BENCH-BAR-PRESS COMMITTEE OF WASHINGTON

STATEMENT OF PRINCIPLES

PREAMBLE

The Bench, Bar and Press (comprising all media of mass communication)

of Washington:

(a) Recognize that reporting by the news media of governmental action,

including the administration of justice, is vital to our form of government

and protected by the Constitutions of the United States and the State of

Washington.

(b) Seek to preserve the constitutionally protected presumption of

innocence for those accused of a crime until there has been a finding of

guilt in the appropriate court of justice.

(c) Believe both constitutional rights can be accommodated without

conflict by careful judicial craftsmanship and careful exercise of

discretion by the bench, the bar, and the news media.

PRINCIPLES

To promote a better working relationship between the bench, bar and

news media of Washington, particularly in their efforts to protect both the

constitutional guarantees of freedom of the press and of the right to a

fair and impartial trial, the following statement of principles is

suggested for voluntary consideration to all members of these professions

in Washington. Any attempt to impose these Principles and Considerations as

mandatory is contrary to the intent of the Bench-Bar-Press Committee and

contrary to the stated goals of these Principles and Considerations.

1. Accurate and responsible reporting of the news media about crime,

law enforcement, and the criminal justice system enhances the

administration of justice. Members of the bench and bar should make

available information concerning that process to the fullest extent

possible under their codes of conduct and professional responsibility.

2. Parties to litigation have the right to have their causes tried by

an impartial tribunal. Defendants in criminal cases are guaranteed this

right by the Constitutions of the United States and the State of

Washington.

3. Lawyers and journalists should fulfill their functions in such a

manner that cases are tried on the merits, free from undue influence by the

pressures of news media reports. To that end, the timing and nature of

media news reports should be carefully considered. It is recognized that

the existence of news coverage cannot be equated with prejudice to a fair

trial.

4. The news media recognize the responsibility of the judge to preserve

courtroom decorum and to seek to ensure both the open administration of

justice and a fair trial through careful management.

5. A free press requires that journalists decide the content of news.

Journalists in the exercise of their discretion should remember that

readers, listeners, and viewers are potential jurors.

6. The public is entitled to know how justice is being administered.

However, lawyers should be aware that the timing and nature of publicity

they create may affect the right to a fair trial. The public prosecutor

should avoid taking unfair advantage of his position as an important source

of news, even though he should release information about the administration

of justice at the earliest appropriate times.

7. Proper judicial, journalistic and legal training should include

instruction in the meaning of constitutional rights to a fair trial, open

justice and freedom of the press, and the role of judge, journalist and

lawyer in guarding these rights. The bench, the bar and the press will

endeavor to provide for continuing education to members of each respective

profession concerning these rights.

8. Open and timely communications can help avoid confrontations. Toward

that end all parties are urged to employ the Bench-Bar-Press Committees

Liaison Subcommittee when conflicts or potential conflicts arise.

CONSIDERATIONS IN THE REPORTING

OF CRIMINAL PROCEEDINGS

The Bench-Bar-Press Committee offers the following recommendations for

voluntary consideration of all parties. They may be of assistance in

educating law enforcement, the press, bar and bench concerning the exercise

of rights, duties and obligations outlined in the Statement of Principles.

The bench, bar, press, and law enforcement officials share in the

responsibility for the administration of an open and fair system of

justice. Each has a special role which the others should respect and none

should try to regulate the judgment of the others.

Public interest in the administration of justice may be particularly

great at times prior to trial. Pretrial proceedings often are as important

to the open administration of justice as the actual trial. The bench should

help ensure both openness and fairness through commonly accepted judicial

procedures consistent with these principles. The bar should carefully

consider the timing and nature of the publicity it creates. The media

should contribute to openness and fairness by careful evaluation of

information that may be kept from the jury at trial and by exercise of

restraint in reporting that information.

All parties should be aware that the jury system has the capacity to

provide unprejudiced panels even in cases of great public interest and

substantial media coverage.

