



## ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

### OPINION 731

#### **Extrajudicial Statements Featuring Displays of Seized Contraband Are Prohibited by *Rule of Professional Conduct 3.6***

The Advisory Committee on Professional Ethics received an inquiry from a prosecutor regarding the public display of drugs, weapons, or other contraband seized during a criminal investigation. The New Jersey Supreme Court previously decided that such extrajudicial speech by prosecutors violates *Rule of Professional Conduct 3.6*, as the contraband may be suppressed and the pretrial statement is likely to prejudice the criminal proceeding. The Committee is not persuaded by Inquirer's argument that the Court undermined or intended to reverse its prior precedent when it amended the *Rules* in 2004. Accordingly, extrajudicial statements featuring displays of seized drugs, weapons, or other contraband do not accord with *Rules of Professional Conduct 3.6* and 3.8 and are not permitted.

The inquiry is governed by *Rule of Professional Conduct 3.6* (Trial Publicity), which provides:

(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 have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(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.

Official Comment by Supreme Court (November 17, 2003)<sup>1</sup>:

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 other than the victim of a crime, 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.

*Rule of Professional Conduct 3.8 (Special Responsibilities of a Prosecutor)* provides:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

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<sup>1</sup> The Court approved revisions to the *Rules of Professional Conduct* on November 17, 2003, but the amendments did not become effective until January 1, 2004.

(c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and

(2) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

The New Jersey Supreme Court has consistently taken the position – since at least the 1980s – that public display of evidence, such as seized drugs and other contraband, is an extrajudicial statement that is prohibited under *Rule of Professional Conduct* 3.6 and its predecessor *Disciplinary Rule* 7-107.<sup>2</sup> In a March 16, 1989, Notice to the Bar, the Court stated:

The Supreme Court of New Jersey has recently had occasion to remind attorneys of the importance of adherence to ethical mandates in connection with extrajudicial comments by prosecutors in criminal trials. Extrajudicial comments on the alleged motives of the accused are inappropriate, *as is the public production of any physical evidence such as seized drugs, confiscated weapons, or other captured contraband.*

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<sup>2</sup> The *Disciplinary Rules* were replaced by the *Rules of Professional Conduct* in 1984. *Disciplinary Rule* 7-107(B)(6) expressly prohibited lawyers from making statements that relate to “[a]ny opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.”

[123 *N.J.L.J.* 638 (March 16, 1989) (emphasis supplied).]

In 1982, the New Jersey Supreme Court addressed prejudicial pretrial publicity, the First Amendment, and defendants' rights to a fair trial in two companion cases. One case concerned extrajudicial speech by a criminal defense lawyer (*In re Hinds*) and the other concerned speech by a prosecutor (*In re Rachmiel*). In *In re Hinds*, 90 *N.J.* 604 (1982), the Court found that the public has "an interest in a fair trial that cannot be imperiled or diminished by out-of-court assertions by either defense or prosecution lawyers." *Id.* at 615. The Court explained: "This interest in trial fairness is particularly acute in the criminal context. There, the problem of preserving the basic fairness and integrity of the proceeding is of constitutional dimension because the defendant's right to a fair trial is guaranteed in the Sixth Amendment of the federal Constitution." *Id.* at 616 (citations omitted). The Court acknowledged the legitimate reasons lawyers make certain extrajudicial statements but found that it must balance the competing interests. "The reconciliation of intersecting values in the administration of criminal justice – the rights of an accused and society's needs for safety and protection – constitutes one of the most difficult and sensitive tasks of government." *Id.* at 624. Restrictions on lawyers' extrajudicial speech "discourage and prevent extraneous matters from being insinuated into a criminal case. Such outside influences, if left unchecked, could divert the search for truth and wreck the intricate machinery of the criminal justice system." *Id.* at 625.

