

21-0001 [Jury Pool Pollution]

I. Issues/Questions

- A. Is it a violation of either Rule 3.5 or 3.6 for an attorney to make a public accusing a prosecuting agency of making its charging decisions based on race, sex, or another prohibited classification?
- B. Does Rule 3.5 prohibit an attorney from broadcasting otherwise inadmissible information including accusations of race-based charging, outside the context of a specific case, to the public?
- C. Does Rule 3.6 prohibit an attorney from broadcasting otherwise inadmissible information including accusations of race-based charging, outside the context of a specific case, to the public?

II. Background and Authorities

- A. Rule 3.5 governs contact with Judges, Officials, Employees, and Jurors. Rule 3.5(g)(3) specifically prohibits contact with a juror “to influence the juror’s actions in future jury service.” For the purpose of Section 3.5, a juror is any “empaneled, discharged, or excused juror.”
- B. California Code of Civil Procedure section 206 governs contact with jurors after a criminal trial, and section 194 provides specific definitions.
 - 1. The broadest definition of any body of jurors is “Source List,” which is the list containing the names of potential jurors.
 - 2. Section 206 refers to “jurors” and “jury,” which would seem to correlate to section 194 definitions of “Trial Juror” and “Trial Jury.” These mean “those jurors sworn to try and determine by verdict a question of fact” and “a body of persons selected from the citizens of the area served by the court and sworn to try and determine by verdict a question of fact” respectively.
 - 3. Comment [2] to Rule 3.5 directs attorneys to review Code of Civil Procedure 206 for guidance on communications with jurors in criminal actions. While not conclusive on that question, it would seem that Rule 3.5 would therefore apply the definitions applicable in 206, i.e., those laid out in section 194.
 - i. Within this context, there have been two ethics opinion regarding former rule 7-106(D) (corresponding to current rule 3.5): 1976-39 and 1987-95, the latter of which was a reconsideration of the former.
 - ii. Ethics Opinion 1976-39 was pithy, cited Texas Ethics opinion 278 (1964) and ABA Code of Professional Responsibility Canon 9, and concluded that “a prosecuting attorney should refrain from making [‘comments to inform individual members of the jury, after the trial of a criminal case, of facts not admissible at the trial which are of a prejudicial or aggravating nature, such as the defendant’s prior convictions for similar crimes’], even in circumstances where it is not intended to harass, embarrass or influence the juror” since they believed “such conduct is improper and unethical.”
 - iii. Ethics opinion 1987-95 delved deeper into the issue, narrow though it was. The issue the committee considered at that time was “whether counsel may or may not discuss with jurors after trial evidence which

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was excluded from their consideration during trial.” The opinion concluded, “absent some manifestation of an intent to harass, embarrass or influence jurors in future jury service, communications with jurors after trial regarding evidence excluded from their consideration are not prohibited” and “to the extent our prior Opinion No. 1976-39 is inconsistent with this opinion, it is disapproved.”¹

- iv. Based on a fair reading of these sources, Rule 3.5, section 206 of the Rules of Civil Procedure, and past ethics opinions all interpret the “jurors” with whom contact is governed to be those who were trial jurors on a trial jury as defined by section 194 of the Code of Civil Procedure.
- v. In conclusion, Rule 3.5 does not govern statements made by an attorney to the general public, regardless of the content of those statements. Accordingly, no workable hypothetical can be created in which Rule 3.5 would address the issues.

- C. Rule 3.6 governs pretrial publicity and states in pertinent part, 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.
 - 1. Rule 3.6 governs Prosecutors and Criminal defense counsel. Prosecutors also have guidance from case law and Rule 3.8(e) for pretrial publicity. Generally, cases are unhelpful as to attacks on prosecuting agencies as parties. Logic dictates that since prosecuting agencies have very limited ability to appeal, it is unlikely that a appellate case law will provide useful in that context.
 - 2. Comment [1] to Rule 3.6 provides insight into the complexity of such statements and lists factors that may be considered in determining whether a statements falls afoul of rule 3.6, including whether the information publicly provided is clearly inadmissible, whether the information is known to be false or deceptive or violative of B&P 6068(d), or Rule 3.3.
 - 3. Application of 3.6 is also complex because it has First Amendment implications. For instance, in *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, the First District Court of Appeal reviewed a defamation suit by an attorney who was accused in the press of relying on forged documents to pursue a lawsuit. The court considered 1) whether the statement was merely a reiteration of the claim of defense (it was); 2) whether a jury pool for the case had been formed; and 3) whether the claim included inadmissible evidence or secret information that the aggrieved party claims is inadmissible was presented. In *Argentieri*, the Court found none of these factors to weigh in favor of a violation of 3.6.

¹ It should be noted that the logic of 1987-95 might merit revisiting, since it is based upon 1984-83, which might be considered stale since the rules were brought more in line with ABA rules in 2018, but this is a rabbit hole. It is unlikely that it would change, but I did not track down more recent opinions to address the relationship between CA and ABA rules.

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4. On its face, Rule 3.6 concerns statements made to the general public, not containing the implicit limitations of rule 3.5 to specific jurors and juries.
5. Based on the foregoing, the proper framework for addressing the issues is Rule 3.6

III. Discussion and Potential Hypotheticals

- A. The California State Bar is committed to reforming the criminal justice system to make it more effective and to remove any systematic or systemic racism. Individual attorneys may also be committed to the same. Whether or not reform is intended, however, even the public statements of a criminal defense attorney is governed by Rule 3.6.
- B. Recent events have highlighted certain claims by criminal defense firms in which accusations of rampant racism and unethical activity feature heavily. E.G., the conflict in Yolo County, which grabbed headlines in the summer of 2020:
<https://www.abc10.com/article/news/local/yolo-county-district-attorney-on-racial-allegations/103-3cebb0a4-a9e9-431b-bd13-88f1c54184f8>
- C. It is likely that future protests will erupt, that reform will continue to be a goal, and that prosecuting agencies will continue to be held accountable at the ballot box. However, reform must not be used as an excuse to corrupt the trial process.
- D. Scenarios:
 1. Scenario One: Criminal defense attorney agrees to give an interview concerning general trends in California criminal law and the need for legislative action on reform. The criminal defense attorney cites national statistics regarding incarceration percentages by race and gender to point out disparities. Defense attorney also provides information regarding certain crimes and the statistics regarding how often those criminal statutes are used by race or gender. This takes place while the defense attorney is engaged in the defense clients of a protected class (gender or race).
 2. Scenario Two: Criminal defense attorney representing a client whose charges are reported in the media. In the press conference, defense indicates they believe their client was targeted due to minority status, which will be a part of their defense. This takes place while the defense attorney is engaged in the defense clients of a protected class (gender or race).
 3. Scenario Three: Criminal defense attorney representing a private person who they believe is being treated unfairly by news media responds that public media are biased for reasons of gender or race. This takes place while the defense attorney is engaged in the defense clients of a protected class (gender or race).
 4. Scenario Four: Criminal defense attorney, at public protest in solidarity with organization that premise is that police and prosecutors conduct illegal and race or gender-specific charging decisions in violation of state law. During the public protest, the attorney makes the statement that they are aware that the county district attorney makes race-based decisions. This takes place while the defense attorney is engaged in the defense clients of a protected class (gender or race).