

**WHO TELLS THEIR STORIES?: EXAMINING THE
ROLE, DUTIES, AND ETHICAL CONSTRAINTS OF
THE VICTIM’S ATTORNEY UNDER
MODEL RULE 3.6**

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In U.S. criminal proceedings, the prosecution typically presents the victim’s story. However, as part of the victims’ rights movement, victims are striving to make their voices heard and tell their stories in their own words. Yet, despite the growing role victims occupy in criminal proceedings and the rights afforded to victims by the Crime Victims’ Rights Act and its state counterparts, victims still remain nonparties in criminal proceedings.

As victims increasingly retain private lawyers to help navigate criminal proceedings and represent their interests, it is important to understand how these lawyers fall within the traditional two-party adversary system. Limited by the current criminal process, one way that victims’ lawyers might help protect their clients’ interests is by engaging in extrajudicial commentary. Model Rule 3.6 of the Model Rules of Professional Conduct—the ethics rule governing trial publicity—restricts materially prejudicial statements made by participating trial lawyers. This Note examines the application of Model Rule 3.6 to victims’ lawyers, looking to the text of the model rule and its purposes. After finding Model Rule 3.6’s text ambiguous, this Note argues that policy concerns guiding the victims’ rights movement and related laws protecting victims’ interests outweigh the justifications for Model Rule 3.6’s strictures. Ultimately, this Note argues that Model Rule 3.6 should not apply to victims’ lawyers.

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INTRODUCTION

A year after Jeffrey Epstein was charged with sex trafficking conspiracy and sex trafficking underage individuals,¹ Ghislaine Maxwell—his former girlfriend and alleged partner in the conspiracy—was arrested outside her New Hampshire residence, after fleeing from authorities.² Maxwell was initially indicted on six counts, stemming from her role “in the sexual exploitation and abuse of multiple minor girls” by Epstein,³ but less than a year later, two more counts were added, alleging, among other charges, sex trafficking conspiracy and sex trafficking of a minor.⁴

Given the defendants’ celebrity status, the cases garnered significant media attention.⁵ The victims retained counsel, who spoke at length to the press.⁶ In response to these public comments, Maxwell’s lawyers requested an order prohibiting prosecutors and counsel for witnesses—specifically counsel for the victims—from making extrajudicial statements,⁷ pursuant to Local Criminal Rule 23.1 of the United States District Courts for the Southern and Eastern Districts of New York (“Rule 23.1”).⁸

In denying Maxwell’s motion for a gag order, Judge Alison J. Nathan stated that the court expected that “counsel for all involved parties” would comply with the court’s local rules and with the rules of professional responsibility.⁹ Still, the order left open the question of whether victims’

1. See Sealed Indictment at 1, 11–12, United States v. Epstein, No. 19-cr-00490 (S.D.N.Y. July 2, 2019).

2. See Nicole Hong et al., *Ghislaine Maxwell, Associate of Jeffrey Epstein, Is Arrested*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/07/02/nyregion/ghislaine-maxwell-arrest-jeffrey-epstein.html> [<https://perma.cc/6JKU-UWB3>].

3. Sealed Indictment at 1, United States v. Maxwell, No. 20-cr-00330 (S.D.N.Y. June 29, 2020). The eighteen-page indictment focused particularly on three underage victims who were groomed by Maxwell. See generally *id.* at 5–9.

4. See Superseding Indictment at 17, 19, United States v. Maxwell, No. 20-cr-00330 (S.D.N.Y. Mar. 29, 2021).

5. Jeffrey Epstein was linked to numerous high-profile celebrities and politicians. See Ali Watkins & Vivian Wang, *Jeffrey Epstein Is Accused of Luring Girls to His Manhattan Mansion and Abusing Them*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/nyregion/jeffrey-epstein-sex-trafficking.html> [<https://perma.cc/B5RW-UC9F>]. After Epstein was found dead in his prison cell as he awaited trial, federal prosecutors focused their attention on Maxwell. See Hong et al., *supra* note 2.

6. See Letter Motion at 3–6, United States v. Maxwell, No. 20-cr-00330 (S.D.N.Y. July 21, 2020) (noting that the victims’ attorneys commented on the possibility of a plea deal, the defense’s potential strategy of blaming the victims and how that could backfire, and the victims’ impressions of Maxwell’s arrest and detention).

7. See *id.* at 1. Such a “gag order” bars prejudicial commentary by trial participants. Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 119 (1995). A gag order is geared toward potential future conduct and requires the court to consider and predict whether certain future statements are likely to prejudice a trial. See *id.* at 137.

8. See Letter Motion, *supra* note 6, at 1; S.D.N.Y. CRIM. R. 23.1. Local Criminal Rule 23.1 prohibits lawyers from releasing information or opinions in connection with pending criminal litigations with which they are associated when the release of the information or opinions would interfere with a fair trial. See S.D.N.Y. CRIM. R. 23.1(a).