In *In re Rachmiel*, 90 *N.J.* 646 (1982), the Court found that there is a rebuttable presumption that statements on topics such as the "quality of the evidence" are likely to affect the criminal proceeding. *Id.* at 657. The Court noted that attorneys for the prosecution or defense in a pending criminal case "have a unique role and responsibility in the administration of criminal justice and, therefore, have an extraordinary power to undermine or destroy the efficacy

of the criminal justice system.” *Id.* at 656. The Court reiterated: “The State’s strong concern and society’s great interest in the proper administration of the criminal justice system cannot be overemphasized. Judicial fairness, integrity and efficacy are sufficiently important objectives to justify a speech restriction that seeks to insure that criminal proceedings will not be frustrated or undermined.” *Id.* at 657.

In 1991, the United States Supreme Court, in *In re Gentile*, connected the ethical restrictions to “the theory upon which our criminal justice system is founded: The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, *evidence which might never be admitted at trial* and ex parte statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.” 501 *U.S.* 1030, 1070, 111 *S.Ct.* 2720, 2742, 115 *L.Ed.* 2d 888, 920 (1991) (emphasis supplied).

In 2002, the Supreme Court Commission on the Rules of Professional Conduct (Pollock Commission) reviewed New Jersey’s *Rules* in light of revisions made by the American Bar Association to the *Model Rules*. At that time, New Jersey *Rule of Professional Conduct* 3.6 contained three paragraphs: paragraph (a) set forth the general standard that a lawyer shall not make an extrajudicial statement that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding”; paragraph (b) listed statements that are likely to have a materially prejudicial effect; and paragraph (c) listed statements that are generally permissible. The Commission recommended that the list of extrajudicial statements likely to have a materially prejudicial effect (paragraph b) be deleted; that a new paragraph permitting a lawyer to make extrajudicial statements in response to recent adverse publicity initiated by others be added; and

that the general restrictions only apply to lawyers who are involved in the investigation or litigation. Pollock Commission Report, pages 23-24 (December 2, 2002), 11 *N.J.L.* 2413 (December 16, 2002).

The Commission also recommended changes to *Rule of Professional Conduct* 3.8. The entire discussion in the Commission Report on this *Rule* is set forth below:

The present version of MRPC 3.8 prohibits a prosecutor from: (1) issuing a subpoena to an attorney to present evidence about a past or present client except under limited circumstances and (2) making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless the statements are necessary to inform the public of the prosecutor's action and serve a legitimate law enforcement purpose. When our RPCs were adopted in 1984, these provisions did not exist in the version of the MRPC reviewed and recommended for adoption by the New Jersey Supreme Court Committee.<sup>3</sup> Our Commission favors adding these provisions to RPC 3.8.

The Supreme Court reviewed the Commission's recommendations. In its Administrative Determinations (September 10, 2003), the Court adopted the Commission's recommendations on revisions to *Rule of Professional Conduct* 3.6, but instead of deleting the list of "impermissible" statements entirely, it placed that list in an "Official Comment" to the *Rule*. With regard to *Rule of Professional Conduct* 3.8, the Court modified the *Rule* to incorporate comments made by the New Jersey Office of the Attorney General, Division of Criminal Justice, pertaining to subpoenas issued to lawyers in grand jury or other criminal proceedings (paragraph e). Neither the Court nor the Attorney General's Office appeared to have specifically focused on the new paragraph (f), regarding extrajudicial statements that may heighten public condemnation but would serve a legitimate law enforcement purpose and inform the public of the nature and extent

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<sup>3</sup> Paragraph (f) of *Model Rule of Professional Conduct* 3.8 was added in 1994, at the same time the ABA substantially revised *Model Rule of Professional Conduct* 3.6.

of the prosecutor's action. Nor was there a discussion of public display of seized contraband or any indication that the Court intended to supersede its prior precedent.

