

Rule 3.6: Trial Publicity

1. Current Kentucky Rule with Official Comments:

SCR 3.130(3.6) Trial publicity

(a) A lawyer 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.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an

accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b)(1-5) (sic), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(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:

(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.

Supreme Court Commentary

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily

entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(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 ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it and~~ will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

~~(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:~~

~~(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;~~

~~(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;~~

~~(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;~~

~~(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;~~

~~(5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or~~

~~(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.~~

~~(e) (b) Notwithstanding paragraphs paragraph (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:~~

~~(1) The general nature of 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 that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;~~

(4) ~~The~~ the scheduling or result of any step in litigation;

(5) A a request for assistance in obtaining evidence and information necessary thereto;

(6) A 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) ~~It~~ in a criminal case, in addition to subparagraphs (1) through (6):

(i) ~~The~~ the identity, residence, occupation and family status of the accused;

(ii) ~~If~~ if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) ~~The~~ the fact, time and place of arrest; and

(iv) ~~The~~ 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).

~~Supreme Court Commentary Comment~~

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

~~No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.~~

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

[3] The Rule sets forth a basic general prohibition against a lawyer=s making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer=s statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of

paragraph (a). Paragraph (b) is not intended to be 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).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person=s refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even

less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party=s lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer=s client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) Background for the Committee’s Recommendation: The current KRPC 3.6 is identical to the MR 3.6 enforce in 1990 when the Supreme Court adopted Kentucky’s version of the MR. The ABA has revised MR 3.6 twice since 1990, but Kentucky has never revised its 1990 Rule.

(2) The first MR revisions resulted from the US Supreme Court decision in Gentile v. St. B. Nev., 501 U.S. 1030 (1991). The Supreme Court Ruled that Nevada’s virtually identical Rule to MR 3.6 was void for vagueness. In a close decision the Court found that permitting a lawyer to state without elaboration the general nature of the claim or defense as provided in paragraph (c) (the so-called safe-harbor provision) conflicted with the paragraph (b) warning that listed kinds of statements that are ordinarily likely to be prejudicial. The Rule provided no principled guidance on when statements crossed the line from permissible ‘general’ to prohibited ‘elaboration.’

(3) The second round of MR 3.6 revisions occurred as a result of the Commission’s 2002 review of all the MR.

(4) Recommendation: The proposed KRPC 3.6 adopts all MR 3.6 changes. In so doing the Committee's recommendation results in these significant changes to the current KRPC 3.6:

(a) Paragraph (a) is changed to:

(i) Narrow the lawyers covered by the Rule to only those lawyers participating in or who have participated in the investigation or litigation of a matter.

(ii) Replace "reasonable person" with "reasonable lawyer" to reflect the view that lawyers should only be subject to professional discipline when their judgments are unreasonably inconsistent with those of their professional peers.

(iii) Replace "would expect" with "knows or reasonably should know" to use wording consistent with the terminology as defined in Rule 1.0(f) and (j).

(b) The phrase "without elaboration" is deleted from the safe-harbor provisions in old paragraph (c), now re-lettered as paragraph (b).

(c) New paragraph (c) is added allowing a lawyer to 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.

(d) Paragraph (b) of the current KRCP 3.6 enumerating six areas in which public comment is more likely than not to have a material prejudicial effect on a proceeding is removed from the Rule and added as Comment [5].

(e) New paragraph (d) is added making the Rule applicable to other lawyers in a firm or government agency associated with a lawyer subject to the Rule.

(f) Six new Comments are added. Five of the six provide guidance on applying the Rule. New Comment [8] adds a cross reference to the paragraph in Rule 3.8 that sets forth special duties of prosecutors with respect to extrajudicial statements.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 3.6 from MR 3.6.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.