9. Order, United States v. Maxwell, No. 20-cr-00330, slip op. at 1 (S.D.N.Y. July 23, 2020).

attorneys were counsel for an involved party who must adhere to the same ethical standards as the defense and prosecution.¹⁰ Rule 23.1 prohibits statements “in connection with pending or imminent criminal litigation with which [the lawyer is] associated.”¹¹ This emphasis on association leaves room for many lawyers to fall within the rule’s scope. Yet, Judge Nathan did not penalize the victims’ attorneys for their public comments on the case, which possibly violated multiple subsections of Rule 23.1.¹²

Although interpreting a local criminal rule, Judge Nathan’s emphasis on the rules of professional responsibility¹³ raises the question: how should the American Bar Association’s (ABA) Model Rule 3.6 (“the Rule” or “Rule 3.6”)—the rule governing trial publicity—apply to victims’ lawyers during criminal trials?¹⁴ Victims are often expected to be witnesses, but they are not parties to the case.¹⁵ But, in high profile cases like Maxwell’s, it is understandable why victims might want independent counsel to advocate and speak on their behalf.¹⁶ Indeed, at Maxwell’s pretrial detention hearing, it became clear that defense counsel would “mount a ‘blame the victim’ defense.”¹⁷ Yet, with little scholarship on how Rule 3.6 applies to victims’ lawyers, victims’ lawyers enter uncharted waters when seeking to adhere to the Rule’s ethical constraints while zealously advocating for their clients.

Rule 3.6 applies to attorneys “*participating . . . in the investigation or litigation of a matter*” and restricts them from making *materially prejudicial* statements publicly.¹⁸ Victims, despite their nonparty status, have great interests in criminal proceedings and are increasingly retaining attorneys to

10. *See id.* The order referenced “counsel for potential witnesses” but did not consider victims’ attorneys generally. *Id.*

11. S.D.N.Y. CRIM. R. 23.1(a).

12. *See* Letter Motion, *supra* note 6, at 5 (arguing that David Boies, the victim’s attorney, “offered his gratuitous critique of defense counsel, commented on the credibility of Ms. Maxwell . . . and commented on what Mr. Boies considers ‘evidence’ in this case, all in violation of subsections (1), (4), (6), and (7) of the Rule”).

13. *See Maxwell*, slip op. at 1.

14. The U.S. Supreme Court has noted that trial participants’ communications during trial may be subject to restrictions. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072–73 (1991). However, the Court has not addressed the constitutionality of a rule that regulates the statements of a lawyer who is not participating in the pending case. *See id.* at 1072 n.5. This leaves open the question of who is a lawyer “participating in” a case. *Id.*

15. *See infra* Part I.B.2.

16. Victims generally have no control over how the prosecution and defense will tell their stories. *See* Lara Bazelon & Bruce A. Green, *Victims’ Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 317 (2020). Yet, especially in a sexual assault case, a victim’s character and credibility are likely to come under tremendous scrutiny. *See* William T. Pizzi, *Victims’ Rights: Rethinking Our “Adversary System,”* 1999 UTAH L. REV. 349, 355. Thus, in a high publicity case where victims may expect defense counsel to engage in “victim blaming” publicly, victims may benefit from having independent counsel speak to the public on their behalf. *See generally infra* note 170 and accompanying text.

17. Patricia Hurtado, *Ghislaine Maxwell’s Attack-the-Victim Strategy May Backfire*, BNN BLOOMBERG (July 15, 2020), <https://www.bnnbloomberg.ca/ghislaine-maxwell-may-play-the-victim-card-in-trial-defense-1.1465631> [<https://perma.cc/6MLL-344F>] (quoting David Boies).

18. MODEL RULES OF PRO. CONDUCT r. 3.6 (AM. BAR ASS’N 2020) (emphasis added).

help protect those interests.¹⁹ However, it is not clear if victims' lawyers are participants in a criminal proceeding when they speak on behalf of their clients, in light of their clients' nonparty status.²⁰ Thus, beyond the plain text of Rule 3.6 and the literal interpretations of "participation," policy concerns arise both for and against its application to victims' lawyers.

This Note highlights arguments for both interpretations, considering: (1) the purposes of Rule 3.6 and the victims' rights movement and subsequent legislation and (2) whether the two can be balanced in today's criminal justice system. As discussed in Part III, this Note argues that such a balance is difficult to strike, but that the goals of the growing victims' rights movement ought to factor more heavily in considering the applicability of Rule 3.6 to victims' lawyers. Thus, to help realize the goals of the victims' rights movement and victims' rights legislation, this Note argues that Rule 3.6 should not apply to victims' lawyers.

Part I of this Note examines the issue of pretrial publicity and how Rule 3.6 seeks to address this concern. It discusses the current use of extrajudicial statements by the prosecution and defense and the application of Rule 3.6. Part I also discusses the rise of the victims' rights movement, the various rights afforded by the Crime Victims' Rights Act²¹ (CVRA), and the reasons why victims retain independent lawyers who may choose to communicate extrajudicially. Part II first considers whether, on its face, Rule 3.6 applies to victims' lawyers, ultimately finding the text of the Rule ambiguous. It then discusses the purposes behind Rule 3.6 and whether the purposes shed any light on its application to victims' lawyers. Lastly, Part II outlines the various policy concerns that drive the victims' rights movement and related legislation, examining how such policies might affect the application of Rule 3.6 to victims' lawyers. Part III argues that Rule 3.6, as it is currently written, should not be applied to victims' lawyers in light of the procedural constraints on victims' true participation in the trial and the underlying policy concerns of the victims' rights movement.

I. THE MODEL RULE, THE TRIAL, AND THE VICTIM

Pretrial publicity—and the threat that attorneys' extrajudicial commentary may pose to a criminal trial—has long been a guiding concern behind Rule

19. *See infra* Part I.C.1.

