

Rule 3.6 Trial Publicity
(Proposed Rule Adopted by the Board on November 17, 2016)

- (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 Business and Professions Code § 6068(e) and rule 1.6, lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, general area of residence, and occupation of the accused;
 - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable* lawyer would believe is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be

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

- (d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] Whether an extrajudicial statement violates this rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code § 6068(d) or rule 3.3; (iii) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Business and Professions Code § 6068(a) and rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

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

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

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 5-120 (Trial Publicity) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard. In addition, the Commission considered the national standard of ABA Model Rule 3.6 (Trial Publicity). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 3.6 (Trial Publicity).

Rule As Issued For 90-day Public Comment

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

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

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

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

Proposed rule 3.6 carries forward the substance of current rule 5-120. The few significant changes to the current rule include the following. In paragraph (a), the “knows or reasonably should know standard” is moved in front of two roman numerals that were added to clarify the

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

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

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.6 [5-120]

Commission Drafting Team Information

Lead Drafter: Karen Clopton

Co-Drafters: Jeffrey Bleich, George Cardona, Joan Croker

I. CURRENT CALIFORNIA RULE

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.

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. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.6 [5-120]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.6 [5-120]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.6 [5-120] 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 Business and Professions Code § 6068(e) and rule 1.6, lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, general area of residence, and occupation of the accused;
 - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable* lawyer would believe is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be

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

- (d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] Whether an extrajudicial statement violates this rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code § 6068(d) or rule 3.3; (iii) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Business and Professions Code § 6068(a) and rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

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

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

Rule 3.6 [5-120] 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 Business and Professions Code § 6068(e) and rule 1.6, lawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
 - (2) ~~the~~information contained in a public record;
 - (3) that an investigation of ~~the~~a matter is in progress;
 - (4) the scheduling or result of any step in litigation;

- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe that there exists the likelihood of substantial* harm to an individual or to the public interest but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, general area of residence, and occupation, ~~and family status~~ of the accused;
 - (b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (C) Notwithstanding paragraph (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: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the ~~member~~ lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code ~~section~~ § 6068(d) or rule 3.3; (iii) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality ~~for~~ for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Business and Professions Code § 6068(a) and rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

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

~~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. RULE HISTORY

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

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.

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

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

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).

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)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule.

Commission Response: No response required.

2. OCTC is concerned with the use of the term “knows” in regards to section (ii) of Comment 1 for the reasons expressed in OCTC’s comments to proposed Rules 1.9 and 3.3 and the General Comments sections of this letter.

Commission Response: The Commission disagrees that “knows” is an inappropriate standard for this rule. Under proposed Rule 1.0.1(f), although “knows” means actual knowledge of the fact in question, that knowledge may be inferred from the specific circumstances.

3. OCTC is also concerned that section (ii) of Comment [1] may allow misleading statements. (See OCTC comments to proposed Rule 3.3; *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to statements that may be misleading or true statements that might imply or suggest through innuendo false conclusions. The Review Department concluded that on its face the language of Canon 5 only reached factual misrepresentations.].) California law has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truth, and false statement of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.)

Commission Response: Comment 1 enumerates factors to consider in applying the rule and does not limit the scope of the rule to false statements. In addition, the Comment incorporates by reference Bus. & Prof. Code § 6068(d) that imposes a duty to use means consistent with truth and not seek to mislead a tribunal by an artifice.

4. OCTC supports Comment [2].

Commission Response: No response required.

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

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. All three comments agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. 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.”

2. 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.”

3. 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.

4. 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.

B. ABA Model Rule Adoptions

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 September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_6.authcheckdam.pdf [last checked 2/7/17]
- 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

IX. 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

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.

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)).
4. 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]).
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.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together

with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. The changes to paragraph (a) are substantive. (See Section IX.A.1, above.)
2. The changes to paragraph (b)(6) are substantive. (See Section IX.A.3, above.)
3. Proposed new paragraph (d) is a substantive change. (See Section IX.A.4, 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.
 - 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 IX.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 IX.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 IX.A.2, above.)

E. Alternatives Considered:

1. (See Section IX.B, above.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.6 [5-120] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.6 [5-120] in the form attached to this Report and Recommendation.