended as exceptions, the new sentence fosters lawyer understanding and compliance.
 - Cons: The existing language may not be deficient as there are no published disciplinary cases in California interpreting current paragraph (A).
5. Add a new paragraph (d) extending compliance with the rule to other lawyers who are associated with the individual lawyer who is covered by paragraph (a). Under the current rule (see the fourth paragraph of the rule 5-120 Discussion section), the prohibition in paragraph (a) extends to “statements made by or on behalf of the member.” The proposed revision instead substitutes new black letter text based on MR 3.6(d) that expressly imposes a compliance obligation on other associated lawyers.
 - Pros: A lawyer should be answerable for the violation of the rule if improper trial publicity statements are made by an associated lawyer. Further, if such statements are made by non-lawyers, then proposed rule 5.3 (re responsibilities regarding nonlawyer assistants) should address most situations.
 - Cons: Although the existing Discussion section language does not expressly hold other associated lawyers accountable for improper statements, the current approach may be preferable because it extends the prohibition to statements made by nonlawyers acting on behalf of the lawyer subject to paragraph (a). By its terms, the proposed new black letter text only protects against statements made by other lawyers.

B. Concepts Rejected (Pros and Cons):

1. Repeal the entire rule. Repealing the current rule would permit this area of lawyer conduct to be governed by judicial oversight through gag orders and other similar mechanisms, which would not have the same chilling effect on lawyer advocacy and speech as the rule’s threat of discipline.
 - Pros: When this rule was first considered by the State Bar it did not receive majority support by the State Bar Board. In part, there were concerns that the Nevada version of the original ABA Model Rule had recently been found to be unconstitutional and it was not certain that the revised version would survive scrutiny.
 - Cons: The current language has withstood constitutional challenge on vagueness grounds (see *Commonwealth of Pennsylvania v. Lambert* (1998) 723 A.2d 684 [the Supreme Court of Pennsylvania held that Pennsylvania’s rule 3.6 was not unconstitutionally vague and that discriminatory enforcement was not a realistic possibility]).

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2. Repeal the right of response provision. As a policy matter, rule 5-120(C) provides for a right of response to permit a lawyer to make an otherwise prohibited statement when such statement is necessary to protect the lawyer's client from substantial undue prejudice arising from recent publicity not initiated by the lawyer. Omitting current paragraph (C) from the Commission's proposed rule would eliminate what is viewed by some as a controversial aspect of the rule.
 - Pros: This provision has been criticized as a proverbial "exception that swallows the rule" that perpetuates a policy position that "two wrongs can make a right." It is perceived by some critics as undermining the rule's intended public protection and harming public confidence in lawyers and the administration of justice.
 - Cons: Lawyer advocacy and protection of client's interest include taking steps to correct false and misleading trial publicity initiated by others. The right of response component in this area of lawyer regulation is a necessary provision especially in the modern information age.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The changes to paragraph (a) are substantive. (See section VIII.A.1, above.)
2. The changes to paragraph (b)(6) are substantive. (See section VIII.A.3, above.)
3. Proposed new paragraph (d) is a substantive change. (See section VIII.A.5, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member."
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

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- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
- 3. In the precatory language of paragraph (b), adding an explicit reference to the duty of confidentiality is a non-substantive clarifying change. Nothing in current rule 5-120 states that a lawyer is relieved of the duty of confidentiality when engaged in trial publicity. (See section VIII.A.2, above.)
- 4. The addition of a new sentence at the end of paragraph (b) is a non-substantive clarifying change. Nothing in current rule 5-120 states that the list of categories of information in paragraph (b) is a comprehensive list. (See section VIII.A.4, above.)
- 5. Proposed revisions to the comments are non-substantive clarifying changes. In proposed Comment [1], the changes add cross references and clarify the language of the current second paragraph of the Discussion section. In proposed Comment [2], a cross reference is added to the special duties of prosecutors in proposed rule 3.8(f). Also in Comment [2], current Discussion language is retained to state expressly that the rule applies equally to prosecutors and criminal defense counsel. The last paragraph of the current rule Discussion section addresses the duty of confidentiality and has been relocated to the black letter text in proposed paragraph (b). (See section VIII.A.2, above.)