20. *See infra* Part II.A.3.

21. Pub. L. No. 108-405, tit. I, 118 Stat. 2261, 2261–65 (2004) (codified as amended in scattered sections of 18 and 34 U.S.C.).

3.6.²² Given Rule 3.6's emphasis on participating lawyers,²³ it is evident that the Rule applies to the prosecution and defense. Indeed, Rule 3.6 has served as a measure against extrajudicial commentary by prosecutors and defense attorneys.²⁴

In the last few decades, crime victims have begun to encompass a new role in the criminal trial—one that suggests victims may be participants. As victims' rights laws have been passed,²⁵ victims have been granted the right to meet with prosecutors, object to plea bargaining, make sentencing statements, and receive restitution.²⁶ Given these rights, a victim's role during the trial has gone beyond one of a mere witness.²⁷ Yet, it is unclear whether victims' attorneys should be subject to Rule 3.6's strictures, particularly in light of the importance of giving victims a voice.

On the other hand, extrajudicial commentary may be particularly damning to the modern trial, especially given the growing role the media plays in court proceedings²⁸ and the way such statements can be quickly disseminated—making it more difficult to find jurors unaffected by the media's framing of the case²⁹ or to ensure a fair trial for the accused.³⁰ Therefore, it is important to determine the victims' lawyers' role in the criminal trial by virtue of their unique clients and to determine whether the constraints of Rule 3.6 ought to apply to them as well.

With this question in mind, Part I.A focuses on Rule 3.6, examining pretrial publicity in criminal cases and discussing how the Rule applies to different situations involving the principal parties to the trial: the prosecution and the defense. Part I.B then examines victims' growing role in criminal trials and that role's codification in victims' rights legislation. Finally, Part I.C considers why victims might increasingly retain counsel during criminal proceedings and how these attorneys might utilize extrajudicial commentary to advocate for their client.

22. See generally Meghan Levine, Note, *The Competing Roles of an Attorney in a High-Profile Case: Trying a Case Inside and Outside of the Courtroom*, 28 GEO. J. LEGAL ETHICS 683, 685–93 (2015). An in-depth examination of the history and jurisprudence concerning Rule 3.6 and pretrial publicity is beyond the scope of this Note. For a detailed description of the history of limitations on pretrial publicity and the ABA's attempts to curb such publicity, see Mattei Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice*, 29 CAMPBELL L. REV. 497, 498–523 (2007).

23. See generally MODEL RULES OF PRO. CONDUCT r. 3.6.

24. See *infra* Part I.A.2.

25. See *infra* notes 101–05 and accompanying text.

26. See *infra* notes 108–13 and accompanying text; see also *infra* note 105.

27. See generally *infra* notes 115–19 and accompanying text.

28. See Roscoe C. Howard, Jr., *The Media, Attorneys, and Fair Criminal Trials*, 4 KAN. J.L. & PUB. POL'Y 61, 61 (1994).

29. See *id.* at 61–62.

30. See *id.* at 62.

A. Rule 3.6 and Extrajudicial Statements

A trial's impact can reach far beyond the courtroom walls. To protect the integrity and fairness of the justice system, the U.S. Supreme Court has acknowledged that states have an interest in regulating attorney speech.³¹ This section considers how Rule 3.6 seeks to curtail pretrial publicity and briefly highlights how the rule has been applied to prosecution and defense counsel.

1. Rule 3.6 as a Solution to Pretrial Publicity

Rule 3.6 states that a lawyer who is “participating in or has participated in the investigation or litigation of a matter” must not make extrajudicial comments that will be made public and have a “substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”³² Rule 3.6 attempts to preserve the defendant's right to a fair trial, based on the understanding that juries could be influenced by out-of-court statements.³³ Rule 3.6 is based on the assumption that attorneys are often a considerable source of pretrial publicity, and thus restricting their speech is a “significant aid” in controlling it.³⁴

Statements by participating lawyers can be particularly prejudicial, as noted by the Supreme Court.³⁵ Rule 3.6's scope thus reflects the presumption that participating attorneys' intimate knowledge and connection to the case suggest they have specialized information and speak from a place of authority.³⁶ Statements by nonparticipants are likely not as prejudicial.³⁷ Indeed, commentary to Rule 3.6 notes 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.”³⁸ Thus, for example, media commentators, who have limited information beyond that publicly available, can speak to the issues in cases.³⁹

Further, Rule 3.6 only restricts those statements that might materially prejudice the proceeding by introducing certain information to the potential jury pool.⁴⁰ Thus, certain statements will not violate Rule 3.6 regardless of whether the lawyer making the statements is participating in the

31. *See* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

32. MODEL RULES OF PRO. CONDUCT r. 3.6 (AM. BAR ASS'N 2020).

33. *See id.* at cmt. 1.

34. *See* Radu, *supra* note 22, at 532 (quoting *Chi. Council of Laws. v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975)).

35. *See* *Gentile*, 501 U.S. at 1074.

36. *See id.*

37. *See id.* at 1057 (opinion of Kennedy, J.) (conceding that “an attorney's speech about pending cases may present dangers that could not arise from statements by a nonparticipant”).

38. MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 3.

39. *See* Sarah K. Fleisch, Note, *The Ethics of Legal Commentary: A Reconsideration of the Need for an Ethical Code in Light of the Duke Lacrosse Matter*, 20 GEO. J. LEGAL ETHICS 599, 601–02 (2007) (noting that the regulations on trial publicity are concerned only “with respect to attorneys involved in a matter, and do[] not extend to attorneys who are not involved, but are commenting on such matters”).

