

c. CROSS REFERENCES:

- (1) Rule 1.2 Establishment and Scope of Representation
- (2) Rule 3.3 Candor and Obligations Toward the Tribunal
- (3) Rule 3.4 Fairness to Opposing Party and Counsel

6. RULE 3.6 EXTRA-TRIBUNAL STATEMENTS

a. A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

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 (including before a military tribunal or commission), or any other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action, and the statement relates to:

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

(2) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any forensic 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 an accused or suspect in a criminal case or other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action;

(5) information the covered attorney knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of

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materially prejudicing an impartial proceeding;

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

(7) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense.

c. Notwithstanding paragraphs a and b(1) through (7), a covered attorney involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim, offense, 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 or regulation, 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 the 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):

(a) the identity, duty station, occupation, and family status of the accused;

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

(c) the fact, time, and place of apprehension; and

(d) the identity of investigating and apprehending officers or agencies and the length of the investigation.

d. Notwithstanding paragraphs a and b(1) through (7), a covered attorney may make a statement that a reasonable covered attorney would believe is required to protect a client from the

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substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

e. The protection and release of information in matters pertaining to the Department of the Navy is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (e.g., the Manual of the Judge Advocate General).

f. COMMENT

(1) It is difficult to strike a balance between protecting the right to a fair trial or proceeding and safeguarding the right of free expression. Preserving the right to a fair proceeding necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly when trial by jury or members is involved. If there were no such limits, the result would be the practical nullification of the protective effects 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.

(2) No body of rules can simultaneously satisfy all interests of fair proceedings and all those of free expression. The formula in this rule is based upon the ABA Model Rules of Professional Conduct and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

(3) Paragraph a provides the general prohibition against release of extrajudicial statements that are reasonably known to carry the substantial likelihood of material prejudice. Paragraph b contains a non-exclusive list of subjects that presumptively result in material prejudice and must be considered specifically prohibited absent unique or compelling circumstances. Paragraph c identifies a non-exclusive list of

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specific matters about which a covered attorney's statement would not ordinarily be considered to present a substantial likelihood of material prejudice and should not, in most instances, be considered prohibited by paragraph a.

(4) 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 covered attorney would believe a public response is required in order to avoid prejudice to the covered attorney'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.

(5) Paragraph e acknowledges that a covered attorney's release of information is governed not only by this Rule but also by Federal statutes and regulations. Prior to releasing any information, a covered attorney should consult the appropriate statute, directive, regulation, or policy guideline.

g. CROSS REFERENCES

- (1) Rule 1.6 Confidentiality of Information
- (2) Rule 3.4 Fairness to Opposing Party and Counsel
- (3) Rule 3.5 Impartiality and Decorum of the Tribunal
- (4) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel

7. RULE 3.7 ATTORNEY AS WITNESS

a. A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness except when:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and quality of legal services rendered in the case; or
- (3) disqualification of the covered attorney would work substantial hardship on the client.

b. A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely

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