

# THE PITFALLS OF LITIGATING IN THE PRESS

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Gibson Dunn Annual MCLE Blitz  
Ethics Panel

**GIBSON DUNN**

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# THE NUTS & BOLTS OF TRIAL PUBLICITY

01

# The Basics

## Rule 3.6(a)

### California Rule of Professional Conduct 3.6:

“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.”

- **Bottom line:** Attorneys should not engage in speech that may undermine the fairness of trial.
- Aligns closely with ABA Model Rule 3.6. Most states have similar rule.

# The Basics

## Rule 3.6(a)

- “**knows or reasonably should know**”
  - Means **actual knowledge** or what a lawyer of “**reasonable prudence and competence**” would know
- “**substantial likelihood**”
  - More than just a possibility; requires **significant risk** of prejudice
- “**materially prejudicing**”
  - Depends on the facts of each case, considering scope of publicity, audience, context, and what is already known to the public
  - Focus is on **prejudice** to the **right to fair trial**

# Safe Harbors

## Rule 3.6(b)

Notwithstanding Rule 3.6(a), a lawyer may state:

- The **claim, offense, or defense** and **identity of persons** (if not prohibited)
- Information in a **public record**
- **Investigation of matter is in process**
- **Scheduling** and **results** of litigation
- **Requests for assistance** in evidence-gathering
- **Warnings of imminent harm** if necessary to protect the public
- **Basic information about the accused** and **procedural facts** (criminal matters)

# Right of Reply

## Rule 3.6(c)

- Attorneys may also make a statement that a reasonable lawyer would believe is required to **protect a client from substantial undue prejudicial effect of recent publicity not initiated** by the lawyer or their client.
- The response must be limited to what's necessary to mitigate adverse publicity.



# Beyond Rule 3.6: Other Ethical Considerations

- Even if permitted under Rule 3.6, attorneys should keep in mind other ethical considerations when speaking about litigation:
  - **Rule 4.1: Truthfulness in Statements to Others**
    - Attorneys may not knowingly make a false or misleading statements during representation
  - **Rule 1.6 / Cal. Bus. & Prof. Code 6068(e): Client Confidentiality**
    - Attorneys must not disclose client confidences
  - **Rule 8.2 Judicial Officials: Truthfulness in Statements about Judicial Officers**
    - Attorneys must not make false/reckless statement about qualifications or integrity of a judge
  - **Cal. Bus. & Prof. Code 6106: Disbarment for Acts of Dishonesty**
    - “commission of any act involving moral turpitude, dishonesty or corruption” is grounds for disbarment

# Beyond Rule 3.6: Defamation Risks

- Even ethically permissible statements can lead to potential **defamation** risk
- Elements:
  - **(1) Assertion of fact**
    - Opinions v. facts
    - Context, language, and audience expectations matter
    - Use of figurative or hyperbolic language
    - Can statement be proven true or false with objective evidence?
  - **(2) Falsity**
  - **(3) Actual malice\***
    - \* Required for statement re: public figure
    - Knowledge of falsity or reckless disregard as to truth or falsity
    - Lower standard (negligence+) to get presumed or punitive damages when about a private figure, but matter of public concern

*Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995).

## Beyond Rule 3.6: Litigation Privilege

- Communication made (1) in **judicial or quasi-judicial proceeding** by (2) a **litigant or other authorized participant** to (3) **achieve the objects of the litigation**, and which has (4) some **connection or logical relation to the action**.

*Silberg v. Anderson*, 50 Cal. 3d 205 (1990); Cal. Civ. Code § 47(b).

- Privilege is absolute and covers allegedly false or fraudulent statements.
- Covers all torts except malicious prosecution.  
*Albertson v. Raboff* 46 Cal. 2d 375 (1956).

## Beyond Rule 3.6: Litigation Privilege

- Privilege is broad, but not infinite.
- ✓ Statements made **in judicial proceedings** (e.g., court filings, hearings, testimony, etc.) are covered
- ✗ Does not extend to **press releases** or **public relations campaigns**  
*Rothman v. Jackson*, 49 Cal. App. 4th 1134 (1996).
- ? **Pre-litigation statements** (e.g., demand letter)
  - Applicability may depend on whether made in “good faith contemplation of a lawsuit.”  
*Dickinson v. Cosby*, 17 Cal. App. 5th 655 (2017).