The ABA, in its Comments to *Model Rule of Professional Conduct* 3.6, did not relax existing rules on public display of contraband. Rather, it takes the position that if there were no restrictions on extrajudicial statements, "the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence." Comment [1]. Comment [5] specifies "certain subjects that are more likely than not to have a material prejudicial effect on a proceeding . . . [such as a statement about] the identity or nature of physical evidence expected to be presented . . . ." Comment [5(3)]. Hence, the *Model Rule*, then and now, prohibits descriptions or displays of seized contraband.

*ABA Model Rule of Professional Conduct* 3.8(f), reviewed by the Pollock Commission and the Court, prohibits statements "that have a substantial likelihood of heightening public condemnation of the accused," excepting statements that "are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose." Comment [5] to this *Model Rule* states:

Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b).



Hence, the Comment clarifies that *Rule of Professional Conduct* 3.8(f) supplements *Rule of Professional Conduct* 3.6 and does not supersede or negate those restrictions. The purpose of paragraph 3.8(f) is explained in *The Law of Lawyering*:

Because the focus is no longer chiefly the fairness of the trial itself, one important interest the paragraph seeks to protect is the reputation of an accused *who is later acquitted*. Of course, comments heightening public condemnation of a defendant before trial might also prejudice the trial, in which case the prosecutor would be in violation of both Rule 3.8(f) and Rule 3.6(a).

Rule 3.8(f) contains an exception for necessary statements involving public information and legitimate law enforcement. One can readily imagine examples: a classic case for triggering the exception might be where an accused has escaped from prison after murdering a guard; prosecutors would surely be permitted to issue a warning that the accused is “armed and dangerous,” even though that would increase public hostility.

[*The Law of Lawyering*, Hazard, Jr., G., Hodes, W., Jarvis, P., § 37.09 page 37-19 (4<sup>th</sup> ed. 2016).]

Some jurisdictions, such as New York, have retained a portion of *Disciplinary Rule* 7-107(C)(7) (the predecessor to *Rule of Professional Conduct* 3.6), which expressly provided that lawyers may state, “at the time of the seizure, a description of the physical evidence seized, other than a confession, admission, or statement.” New York *RPC* 3.6(c)(7)(iv). New Jersey did not retain this language when it adopted *Rule of Professional Conduct* 3.6 in 1984. As noted in *Professional Responsibility in Criminal Defense Practice*, the phrase was deleted from the 1984 *ABA Model Rule of Professional Conduct* 3.6 because:

[s]uch evidence is frequently subject to pretrial motions alleging improper warrant, absence of probable cause, and other grounds for suppression. . . . Permitting publicity at the time of seizure can circumvent the effect of suppression by placing in public circulation evidence not admissible at trial. *See Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966).

[*Professional Responsibility in Criminal Defense Practice*, Hall, Jr., J., (3d ed. 2005), pages 498-99.]

Like New York, the United States Department of Justice authorizes prosecutors to “describe” items seized at the time of arrest. 28 C.F.R. § 50.2(b)(6)(v). The same regulation, however, infuses a note of caution:

Because of the difficulty and importance of the questions they raise, it is felt that some portions of the matters covered by this statement, such as the authorization to make available Federal conviction records and a description of items seized at the time of arrest, should be the subject of continuing review and consideration by the Department on the basis of experience and suggestions from those within and outside the Department.

[28 C.F.R. § 50.2(a)(4).]

This Committee agrees that caution is warranted. Prosecutors have “the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” *Model Rule of Professional Conduct 3.8* Comment [1]. In addition, when it comes to extrajudicial speech, prosecutors “have an extraordinary power to undermine or destroy the efficacy of the criminal justice system.” *In re Rachmiel, supra*, 90 N.J. at 656. Extrajudicial statements serve various purposes, such as enhancing the visibility of the police, furthering good relations within the law enforcement community, or publicly highlighting a campaign to aggressively fight drug trafficking. Prosecutors must weigh competing interests when engaging in extrajudicial speech – and be aware that their motives, when commenting about cases outside the courtroom, are not unidimensional.