1. It is appropriate to make public the following information

concerning the defendant:

(a) The defendants name, age, residence, employment, marital status,

and similar background information. There should be no restraint on

biographical facts other than accuracy, good taste, and judgment.

(b) The substance or text of the charge, such as complaint, indictment,

information and where appropriate, the identity of the complaining party.

(c) The identity of the investigating and arresting agency and the

length of the investigation.

(d) The circumstances immediately surrounding an arrest, including the

time and place of arrest, resistance, pursuit, possession and use of

weapons, and a description of items seized at the time of arrest.

2. The release of certain types of information by law enforcement

personnel, the bench and the bar and the publication thereof by news media

generally tends to create dangers of prejudice without serving a

significant law enforcement or public interest function. Therefore, all

concerned should be aware of the dangers of prejudice in making pretrial

public disclosures of the following:

(a) Opinions about a defendants character, his guilt or innocence.

(b) Admissions, confessions or the contents of a statement or alibis

attributable to a defendant.

(c) References to the results of investigative procedures, such as

fingerprints, polygraph examinations, ballistic tests, or laboratory tests.

(d) Statements concerning the credibility or anticipated testimony of

prospective witnesses.

(e) Opinions concerning evidence or argument in the case, whether or

not it is anticipated that such evidence or argument will be used at trial.

Exceptions may be in order if information to the public is essential to

the apprehension of a suspect or where other public interests will be

served.

3. Prior criminal convictions are matters of public record and are

available to the news media through police agencies or court clerks; law

enforcement agencies should, if requested, make such information available

to the news media. The public disclosure of this information by the news

media may be highly prejudicial without any significant addition to the

publics need to be informed. The publication of such information should be

carefully considered.

4. Law enforcement and court personnel should not prevent the

photographing of defendants when they are in public places outside the

courtroom. They should not encourage pictures or televising nor should they

pose the defendant. The media should recognize that a judge is subject to

the Code of Judicial Conducts Canon 3(7) which provides:

A judge may permit broadcasting, televising, recording, and taking

photographs in the courtroom during sessions of the court, including

recesses between sessions, under the following conditions:

(a) Permission shall have first been expressly granted by the

judge and under such conditions as the judge may prescribe;

(b) The media personnel will not distract participants or

impair the dignity of the proceedings; and

(c) No witness, juror, or party who expresses any prior

objection to the judge shall be photographed nor shall the testimony

of such a witness, juror, or party be broadcast or telecast.

Notwithstanding such objection, the judge may allow the broadcasting,

televising, recording, or photographing of other portions of the

proceedings.

Artists renditions sketched in the courtroom are not governed by this

canon and should not be curtailed unless such actions unduly distract

participants or impair the dignity of the proceedings.

5. Photographs of a suspect may be released by law enforcement

personnel provided a valid law enforcement function is served thereby. It

is proper to disclose such information as may be necessary to enlist public

assistance in apprehending fugitives from justice.

6. The media are free to report what occurs in the course of judicial

proceedings. All participants in the administration of justice should work

to keep the entire course of judicial proceedings, including pretrial

hearings, open to public scrutiny. The bench should consider using all the

means available to ensure protection of a defendants constitutional rights

without interfering with the publics scrutiny of the criminal justice

system. The closure of a judicial proceeding should be used only as a last

resort.

7. The bar and law enforcement officials should expect that their

statements about a case will be reported in the media. Such statements

should be made in a time and manner contributing to public understanding of

law enforcement and the criminal justice system, rather than influencing

the outcome of a criminal trial.

RPC 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 the lawyer knows or reasonably should know will be disseminated by means of public communication and 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) 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 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 the 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).

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.

[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 commentsin these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] [Washington revision] Finally, extrajudicial statements that might otherwise raise a question under thisRule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer or LLLT , or third persons, where a reasonable lawyer would believe a public response isrequired 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 theadjudicative 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.

[Comment [7] amended effective April 14, 2015.]

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

RPC 3.8

SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

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(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 Rule 3.6 or this Rule.

Comment

[1] [Washington Revision.] A prosecutor has 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. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[5] 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) or 3.6(c).

Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.