## Beyond Rule 3.6: Fair and True Report Privilege

- Under California Civil Code § 47(d), a statement is privileged if it is:  
  
“a **fair and true report** in, or a communication to, a **public journal**, of (A) a **judicial**, (B) **legislative**, or (C) other **public official proceeding**, or (D) of anything said in the course thereof . . . .”
- Minor inaccuracies don't destroy privilege and some flexibility or literary license is permitted. However, the report must be **fair** and **substantially accurate**.
- Unlike other states (e.g., New York), statement must be made to or by a news organization (a “public journal”).
- Cannot claim privilege if it violates Rule 3.6.


# CASE STUDIES

## ETHICS IN PERSPECTIVE

02

**Gentile v.  
State Bar of  
Nevada  
501 U.S. 1030  
(1991)**

**METRO MISSING \$2.5 MILLION IN DRUGS, CHECKS**



**Jury indicts vault owner on \$2.5 mil. theft charge**

By Pauline Bell and Harold Hyman  
SUN Staff Writers

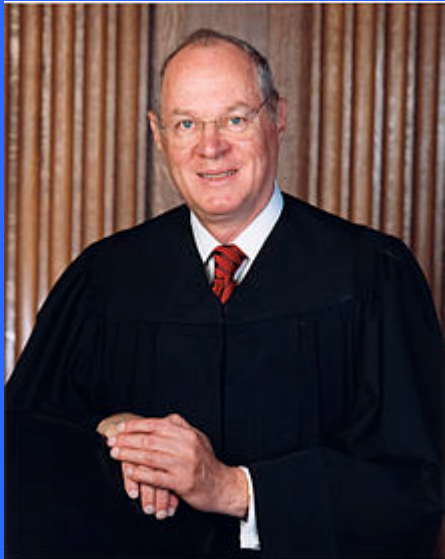
The owner of the now defunct Western Vault Corp. was indicted by a Clark County grand jury Friday on charges he stole \$2.5 million in cash, coins, jewelry and other merchandise, including about \$1.3 million worth of drugs and travelers checks belonging to Metro Police, from safe deposit

Attorney Dominic Gentile says client is "scapegoat."

SUN photo by LEE ZAIC

However, the attorney for businessman Grady Sanders said his client is being set up as "the scapegoat" for the Metro detective who really stole the checks and cocaine. Evidence presented at trial will prove Sanders innocent, said defense lawyer Dominic P. Gentile.

***Gentile v.  
State Bar of  
Nevada***  
**501 U.S. 1030  
(1991)**



- **Holding**: A state bar may only prohibit attorney from making public statement if it would result in “substantial likelihood of material prejudice” to the fairness of the proceedings.
- Considerations:
  - Balance between lawyer’s **First Amendment rights** and state’s interest in **fair trial**.
  - Attorneys have special duties and influence which justify **stricter speech limits** than those for the press or the general public.
  - “**Substantial likelihood**” standard is flexible, but not impermissibly vague.



# *J-M Manufacturing v. Phillips & Cohen* 247 Cal. App. 4th 87 (2016)

News | November 15, 2013



## JM Eagle Faces Billions In Damages After Jury Finds JM Liable For Fraud For Making And Selling Faulty Water System Pipes

*Formosa Plastics agrees to pay \$22.5 million settlement*

Los Angeles, CA / JM Eagle  
claims to be the largest  
entities substandard  
country – opening

As a result of the d

"JM Eagle defrauded its customers for 10 years," Havian continued. "The jury obviously decided that JM Eagle management cared only about the amount of pipe JM produced, not the quality of that pipe. JM Eagle deceived outside inspection agencies and ignored over a decade of failing test results. The jury's conclusion that JM Eagle committed fraud was based on a lot of evidence."

- Defamation and trade libel claims based on statement that jury found JM's pipes were "faulty," "substandard," "weak," and "shoddy."
- **Issue:** Were statements false? Does fair report privilege protect press release?