40. *See* MODEL RULES OF PRO. CONDUCT r. 3.6(a); *id.* r. 3.6 cmt. 1.

proceeding.⁴¹ Particularly prejudicial statements are those that threaten the fairness of the proceeding for the defendant, who is entitled to a fair trial and a verdict based on the evidence introduced in the courtroom, not evidence or statements made outside the trial.⁴²

Every state has adopted a version of the Model Rules of Professional Conduct (“the Model Rules”),⁴³ with many also adopting Rule 3.6, either in its entirety or with modifications.⁴⁴ In *Gentile v. State Bar of Nevada*,⁴⁵ the U.S. Supreme Court considered the disciplining of a defense attorney under Nevada Supreme Court Rule 177, which mirrored Rule 3.6’s “substantial likelihood of material prejudice” test for extrajudicial statements,⁴⁶ after the attorney held a press conference to counter negative press against his client.⁴⁷ The Court overturned Gentile’s disciplinary action.⁴⁸ The Court found that participating attorneys’ speech may be limited when the restraint is narrowly tailored to meet the state’s interest.⁴⁹ Chief Justice William H. Rehnquist noted that, as representatives of clients in pending cases, lawyers are held to a higher ethical standard, and their First Amendment rights can be limited by ethical rules barring extrajudicial commentary.⁵⁰ Thus, the Court affirmed the constitutionality of the “substantial likelihood of material prejudice” test as a permissible balance between the First Amendment rights of lawyers and the state’s interest in fair trials.⁵¹ The Court, however, refrained from speaking to the constitutionality of a rule that prohibited statements by attorneys not participating in the case.⁵²

Still, despite its worthwhile goals, Rule 3.6 has faced criticism. In light of *Gentile*, some scholars have suggested that prohibiting attorney speech

41. The Rule outlines statements that would not likely be materially prejudicial to the proceeding. *See id.* r. 3.6(b).

42. *See Gentile*, 501 U.S. at 1075 (majority opinion).

43. *See Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/Y8X7-KLZV] (last visited Oct. 29, 2021).

44. *See* ABA CPR Pol’y Implementation Comm., *Rule 3.6: Trial Publicity*, AM. BAR ASS’N (Sept. 1, 2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-6.pdf [https://perma.cc/64HW-ZLMC].

45. 501 U.S. 1030 (1991).

46. *Id.* at 1068.

47. *See id.* at 1063–64.

48. *See id.* at 1058.

49. *See id.* at 1075–76.

50. *See id.* at 1073–75.

51. *Id.* at 1075.

52. *See id.* at 1072 n.5.

violates attorneys' First Amendment rights.⁵³ This is particularly damning, where Rule 3.6's text and application may be flawed.⁵⁴

First, Rule 3.6's standards may be vague, making application of its guidance difficult. At least one scholar has argued that it seems "ludicrous to base an entire disciplinary rule around an unproven supposition, and punish a lawyer if the lawyer's good-faith belief that a particular statement is unlikely to prejudice a jury is not shared by the state bar disciplinary board."⁵⁵ Other critics have argued that the Rule is an overly restrictive, and potentially inadequate, means of protecting fair trials.⁵⁶ Although the Rule's text suggests equal application to all participating attorneys, the Rule is unequally applied; defense attorneys are more likely to face repercussions⁵⁷ despite instances of prosecutorial prejudicial publicity happening more frequently.⁵⁸ Another argument suggests that Rule 3.6 is insufficient to safeguard trials from prejudicial information and does not adequately deal with involved third parties.⁵⁹

2. How Rule 3.6 Has Traditionally Been Applied

Traditionally, prosecutors and defense attorneys have been the sources of pretrial publicity in criminal cases, as their commentary is perceived—rightly or wrongly—by the public to be particularly reliable.⁶⁰ But, prosecutors and

53. See, e.g., Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 863–66, 871–74 (1998) (arguing that lawyers' speech about pending trials is constitutionally protected political speech and any restrictions should be subject to strict scrutiny regardless of lawyers' special position as officers of the court); Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1388–94 (1993) (arguing that the *Gentile* decision unduly restricts attorney speech).

54. See, e.g., Katrina M. Kelly, Comment, *The "Impartial" Jury and Media Overload: Rethinking Attorney Speech Regulation in the 1990s*, 16 N. ILL. U. L. REV. 483, 496–504 (1996) (arguing that Rule 3.6 sets forth a vague, overbroad standard that is ultimately ineffective).

55. Gabriel G. Gregg, Comment, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1366 (1996).

56. See, e.g., Christopher A. Brown, Note, *The Worsening Problem of Trial Publicity: Is "New" Model Rule 3.6 Solution or Surrender?*, 29 IND. L. REV. 379, 397 (1995); Radu, *supra* note 22, at 531; *infra* notes 282–88 and accompanying text.

57. See Joel H. Swift, *Discriminatory Regulation of Trial Publicity: A Caveat for the Bar*, 12 N. ILL. U. L. REV. 399, 418 (1992). The profession's response appears more concerned with defense counsels' speech, despite evidence that the prosecution appears to be the primary source of pretrial publicity. See *id.* at 416.