E. Alternatives Considered:

1. (See section VIII.B, above.)

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) In a criminal case, current rule 5-120(B)(7)(a) permits a lawyer to state “the identity, residence, occupation, and family status of the accused.” As proposed, the drafting team has placed brackets around a possible revision that would delete “residence” and “family status” due to public safety and privacy concerns. Making any changes to the current language is presented by the drafting team as an open issue.

One member of the drafting team would delete the entire subparagraph, in part, because “information contained in the public record” is already covered by subparagraph (b)(2) and because an accused should be accorded a presumption of innocence. Other team members would delete “family status” but retain language allowing reference to at least general area of residence as a means of avoiding misidentification of an accused, as many people have the same name or similar names in a given community.

In addition, the drafting team considered the approach of adding a new comment along the lines of the following:

“[3] Paragraph (b) describes statements that are permitted under this rule. Although permitted, a lawyer should be circumspect in exercising discretion to make such

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statements. Among the factors to consider are the safety and privacy rights of all persons whose personal identifying information would be publicized by a lawyer's permitted statement."

It is anticipated that individual members of the drafting team will express their respective views at the Commission meeting.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Clopton

- [Date]: Email Comment

Bleich

- [Date]: Email Comment

Cardona

- [Date]: Email Comment

Croker

- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3.6 [5-120] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3.6 [5-120] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

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XIII. FINAL COMMISSION VOTE/ACTION
Date of Vote: Action: Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 5-120
“Trial Publicity”

I. Text of Current Rule:

- (A) A member 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 be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
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 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
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 - (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.
- (C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph

shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion:

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Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) 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; (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); 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.

II. Background/Purpose:

The development of proposed rule 5-120 was mandated by former California Business and Professions Code section 6103.7,¹ which required the State Bar to submit to the

¹ The text of former Business and Professions Code section 6103.7, which was added by Stats. 1994, ch. 868 and repealed by Stats. 2001, ch. 24, is as follows:

Section 1. No later than March 1, 1995, the State Bar of California shall submit to the Supreme Court for approval a rule of professional conduct governing trial publicity and extrajudicial statements made by attorneys concerning adjudicative proceedings.

Section 2. The legislature find and declares the following:

- (1) Recent legal proceedings have generated extraordinary media coverage and raise serious questions regarding the potentially prejudicial and otherwise harmful effect of some media coverage. Important constitutional issues of free speech, the right to a fair trial, and related questions are implicated and require thorough review by the State Bar.
- (2) In light of the fact that the American Bar Association has now reformed its rule on this subject, it is appropriate to require the State Bar to commence and complete its rulemaking process no later than March 1, 1995.
- (3) During the rulemaking process, the State Bar shall, among other materials, review and consider the American Bar Association’s Model Rule 3.6, as modified.

Supreme Court for approval a rule of professional conduct governing trial publicity and extrajudicial statements made by attorneys concerning adjudicative proceedings.

Business and Professions Code section 6103.7 required that the State Bar, as part of its rulemaking process, review and consider current American Bar Association Model Rule of Professional Conduct 3.6 (Trial Publicity) ("MR 3.6").²

Section 3. It is the intent of the Legislature in enacting this act to memorialize the Supreme Court expeditiously to review and, as appropriate, approve the rule adopted by State Bar pursuant to this section.

² ABA Model Rule 3.6 Trial Publicity states:

- (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 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.
- (b) Notwithstanding paragraph (a), a lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) the information contained in a public record;
 - (3) that an investigation of the 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
 - (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 firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

ABA Model Rule 3.6 was similar to DR 7-107, except as follows: **First**, Rule 3.6 adopted the general criterion of “substantial likelihood of materially prejudicing an adjudicative proceeding” to describe impermissible conduct. **Second**, Rule 3.6 made clear that only attorneys who are, or have been involved in a proceeding, or their associates, are subject to the Rule. **Third**, Rule 3.6 omitted the particulars in DR 7-107(b), transforming them instead into an illustrative compilation as part of the Rule's commentary that is intended to give fair notice of the kinds of statements that are generally thought to be more likely than other kinds of statements to pose unacceptable dangers to the fair administration of justice. Whether any statement would have a substantial likelihood of materially prejudicing an adjudicatory proceeding depends upon the facts of each case. The particulars of DR 7-107(C) were retained in Rule 3.6(b), except DR 7-107(C)(7), which provided that a lawyer may reveal “[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement.” Such revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions whose success would be undermined by disclosure of the suppressed evidence to the press. **Finally**, Rule 3.6 authorized a lawyer to protect a client by making a limited reply to adverse publicity substantially prejudicial to the client.

