

[CAPTION]

**MOTION FOR PROTECTIVE ORDER PROHIBITING THE PARTIES, COUNSEL, LAW
ENFORCEMENT OFFICIALS AND COURT PERSONNEL FROM DISSEMINATING
INFORMATION OR RELEASING ANY EXTRA-JUDICIAL STATEMENTS BY MEANS OF
PUBLIC COMMUNICATION**

The Defendant, by counsel, respectfully requests this Court for a Protective Order preventing the parties to this cause, law enforcement officials, or court personnel from making extra-judicial statements or otherwise disseminating information concerning this cause by any means of public communication. In support of said Motion, the Defendant states the following:

1. The above entitled cause has received extensive treatment in the local news media.
2. The media accounts concerning this cause have contained an undue number of extra-judicial statements by [insert law enforcement officers/prosecutors/other] relating not only to the progress of the investigation, but conclusions by the [insert officers/prosecutors/others]_calculated to prejudice the Defendant. An example of the media reports containing said extra-judicial statements are attached hereto and referenced as Exhibits A.
3. The additional extra-judicial statements to the news media is likely to produce a result of undue prejudice in the community so as to deprive the Defendant of a fair trial guaranteed by Article 1, Sec. 13 of the Indiana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, the Defendant, by counsel, respectfully requests that this Court enter a Protective Order directing the parties, counsel, law enforcement officials, and court personnel to refrain from making any further extra-judicial statements relating to this cause and to refrain from further dissemination of information concerning this cause by way of public communication, and for all other relief just and proper in the premises.

(Signature)


REFERENCES



CASEBANK D.1.b; N.1.d


Indiana Rules of Professional Conduct, Rule 3.6 (precludes lawyers from making extrajudicial statements that have a "substantial likelihood of materially prejudicing" the proceeding; it also contains a list of presumptively prejudicial and permitted statements).


National Prosecution Standards 107 (2d Ed. 1991) published by National District Attorneys Association.

CASE LAW

Gentile v. State Bar of Nevada, [111 S.Ct. 2720](#)  (1991) (invalidating part of Nevada's Rule 3.6 on vagueness grounds; however, opinion does not clarify boundaries of permitted extrajudicial speech). NOTE: Indiana's Rule 3.6 includes the same "substantial likelihood" standard as Nevada's rule did. See [25 Ind. L. Rev. 1331, 1336](#) [Shepardize](#) (1992).

Buckley v. Fitzsimmons, [113 S.Ct. 2606](#)  (1993) (prosecutors do not enjoy absolute immunity in actions brought under [42 USC 1983](#) [Shepardize](#) for damages arising from extrajudicial statements made by prosecutor). See Simms v. Barnes, [689 N.E.2d 734](#)  (Ind.Ct.App. 1997).

South Bend Tribune v. Elkhart Circuit Court, [691 N.E.2d 200](#)  (Ind.Ct.App. 1998) (gag order did not provide a restraint on media, and was justified in light of surrounding facts; the trial court was in the best position to determine that there was a reasonable likelihood that pretrial publicity would prejudice a fair trial and that only effective remedy was order restraining parties from discussing case with the media).

In re Litz, [721 N.E.2d 258](#)  (Ind. 1999) (defense counsel's comments to local newspapers which stated that defendant had been in jail for eighteen months for crime she did not commit, that she passed lie detector test, and that prosecutor's decision to retry case was abominable violated Rule of Professional Conduct 3.6).

Matter of Brizzi, [962 N.E.2d 1240](#) [Shepardize](#) (Ind. 2012) (Prosecutor engaged in misconduct by making public statements that he knew or should have known would have a substantial likelihood of materially prejudicing adjudicative proceedings and a substantial likelihood of heightening public condemnation of criminal defendants in violation of Rules of Professional Conduct 3.6(a) and 3.8(f). Rules do not require a finding of actual prejudice to defendants, but rather a substantial likelihood of heightened public condemnation of the accused. Here, press release re: murder case did not include the required explanation that a charge is merely an accusation and the defendant is presumed innocent until proven guilty. Rule 3.6(b)(2) permits statements re: "information contained in a public record," but not prosecutor's own opinion about evidence or defendant's guilt. Also not likely probable cause affidavits or repeating information in media accounts. There was no evidence that any of Respondent's statements were meant to serve such law enforcement purposes as protecting potential victims or apprehending suspected perpetrators still at large. In performing his important responsibility of apprising the public of activities in his office, Respondent stepped well beyond the bounds permitted by Rules 3.6 and 3.8).

NOTE

While lawyers should avoid making spontaneous comments, a curt "no comment" should be usually avoided in favor of some explanation about the restrictions on lawyers' speech. See Shapiro, "Using the

Media to Your Advantage", *Indiana Defender*, August 1993, page 22.