58. See *id.* at 406–08 (noting that an ABA study suggests pretrial publicity is tied to the prosecution more than the defense).

59. See Radu, *supra* note 22, at 531. For example, chilling lawyer speech does not guarantee that information will not still be circulated by the press or divulged by somebody close to the case who is not barred by the Model Rules. See *id.* For a more detailed discussion of the Rule's lack of clarity as to third parties, particularly victims' lawyers, see *infra* Part II.A.

60. See Howard, *supra* note 28, at 67 (citing *Chi. Council of Laws. v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975)).

defense counsel often have different motivations underlying their trial publicity and, indeed, often utilize the media in different ways.⁶¹

The prosecutor has direct contact with everybody related to the criminal prosecution—including the victims, witnesses, and law enforcement—making the prosecutor an excellent press target.⁶² Indeed, prosecutors are subject to continuous press coverage as they conduct investigations and proceed through the trial.⁶³ Nonetheless, Rule 3.6 limits a prosecutor's public statements about the case⁶⁴ to, for example, stating the claim,⁶⁵ notifying the public of a pending investigation,⁶⁶ requesting assistance in obtaining evidence,⁶⁷ and warning if a person involved may be dangerous.⁶⁸ The prosecutor's speech often serves significant public interests⁶⁹ that would be permissible under Rule 3.6.⁷⁰

However, while Rule 3.6 does allow the prosecution some freedom in making extrajudicial statements, the prosecutor holds immense power “to deprive persons of their liberty, destroy their reputations, and even bring about their death.”⁷¹ A prosecutor's speech, in a culture that—whether justifiably or not—finds prosecutors inherently trustworthy, has a greater potential to prejudice the defendant vis-à-vis the public.⁷² Thus, prosecutors are prohibited from making statements that would materially prejudice the proceeding.⁷³ For example, prosecutors cannot make statements containing opinions concerning the defendant's guilt.⁷⁴ Comments about specific cases, as well as discussions of evidence and the defendant's character, are also examples of impermissible statements.⁷⁵ Yet, despite Rule 3.6's clear application to prosecutors, regulation of prosecutor speech remains inconsistent, and disciplinary action is infrequent.⁷⁶

61. See Daniel J. Hurson, *The Trial of a Highly Publicized Case—A Prosecutor's View*, 16 AM. CRIM. L. REV. 473, 474 (1979) (“The presence of the press [has] an impact on the strategic and tactical considerations by both the prosecution and the defense.”).

62. See Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 891 (1990).

63. See Hurson, *supra* note 61, at 474.

64. See MODEL RULES OF PRO. CONDUCT r. 3.6(b) (AM. BAR ASS'N 2020).

65. See *id.* r. 3.6(b)(1).

66. See *id.* r. 3.6(b)(3).

67. See *id.* r. 3.6(b)(5).

68. See *id.* r. 3.6(b)(6).

69. See Bennett L. Gershman, *The Prosecutor's Duty of Silence*, 79 ALB. L. REV. 1183, 1184 (2015).

70. Interestingly, prosecutors have the ability to make the public record by choosing what information to include in various court filings, all of which can theoretically be discussed under Rule 3.6. See MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2). *But see* Gershman, *supra* note 69, at 1207 (noting that the public record exception does not give prosecutors freedom to “gratuitously place prejudicial information in a public record” for the media to report on).

71. Gershman, *supra* note 69, at 1214.

72. See *id.* at 1215. Prosecutors' statements are often seen as authoritative. See *id.*

73. See *id.* at 1203.

74. See *id.* at 1203–04.

75. See *id.* at 1185.

76. See *id.* at 1185–86, 1188.

While regulating prosecutor speech is necessary to preserve a defendant's right to a fair trial,⁷⁷ defense attorneys, too, are precluded from speaking out about a criminal trial to protect "the integrity and fairness of a State's judicial system."⁷⁸ Yet, defense attorneys, unlike prosecutors, represent particular individuals and thus owe a duty to those clients to advocate on their behalf and serve their interests to the greatest and most ethical extent possible.⁷⁹ In fact, defense counsel may have a heightened duty to advocate on a client's behalf, as they protect the defendant's life, liberty, and property against the government.⁸⁰ Pretrial publicity could be incredibly harmful to the defendant, who has the right to a fair trial before an impartial jury.⁸¹ Thus, defense attorneys also have a duty to protect their clients against prejudice from publicity.⁸²

Although Rule 3.6's restrictions against extrajudicial statements ought to apply equally to both prosecutors and defense counsel,⁸³ some scholars have argued that the restrictions should apply in a limited fashion to defense counsel.⁸⁴ Limiting the defense to only a few permissible statements, such as denying charges or reminding the public of the presumption of innocence, is insufficient when considered alongside the weight of the indictment.⁸⁵ Moreover, defense counsel's extrajudicial commentary is unlikely to significantly outweigh the prosecution's commentary.⁸⁶

Recognizing the duty that defense attorneys have and the limitations that the Rule itself imposes on attorneys' ability to advocate for their clients, Rule 3.6 contains an exception to the general prohibition on extrajudicial statements, allowing lawyers to make comments as "required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."⁸⁷ Such statements must be limited to only what is necessary to mitigate adverse publicity.⁸⁸ This provision acknowledges that a response to prejudicial statements may be useful in lessening the adverse impact of initial statements on the

77. See generally *id.* at 1217–19, 1218 n.215.

78. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991); see also Matheson, *supra* note 62, at 877 (noting that Model Rule 3.6 makes no distinction between extrajudicial statements by prosecutors or defense).

