

**COPRAC**  
**MEMORANDUM**

TO: COPRAC  
FROM: Rule 3.6/4.1 Working Group (Cassidy Chivers, Vikita Pointdexter, Deepika Ravi & Brandon Krueger)  
DATE: June 7, 2024  
RE: CJA Proposed Revisions to Rule 3.6 and 4.1

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**SUMMARY**

We have been tasked to consider the California Judges Association's (CJA) proposal to revise CRPC 3.6 and 4.1. The proposal was precipitated by escalating threats to the safety of bench officers, including death threats. These threats often follow public criticism by attorneys who disagree with a targeted judge's rulings. Thus, attorneys have a responsibility to consider these dangers when making public statements to the media or through social media in the course of representing a client.

**Proposal**

From the CJA:

**INTRODUCTION:**

Bench officers are increasingly the subjects of personalized attacks and baseless accusations of improper conduct. Such attacks jeopardize public trust and confidence in our legal system and the judiciary. They have also led to threats and even violence against judges and court staff and their families. These attacks are often made to exert undue influence on judges and threaten judicial independence, which is the foundation of our system of justice. The California Code of Judicial Ethics hampers a bench officer's ability to respond to these accusations and attacks, further diminishing the public's understanding of and trust in our courts.

The California Judges Association asks COPRAC and the California State Bar to lead the way in addressing a dangerous trend that not only threatens the safety of court personnel, but also threatens our entire legal system. Thank you for your consideration.

**PROPOSED LANGUAGE:**

**Rule 3.6**

a. A lawyer who is participating ... will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter or (iii) **have a substantial likelihood of placing the safety of any judicial officer or other person associated with the**

**proceeding, or the judicial officer's or other person's immediate family, in jeopardy.**

#### Rule 4.1

In the course of representing a client a lawyer shall not knowingly: ...

or **(c) make a false or misleading statement of a material fact to the media or social media.**

### **Initial Assessment**

The Working Group reviewed and discussed the proposed revisions and it is our initial assessment that:

- We agree that the safety concerns expressed by the CJA are legitimate, important and urgent. However, revisions to the rules may not be the best way to address those concerns.
- Existing rules prohibit the same conduct and communications that are targeted by the proposed revisions. E.g.:
  - CRPC 8.4(c): “It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation.”
  - CRPC 8.4(d): “It is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice.”
  - CRPC 4.1(a): “In the course of representing a client a lawyer shall not knowingly: make a false statement of material fact or law to a third person.” (We questioned whether “media” and “social media” could be included in the definition of “person,” which means “a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.” See, CRPC 1.01(g-1), citing Cal. Evid. Code § 175.)
- A few of us questioned whether the revisions are narrowly tailored to survive constitutional scrutiny. That is, the prohibition against making “misleading” statements to the “media” or “social media” casts a wide net to include statements that may not pose any risk or threat of violence to bench officers, and thus may serve to unduly chill the free speech rights of the speaker.
- In any event, we agreed that instead of revising the Rules (or even adding comments to existing Rules) – which could take years for their adoption – a better approach is to issue a brief ethics opinion or perhaps an Alert.

### **Initial Action Plan**

We would like to discuss the Working Group’s initial assessment at the next Committee meeting. In advance of the meeting, time permitting, we will research whether ethics opinions or other authorities have addressed application of existing rules to public comments by lawyers that engenders threats and risks to the safety of bench officers. We may also want to discuss our assessment with the CJA requesters, and specifically discuss whether they have considered

whether existing Rules adequately address their concerns, and if so, the reasons they believe they are not adequate.