Inquirer states that there currently is an opioid crisis in New Jersey and law enforcement is actively investigating and seizing illegal drugs and weapons. “[T]here are occasionally large-scale seizures from major drug trafficking rings involving multiple kilograms and millions of

dollars' worth of contraband.” He asserts that display of such contraband by prosecutors would further public awareness of the drug epidemic and “underscore[] to criminal trafficking organizations that law enforcement efforts in the State are robust, and may deter organizations from transporting the illegal substances locally.” He suggests that public display of contraband will “encourag[e] citizens to engage in public discourse about these issues and [] cooperate with law enforcement in our efforts to combat the crisis.” Lastly, he notes that other states, such as New York, permit prosecutors and police to display seized contraband at public events.<sup>4</sup>

Inquirer argues that the prior New Jersey Supreme Court precedent construing *Rule of Professional Conduct* 3.6 was superseded by the 2004 amendment to *Rule of Professional Conduct* 3.8. *Rule of Professional Conduct* 3.8(f) permits statements that “have a substantial likelihood of heightening public condemnation of the accused” when such statements are “necessary to inform the public of the nature and extent of the prosecutor’s action and would serve a legitimate law enforcement purpose.” Inquirer asserts that, because of the current opioid epidemic, public display of confiscated drugs and weapons are necessary and will serve law enforcement purposes and, therefore, should be permitted under *Rule of Professional Conduct* 3.8(f).

This argument sweeps away the focus of *Rule of Professional Conduct* 3.8(f) – “necessary” statements that “heighten[] public condemnation of the accused.” As noted above, the classic example of such a statement concerns a criminal defendant who has murdered a guard in an escape from prison prior to trial; the prosecutor may publicly state that the defendant is

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<sup>4</sup> Pursuant to *Rule of Professional Conduct* 3.8(f), prosecutors shall “exercise reasonable care” to prevent police and related personnel from making an extrajudicial statement that the prosecutor is prohibited from making under *Rule of Professional Conduct* 3.6. Hence, if the prosecutor may not display seized contraband, the police may not do so.

“armed and dangerous.” In that case, the public warning heightens public condemnation of the accused but is also necessary to protect the public against an immediate harm and serves law enforcement purposes. The inquirer’s argument that public display of confiscated drugs, weapons, or other contraband serves a “legitimate law enforcement purpose” because it heightens public awareness of the drug epidemic and “underscore[] to criminal trafficking organizations that law enforcement efforts in the State are robust” is overbroad. There would be very little left of the prohibition against prejudicial extrajudicial statements if mere heightened public awareness of (thus leading presumably to enhanced general apprehension about) criminal activity was sufficient to justify extrajudicial statements by prosecutors. “Legitimate law enforcement purpose” only covers communications that are necessary to protect against or alert the community about a *specific and current* danger to public safety.

Moreover, we believe that communications that go beyond what is minimally required for the public to achieve an objective understanding of *what* specific actions were taken by the prosecutor, and amount to an explanation or justification of *why* the prosecutor took those actions, are not “*necessary* to inform the public of the nature and extent of the prosecutor's action” within the meaning of RPC 3.8(f). *Rule of Professional Conduct* 3.8(f) presents a narrow exception to the prohibition on statements that will heighten public condemnation of the accused; it does not supersede or negate the general provisions of *Rule of Professional Conduct* 3.6. When the New Jersey Supreme Court amended our *Rules of Professional Conduct* 3.6 and 3.8 in 2004, there was no change to the preexisting law on permitted or prohibited extrajudicial statements, including public displays of drugs, weapons, or other contraband.

All agree that the current opioid crisis in New Jersey is frightening and tragic. It is hoped that law enforcement, medical providers, and addiction support services will increase their

efforts and employ all lawful measures to attempt to stem this epidemic. Extrajudicial statements featuring displays of seized drugs, weapons, or other contraband, however, do not accord with *Rules of Professional Conduct* 3.6 and 3.8 and are not permitted.