79. See Mawiyah Hooker & Elizabeth Lange, Note, *Limiting Extrajudicial Speech in High-Profile Cases: The Duty of the Prosecutor and Defense Attorney in Their Pre-Trial Communications with the Media*, 16 GEO. J. LEGAL ETHICS 655, 663 (2003).

80. See Margaret Tarkington, *Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 FLA. L. REV. 1873, 1922 (2014).

81. See generally Hooker & Lange, *supra* note 79, at 663–65.

82. See *id.*

83. See Sally R. Weaver, *Judicial Restrictions on Attorneys' Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech*, 33 VAND. L. REV. 499, 514 & n.91 (1980).

84. See, e.g., *id.*; Tarkington, *supra* note 80, at 1922–35.

85. See Weaver, *supra* note 83, at 514.

86. See *id.*

87. MODEL RULES OF PRO. CONDUCT r. 3.6(c) (AM. BAR ASS'N 2020).

88. See *id.*

proceeding.⁸⁹ However, this provision is unlikely to allow the defense much reprieve from negative publicity, as even legitimate responses to certain public statements could further extrajudicial discussion.⁹⁰

B. *The Victim's Role in the Criminal Trial*

Although the application of Rule 3.6 is relatively clear for lawyers of the two parties to the proceeding, the application is less clear for the growing body of lawyers who represent a nonparty with great interests. This section highlights victims' growing role in the criminal proceeding, beginning with a brief overview of the victims' rights movement, before turning to the CVRA and how its recognition of victims' rights and interests has affected the victim's role in criminal cases.

1. The Victims' Rights Movement: A Push for Greater Rights

Crime is conceptualized as a wrong committed against the community at large.⁹¹ Although, historically, crime victims were central to the criminal justice process,⁹² in more modern times the prosecutor carries near absolute discretion over the power to charge, prosecute, settle, or dismiss a criminal case.⁹³ Moreover, victims have never been afforded true party status in the criminal justice system, leaving them as mere nonparty witnesses.⁹⁴ Although the criminal trial's two-party adversarial nature presupposes that only the defense and the prosecution have an interest in the case, proponents of victims' rights laws have consistently countered this notion, arguing that victims also have a significant interest.⁹⁵

Accordingly, the victims' rights movement grew out of victims' dissatisfaction with the criminal justice process.⁹⁶ It began during the 1960s, crossing the political spectrum and party lines and engaging everyone who could see themselves as potential victims.⁹⁷ The movement sought to bring about reforms that would make conviction easier, help victims receive better

89. *See id.* r. 3.6 cmt. 7.

90. *See* Hooker & Lange, *supra* note 79, at 664.

91. *See* Andrew J. Karmen, *Who's Against Victims' Rights?: The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 158 (1992).

92. *See generally* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 366–72 (1986) (detailing the evolution of the modern criminal trial and the victim's changed role).

93. *See* Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177, 178 (1992).

94. *See id.*

95. *See generally id.*

96. *See* Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 523–24; *see also* LOIS HAIGHT HERRINGTON ET AL., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME 5 (1982), <https://www.ncjrs.gov/pdffiles1/ovc/87299.pdf> [<https://perma.cc/WT2G-77YD>] (“I will never forget being raped, kidnapped, and robbed at gunpoint. However, my sense of disillusionment of the judicial system is many times more painful.” (quoting unnamed crime victim)).

97. *See* Abrahamson, *supra* note 96, at 521–32.

treatment in the criminal justice system, and ensure the active participation by victims in criminal proceedings.⁹⁸

The importance of active victim participation grew out of an emphasis on the negative psychological effects that could arise when victims are not given a meaningful chance to participate in criminal proceedings.⁹⁹ Indeed, it was argued that giving victims a voice could improve their mental condition and welfare.¹⁰⁰ Recognizing these interests, Congress passed the Crime Victims' Rights Act, seeking to give crime victims participatory rights in the criminal justice process.¹⁰¹

The CVRA was enacted as a result of advocacy by various victims' rights groups,¹⁰² ultimately passing both the House of Representatives and the Senate with overwhelming majority support.¹⁰³ Due to the large volume of criminal proceedings in state courts, Congress intended the CVRA to serve as a model for the states in amending their constitutional and statutory provisions to expand victims' rights.¹⁰⁴ Today, all states have their own victims' rights legislation or amendments.¹⁰⁵

Although not the first federal crime victims' rights statute, the CVRA was the first to grant victims standing to enforce their rights.¹⁰⁶ As such, the CVRA explicitly contains an enforcement mechanism that entitles victims to seek mandamus review in appellate courts if their rights have been violated.¹⁰⁷

The CVRA grants victims ten enumerated rights,¹⁰⁸ among them the right to reasonable and timely notice of proceedings,¹⁰⁹ the right not to be excluded from any court proceeding unless the victim's testimony would be materially

98. See Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 244 (2005).

99. See *id.*

100. See *id.*

101. See Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victim's Rights Act*, 105 NW. L. REV. COLLOQUY 164, 177 (2011).

102. See David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 631 (2008).

103. See *id.* at 632 (noting that the Senate passed the CVRA by a vote of 96–1, and the House passed it by a vote of 393–14).

