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Trial publicity

PROPOSED RULE 3.6

By Vince Parrett

Trials. Americans are fascinated by them; the media loves to report them; California lawyers talk endlessly about them on TV and social media in 24-hour news cycles.

Indeed, California lawyers have never been shy of talking before cameras about trials. Until 1994, California was the only state in America that had no rule of professional conduct regulating lawyers on trial publicity. What changed in 1994? The O.J. Simpson murder trial and the Trial TV industry it spawned — which prompted the California Legislature and California State Bar one year later to enact Rule 5-120 to rein in what some saw as trial publicity run wild.

The first principle of California Rule 5-120, following existing ABA Rule 3.6, prohibits a lawyer from making statements to the media that the lawyer "knows or reasonably should know" will have "a substantial likelihood of materially prejudicing an adjudicative proceeding." Cal. Rule 5-120(A); ABA 3.6(a) (same).

And now the California State Bar has proposed amendments to this rule on trial publicity, including renaming it as California Rule of Professional Conduct 3.6 to mirror ABA Rule 3.6 ever more closely. If the proposed amendments are adopted by the California Supreme Court, there are three substantive changes to this rule that lawyers need to know about:

Substantive Change #1: Knowledge standard of proposed Rule 3.6(a) applies both to public dissemination and likelihood of material prejudice.

Proposed Rule 3.6(a) revises current Rule 5-120(A) as follows:

(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.

Before this proposed change, some argued that it was ambiguous whether the knowledge standard — "knows or reasonably should know" — applied to the means-of-public-communication element. So this change now makes clear that the knowledge standard applies both to the means of public dissemination and likelihood of material prejudice.

Substantive Change #2: Proposed Rule 3.6(b)(6) only permits warnings that are reasonably necessary to protect health and safety rather than vague "public interest."

Proposed Rule 3.6(b)(6) revises current Rule 5-120(B)(6) as follows:

(b) Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code subdivision (e) and rule 1.6, lawyer may state:

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public.

By deleting the vague term "public interest" and limiting dissemination of this type of information to that which is reasonably necessary to avoid harm, this proposed change would focus on protecting health and safety rather than on the unspecified "public interest."

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The media's satellite dishes covering the O.J. Simpson trial, Los Angeles in 1995.

Substantive Change #3: Proposed Rule 3.6(d) extends Rule 3.6(a)'s prohibition against extrajudicial statements to all lawyers associated in a firm or agency with the trial lawyer.

Adding a new paragraph to the current rule, proposed Rule 3.6(d) provides:

(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).

While the commentary in the Discussion Section of current Rule 5-120 explains that its prohibition against extrajudicial statements in "Paragraph (a) is intended to apply to statements made by or on behalf of the member," proposed Rule 3.6(d) would expressly impose a compliance obligation on all other associated lawyers in a law firm or government agency — regardless of whether they are making the statement "on behalf of" the trial lawyer in their firm or agency. Given the massive size of some law firms and agencies trying cases today, proposed Rule 3.6(d) could greatly expand the reach of the Rule 3.6(a).

But the right of retaliation remains unchanged in proposed Rule 3.6(c)

While California lawyers do need to be aware of the three substantive changes above, it is perhaps just as important to know that the right of response, which some call retaliation, remains unchanged in proposed Rule 3.6(c):

(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.

Although some criticize this provision as an "exception that swallows the rule," California lawyers have always (long before and long after the O.J. trial) protected their clients' interests by correcting false and misleading trial publicity started by others. It's a tradition of the California bar. Especially in this era of multimedia, social media, and 24-hour news cycles, this right of response may be more important now than ever.

Vince Parrett *is a partner with Bergeson LLP.*