# *J-M Manufacturing v. Phillips & Cohen* 247 Cal. App. 4th 87 (2016)

## Findings:

*“JM Eagle faces billions in damages after jury finds JM liable for making and selling faulty water system pipes.”*

→ Headline not misleading when “read and considered with the press release as a whole.”

*“The trial exposed JM Eagle's deliberate efforts to cut costs by using shoddy manufacturing practices to make weaker but more profitable polyvinyl chloride (PVC) pipe.”*

→ Protected by fair report privilege because it was “fair characterization of the trial evidence” and no reasonable reader would consider it part of the jury’s verdict.

*“This likely will mean damages could total billions of dollars because it’s expensive and disruptive to replace water pipe.”*

→ Nonactionable opinion about potential damages.

**HYPOTHETICALS**  
**ETHICAL AND LEGAL**  
**RISKS FOR THE**  
**UNWARY**

**03**

# Hypothetical 1: The High-Profile Press Conference

You represent a whistleblower in a huge fraud case against a government contractor. Shortly after filing the lawsuit, you hold a press conference and make the following statement:

**“The evidence we have is irrefutable, and we will prove in court that this company deliberately defrauded taxpayers.”**

The company sues for defamation and claims the statements were inflammatory and prejudiced the potential jury pool.

# Hypothetical 1: The High-Profile Press Conference

**“The evidence we have is irrefutable, and we will prove in court that this company deliberately defrauded taxpayers.”**

## **Discussion Questions:**

- Does this statement violate any ethical rule(s)?
- Does the attorney’s statement fall within the safe harbor provisions for public comments under Rule 3.6?
- Would the timing of the press conference (before any discovery) affect the likelihood of material prejudice to the proceedings?
- Defamation risk? Does litigation privilege apply?

# Hypothetical 2: The High-Profile Criminal Proceeding

PRESS RELEASE

## Luigi Mangione Charged with the Stalking and Murder of UnitedHealthcare CEO Brian Thompson and Use of a Silencer in a Crime of Violence

Thursday, December 19, 2024

Share >

For Immediate Release

Office of

A criminal complaint was unsealed today charging Luigi Mangione with the stalking and murder of Brian Thompson, CEO of UnitedHealthcare, in Maryland, in connection with the Dec. 4 murder of UnitedHealthcare CEO Brian Thompson in Midtown Manhattan. Mangione was taken into federal custody and is being held in federal custody. He is scheduled to appear in federal court this afternoon in Manhattan federal court before U.S. Magistrate Judge Robert M. Winkler of the Southern District of New York.

"Today, the Justice Department has brought federal murder charges against Luigi Mangione, who is accused of the stalking and murder of UnitedHealthcare CEO Brian Thompson in Maryland, in connection with the Dec. 4 murder of UnitedHealthcare CEO Brian Thompson in Midtown Manhattan. Mangione was taken into federal custody and is being held in federal custody. He is scheduled to appear in federal court this afternoon in Manhattan federal court before U.S. Magistrate Judge Robert M. Winkler of the Southern District of New York."



# Hypothetical 2: The High-Profile Criminal Proceeding

**“As alleged, Mangione planned his attack for months and stalked his victim for days before murdering him — methodically planning when, where, and how to carry out his crime.** I am grateful to our state and local law enforcement partners for their tireless efforts to locate and apprehend the defendant and to ensure that he answers for his alleged crime.”

- Attorney General Merrick B. Garland

“Brian Thompson was **gunned down in cold blood** as he walked down a street in midtown Manhattan,” said Acting U.S. Attorney Edward Y. Kim for the Southern District of New York. **“Thompson was allegedly killed just because he held the position of chief executive officer of a health insurance company. As alleged, Luigi Mangione traveled to New York to stalk and shoot Thompson in broad daylight in front of a Manhattan hotel, all in a grossly misguided attempt to broadcast Mangione’s views across the country. But this wasn’t a debate, it was murder, and Mangione now faces federal charges.** This office and its law enforcement partners remain steadfast in our commitment to fight violence in whatever form it takes.”