104. See *id.* at 633.

105. See *Victims' Rights*, PRETRIAL JUST. CTR. FOR CTS., <https://www.ncsc.org/pjcc/topics/victims> [<https://perma.cc/9VN9-UDNY>] (last visited Oct. 29, 2021) (“All states, the District of Columbia, and most U.S. territories have statutory or constitutional provisions that enumerate rights and protections for victims of crime.”). The National Conference of State Legislatures maintains a searchable database of all state legislation concerning victims' rights. See *Victims' Pretrial Release Rights and Protections*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-victims-rights-and-protections.aspx> [<https://perma.cc/EH4Y-8L9M>] (last visited Oct. 29, 2021).

106. See Russell P. Butler, *What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings*, 19 FED. SENT'G REP. 21, 21 (2006).

107. See 18 U.S.C. § 3771(d)(3).

108. See *id.* § 3771(a).

109. See *id.* § 3771(a)(2).

altered by hearing other testimony,¹¹⁰ the right to be reasonably heard at any public proceeding,¹¹¹ the right to restitution,¹¹² and the right to be treated with fairness and respect.¹¹³ To ensure victims are able to exercise these rights, the CVRA also permits victims to seek the advice of an attorney.¹¹⁴

2. The Victim's Role and Interests

Victims have a unique role within the criminal justice system, as allies of the government prosecutors and as independent actors with their own interests, which can, and often do, conflict with the interests of the prosecutors.¹¹⁵ Thus, giving crime victims new rights “necessitate[d] a shake-up in the balance of power within the adversarial system.”¹¹⁶ The CVRA grants victims certain procedural rights, such as the right to be heard regarding pleas and sentencing.¹¹⁷ Under the CVRA, the victim is no longer an outsider but can be present and vocal in the criminal trial.¹¹⁸ Further, the CVRA's appellate review provision represents a powerful new remedy to protect crime victims.¹¹⁹

However, the CVRA does not give victims party status in criminal trials.¹²⁰ Therefore, the trial is still an adversarial procedure between the prosecutor and the defendant.¹²¹ Further, victims only have standing to enforce their rights in connection with claims arising under the CVRA.¹²² Thus, the victim is in an unusual position: the victim undoubtedly has rights and an acknowledged stake in the proceeding, but the victim is still an outsider, rather than a party, to the criminal trial.¹²³ While victims have been granted certain participatory rights, these rights are inherently tied to the

110. *See id.* § 3771(a)(3).

111. *See id.* § 3771(a)(4).

112. *See id.* § 3771(a)(6).

113. *See id.* § 3771(a)(8).

114. The CVRA does not explicitly provide the right for a private attorney, but this right can be inferred from the provisions. *See, e.g., id.* § 3771(c)(2) (“The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described . . .”).

115. *See* Karmen, *supra* note 91, at 160–61.

116. *See id.* at 161.

117. *See* Cassell & Joffe, *supra* note 101, at 167.

118. *See id.* at 182–83.

119. *See id.* at 169.

120. *See* Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 259 (2008) (“[N]owhere does the CVRA suggest that it confers party or even intervenor status on victims.”); *see also* United States v. Rubin, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008) (“[V]ictims . . . are not accorded formal party status, nor are they even accorded intervenor status . . .”).

121. *See* Blondel, *supra* note 120, at 259 (“The government and the defendant thus remain the sole parties to criminal prosecutions.”).

122. *See id.* at 259–60; *see also* Cassell & Joffe, *supra* note 101, at 170–71 (“[T]he Act's enforcement provision specifically provides victims with appellate review only when their enumerated rights are violated.”).

123. *See* Blondel, *supra* note 120, at 259; *see also* Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 337 (“The adversary system, in a criminal case, assumes only two parties: the government and the defendant.”).

CVRA.¹²⁴ Thus, it is unclear, for example, if victims can assert these rights at the investigatory stage of the prosecution or only once charges have been brought.¹²⁵

Nonetheless, the CVRA reflects an acknowledgement that victims have a stake in the proceeding¹²⁶ and “legitimate interests” tied to the criminal case.¹²⁷ Among the interests that victims have, first, is an interest in retribution¹²⁸ and in seeing the case resolved justly.¹²⁹ Second, victims may have an interest in restitution.¹³⁰ Third, victims likely have an interest in preserving their privacy.¹³¹ Fourth, victims generally have an interest in avoiding retraumatization, which may occur as a result of going through the proceeding and reliving the crime.¹³² Fifth, victims have an interest in having their voices heard.¹³³ Often, the victim has a story to tell, and it could be incredibly beneficial for the victim to tell that story.¹³⁴ Finally, victims have an interest in preserving their autonomy throughout the criminal proceeding.¹³⁵

124. See Blondel, *supra* note 120, at 259–60.

125. There has been conflict regarding when CVRA rights attach, as some prosecutors argue that various CVRA rights do not attach until the formal charges are brought. See Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 81–82 (2015) (detailing this conflict). In order for the CVRA’s purposes and goals to be fully realized, however, the rights may need to extend to victims even before formal charges are filed. See Paul G. Cassell et al., *Crime Victims’ Rights During Criminal Investigations?: Applying the Crime Victims’ Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 62, 69–71 (2014) (arguing that CVRA rights attach before formal charging).

126. See 150 CONG. REC. 22,951 (2004) (statement of Sen. Jon Kyl) (“Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm.”).

127. *Id.* at 22,952.