On October 11, 1994, following consideration of draft versions of proposed rule 5-120 prepared by the State Bar Standing Committee on Professional Responsibility and Conduct and State Bar staff, the Board Committee on Admissions and Competence published draft rule 5-120 for a 90-day public comment period. Draft rule 5-120 was patterned on MR 3.6 and prohibited a lawyer who is participating or has participated in the investigation or litigation of a matter from directly or indirectly making 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 would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Based on the United States Supreme Court's analysis of Nevada's trial publicity “substantial likelihood” standard in Gentile v. State Bar of Nevada (1991) 501 U.S. 1030 [111 S. Ct. 2720], it was believed that this standard was constitutional and would be an appropriate standard for rule 5-120. The ABA had used this standard as well as the vast majority of jurisdictions.

Draft rule 5-120 also contained the “safe harbor” provisions found in then Model Rule 3.6(b). Although safe harbor provisions are intended to provide guidance to attorneys, the problems inherent in safe harbor provisions were illustrated in *Gentile*. Safe harbor provisions can be subject to many interpretations. No matter how well crafted, they cannot always address the nuances of each individual case. Based on these concerns, some commenters argued that it was better to promulgate a single prohibition/standard without safe harbor provisions placed in the rule and with relevant factors instead enumerated in the rule Discussion.

On the other hand, where the rule itself did not expressly clarify statements that a lawyer may make without fear of discipline, lawyers would be forced to guess which extrajudicial statements may cross the line. Without the addition of safe harbor provisions, the rule prohibition, standing alone, could have a chilling effect on lawyers' speech. This was because virtually any extrajudicial statement made by a lawyer could

raise a complaint to the State Bar. Although the rule prohibition set forth an objective standard, an individual's perception of whether a particular extrajudicial statement is materially prejudicial can be highly subjective, especially when that individual has an interest in the case, such as where the individual is a party, counsel, or even a close observer in the case.

Additionally, if a lawyer were afraid to defend a client in the court of public opinion for fear of discipline, the client could be severely prejudiced. Justice Kennedy, in his plurality decision in *Gentile*, acknowledged that an attorney "...may pursue lawful strategies to... attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." (*Gentile, supra*, 111 S.Ct. at p. 2729)

III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):*

A. 2016 Comment

In a [REDACTED], 2016 memorandum to the Commission, OCTC provided the following comment regarding rule 5-210:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comment.

1. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comment 8 is identical to Comment 7 and should, therefore, be stricken.

C. 2001 Comment.

None.

IV. *Potential Deficiencies in the Current Rule:*

A. Rule 5-120(A) provides that:

A member 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 be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This language might be ambiguous as to whether the "knows or reasonably should know" standard applies 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. Rule 5-120 could be clarified to avoid this ambiguity.

B. Rule 5-120(B) enumerates safe harbor statements that a lawyer is permitted to disseminate notwithstanding the rule's general prohibition. However, nothing in this paragraph explicitly provides that the making of such statements is subject to a lawyer's duty of confidentiality. Given California's strong emphasis on the duty of confidentiality this could be regarded as a deficiency.

C. One of the paragraph (B) safe harbor statements is for a lawyer to disseminate information concerning "a warning of danger" where there is reason to believe there exists the likelihood of harm to an individual or the public interest. This language might be unclear as to whether this safe harbor applies only to the extent the dissemination of a warning is reasonably necessary to protect an individual or the public. Rule 5-120 could be clarified to expressly impose this limitation on the safe harbor.

D. As a policy matter, rule 5-120(C) provides for a right of response to permit a lawyer to make an otherwise prohibited statement when such statement is necessary to protect the lawyer's client from substantial undue prejudice arising from recent publicity not initiated by the lawyer. This provision has been criticized as a proverbial "exception that swallows the rule" and as reflective of a policy that "two wrongs can make a right." The policy decision to include this provision could be re-evaluated to determine if it adequately achieves the goals of public protection and promoting confidence in the administration of justice.