*A criminal complaint is merely an allegation. All defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.*

# Hypothetical 2: The High-Profile Criminal Proceeding



“This is a young man,” [Mangione’s lawyer] said. “He is being treated like a human ping-pong ball between two warring jurisdictions here.”

She also accused state and federal authorities of treating Mr Mangione like "**political fodder**" and a "**spectacle**" by bringing him back to New York by helicopter, surrounded by officials and armed guards, in full view of cameras and journalists.

The judge, Gregory Carro, said that he is unable to control what happens outside court, but vowed that Mr Mangione would receive a fair trial.

In response, the state's prosecutor said that **he had never seen a case with a "higher volume" of quality evidence.**

Source: *Luigi Mangione pleads not guilty to murdering healthcare CEO*, BBC (Dec. 23, 2024)



# Hypothetical 3: The Splashy Complaint



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 22 Plaintiff,  
 23 v.  
 24 WAYFARER STUDIOS LLC, a California  
 25 Limited Liability Company, JUSTIN BALDONI,  
 26 an individual, JAMEY HEATH, an individual,  
 27 STEVE SAROWITZ, an individual, MELISSA  
 28 NATHAN, an individual, THE AGENCY GROUP  
 PR LLC, a Delaware Limited Liability Company,  
 JENNIFER ABEL, an individual, RWA  
 COMMUNICATIONS, LLC, a California Limited  
 Liability Company, JED WALLACE, an  
 individual, STREET RELATIONS INC., a  
 California Corporation, and DOES 1-100,  
 Defendants.

NBC NEWS POLITICS U.S. NEWS LOCAL WORLD BUSINESS SPORTS EDITORS' PICKS SHOPPING TIPLINE WATCH LIVE

POP CULTURE NEWS

## What to know about the Blake Lively and Justin Baldoni drama: Legal complaint, PR accusations and more

Lively has alleged that her "It Ends With Us" co-star and director created a hostile work environment and tried to ruin her reputation. Baldoni denied the accusations.

### *It Ends With Us*' Jenny Slate Calls "Attack" on Blake Lively's Reputation "Terribly Dark, Disturbing"

Jenny Slate, who starred alongside Blake Lively and Justin Baldoni in *It Ends With Us*, shared her support for "loyal friend" Lively, who filed a complaint against Baldoni for sexual harassment.

By JESS COHEN DEC 24, 2024 7:10 AM TAGS

COMPLAINT FOR DAMAGES

- (1) SEXUAL HARASSMENT (CAL. GOV. CODE, § 12940/TITLE VII OF THE CIVIL RIGHTS ACT (CAL. GOV. CODE, § 12940));
- (2) RETALIATION (CAL. GOV. CODE, § 12940/TITLE VII);
- (3) FAILURE TO INTERFERE WITH EXERCISE OF RIGHTS (CAL. GOV. CODE, § 12940);
- (4) RETALIATION (CAL. GOV. CODE, § 1102.5);
- (5) AIDING AND ABETTING SEXUAL HARASSMENT AND RETALIATION (CAL. GOV. CODE, § 12940);
- (6) BREACH OF CONTRACT;
- (7) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;
- (8) NEGLIGENCE;
- (9) FALSE LIGHT INVASION OF PRIVACY (CAL. GOV. CODE, § 1708.5);
- (10) INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE.

TODAY ON THE SHOW SHOP WELLNESS PARENTS FOOD LIFE GIFT GUIDES SIGN UP / SIGN IN

## Why is Blake Lively suing Justin Baldoni? A timeline of 'It Ends with Us' controversy

Lively filed a complaint accusing Baldoni, her costar and director of "It Ends with Us," of sexual harassment and retaliation.

BUSINESS INSIDER

## The 5 biggest allegations from Blake Lively's complaint against Justin Baldoni

# TAKEAWAYS FOR ATTORNEYS

04

# Practical Lessons for Attorneys

1. PR can be a powerful tool to help achieve your litigation objectives – but don't let it spoil your case.
2. Be truthful, be fair, and stick to the facts.
3. The litigation and fair report privileges are broad – but there are limits.

# Questions?

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