E. Unlike Model Rule 3.6, rule 5-120 does not include black letter text addressing the application of the rule to other lawyers associated with the attorney subject to the prohibition, such as lawyer associated in a law firm or government agency. Rule 5-120 does include a Discussion sentence providing that the rule is "intended to apply to statements made by or on behalf of" the lawyer who is subject to the general prohibition in paragraph (A).

V. *California Context:*

A. California Civil Code § 47(d)(2)(A)

Civil Code § 47 provides that a statement made in a judicial proceeding is a privileged communication. However, subdivision (d)(2)(A) states that this privilege does not apply to a statement that "[v]iolates Rule 5-120 of the State Bar Rules of Professional Conduct."

B. Business and Professions Code § 6068(b)

This duty of an attorney requires an attorney to "maintain the respect due to the courts of justice and judicial officers."

C. Attorney Speech Prejudicial to the Administration of Justice in California

In California, speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice. (See *Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman* (9th Cir.1995) 55 F.3d 1430, 1442.

D. Guidelines for the Operation of Family Law Information Centers and Family Law Facilitator Offices

Appendix (C) to the California Rules of Court sets forth guidelines for attorneys who serve in Family Law Information centers or Family Law Facilitators offices. Guideline #8 addresses public statements and provides that:

An attorney working in a family law information center or family law facilitator office and his or her staff must at all times comply with Family Code section 10014, and must not make any public comment about the litigants or about any pending or impending matter in the court.

VI. Approach In Other Jurisdictions (National Backdrop):

A. Model Rule 3.6 is the ABA counterpart to rule 5-120. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.6: Trial Publicity," revised May 6, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_6.authcheckdam.pdf

- Twenty-four jurisdictions have adopted Model Rule 3.6 verbatim.³ Ten jurisdictions have adopted a slightly modified version of Model Rule 3.6.⁴ Seventeen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.6."⁵

VII. Public Comment Received by the First Commission:

A. The clean text of proposed rule 3.6 as drafted by the first Commission and adopted by the Board to replace rule 5-120 is enclosed with this assignment,

³ The twenty-four jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, Nebraska, Nevada, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

⁴ The ten jurisdictions are: California, Illinois, Indiana, Iowa, Massachusetts, North Carolina, Ohio, Oregon, Vermont, and Wisconsin.

⁵ The seventeen jurisdictions are: Alabama, Connecticut, District of Columbia, Florida, Georgia, Maine, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Texas, Virginia, and Washington.

together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rules differ from current rule 5-120, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 5-120 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether rule 5-120(A) should be revised to clarify that the "knows or reasonably should know" standard applies to both the means of dissemination and the likelihood of material prejudice. (See above section IV.A.)

(2) Whether rule 5-120(B) should be revised to expressly state that safe harbor statements are subject to the duty of confidentiality. (See above section IV.B.)

(3) Whether the safe harbor provision that permits a lawyer to warn of danger should be expressly restricted to dissemination of information only to the extent that it is reasonably necessary to protect an individual or the public. (See above section IV.C.)

(4) Whether, as a policy matter, the right of response in paragraph (C) should be retained. (See above section IV.D.)

(5) Whether the black letter of the rule should be revised to clarify that the general prohibition applies to statements made by or on behalf of the lawyer who is subject to paragraph (A), including lawyers associated in a firm or government agency. (See above section IV.E.)

IX. Research Resources:

- [Civil Code § 47\(d\)\(2\)\(A\)](#) (re: privileged publication or broadcast)
- [California Rules of Court, Appendix C, proposed guideline 8](#) (public comment)
- [Gentile v. State Bar of Nevada](#) (1991) 501 U.S. 1030 [111 S.Ct. 2720]
- [Standing Committee on Discipline of the United States District Court v. Yagman](#) (9th Cir. 1995) 55 F.3d 1430
- [Ramirez v. Trans Union, LLC](#) (N.D. Cal. 2013) 2013 WL 1164921, 2013 U.S. Dist. Lexis 39120g