128. See Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 136 (1983).

129. See Lois Haight Herrington, *The Victim of Crime*, 26 S. TEX. L.J. 153, 161–62 (1985) (noting that victims have an interest in fair adjudication of the case); see also Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 294 n.30.

130. See Herrington, *supra* note 129, at 162–63 (discussing the value of restitution for victims).

131. See Garvin & Beloof, *supra* note 125, at 77 (arguing that victims of sexual assault are “confronted with potential privacy intrusions at nearly every turn . . . from subpoenas for their confidential or privileged records . . . to motions to examine the victim’s body, mind, or dwelling”).

132. See *id.* at 70–71; see also Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 84–86 (2020) (discussing how victims are retraumatized in the criminal justice process).

133. See O’Hara, *supra* note 98, at 244.

134. See *id.*

135. See Garvin & Beloof, *supra* note 125, at 70–72. Autonomy, or agency, can be defined as “the ability to meaningfully choose whether, when, how, and to what extent to meaningfully participate in the system and exercise their rights.” *Id.* at 71. For crime victims, having agency can make the difference between a positive experience with the criminal justice system and an experience that leads to secondary victimization. See *id.* at 71–72.

C. *The Victim's Lawyer as Advocate*

Despite the limitations of the CVRA, victims may retain attorneys to ensure all rights granted to the victim in the law are protected throughout the proceeding.¹³⁶ As discussed below, victims might choose to retain counsel to protect—and to advocate on behalf of—their interests.¹³⁷ After considering why victims might choose to retain independent counsel, this section examines the different reasons why a victim's lawyer might choose to engage in extrajudicial commentary.

1. The Role of the Victim's Counsel

Despite the progress made by various victims' rights laws, victims are still denied agency or autonomy within the criminal process.¹³⁸ Specifically, victims have no control over how their experiences will be told at trial.¹³⁹ When the prosecutor calls the victim as a witness, “the victim's story is shaped and appropriated by others.”¹⁴⁰ Since the prosecutor represents the state and not the victim,¹⁴¹ the prosecutor may face ethical conflicts if seeking to represent the interests of both the state and the victim.¹⁴² And, although victims have the right to retain counsel, there is no explicit right to an attorney for victims in criminal trials.¹⁴³ Thus, for victims to be sufficiently represented in the criminal justice system, victims may need independent counsel.¹⁴⁴

Accordingly, “victim lawyers are . . . a source of personal representation through which to advance the agency of the victim in a justice system that would otherwise limit the victim.”¹⁴⁵ The values that have shaped the

136. See 18 U.S.C. § 3771(d)(1) (noting that a crime victim or their “lawful representative” may assert the rights afforded); 150 CONG. REC. 7295 (2004) (statement of Sen. Dianne Feinstein) (“This part of the bill is what makes this legislation so important, and different from earlier legislation: It provides mechanisms to enforce the set of rights provided to victims of crime.”).

137. See *infra* Part I.C.1.

138. See Bazelon & Green, *supra* note 16, at 316–18.

139. See *id.* at 317.

140. *Id.*

141. See Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 563 (2005) (“A prosecutor's ‘clients’ are the people who live in the prosecutor's jurisdiction, including police, witnesses, crime victims, and even the accused.”). The Model Rules do not address the prosecutor's responsibilities to crime victims, but they do note that prosecutors have a general duty to serve the cause of justice. See MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020).

142. See Rowland, *supra* note 93, at 191 (“[T]here is a very real possibility that prosecutors violate the Canon of Ethics when they purport to represent both the interests of the state and the interests of the victim in the same case.”).

143. See 150 CONG. REC. 22,952 (2004) (statement of Sen. Jon Kyl) (“This bill does not provide victims with a right to counsel but recognizes that a victim may enlist a counsel on their own.”); see also Butler, *supra* note 106, at 24 (noting that “[t]here is no express statutory provision for the appointment of counsel for most victims, but such authority is implicit in the CVRA”).

144. See Rowland, *supra* note 93, at 194.

145. Tyrone Kirchengast, *Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial*, 16 NEW CRIM. L. REV. 568, 572 (2013).

evolution of the victim's role in the criminal justice system—dignity, fairness, and respect for privacy—are the foundation for due process rights for victims.¹⁴⁶ Such due process rights, which take the form of fair notice and an opportunity to be heard,¹⁴⁷ might only be realized if victims retain legal counsel, allowing them to achieve true agency.¹⁴⁸

Independent lawyers can help victims attain the benefits provided by the CVRA. The CVRA recognizes both the victims' interest in fair notice¹⁴⁹ and the victims' interest in being heard.¹⁵⁰ For instance, the CVRA provides victims with the right to be reasonably heard regarding plea bargains and sentencing.¹⁵¹ This extends victims participatory opportunities, even if the participation has no effect on the proceeding.¹⁵² Yet, this opportunity to participate has immense benefits for the victim, as the victim gains “access to a forum that directly and individually acknowledges her victimhood.”¹⁵³ These benefits were the driving force behind the CVRA, as Congress understood the harm that befalls victims when they are left entirely outside of the criminal process.¹⁵⁴

Focusing particularly on sexual assault victims, two scholars have argued that the use of “Special Victim Counsel” in military sexual assault cases greatly increased victim satisfaction with the investigation and court process, which in turn helped the victims exercise their agency in engaging with the system.¹⁵⁵ By contrast, the current civilian process typically entails “entering a criminal process in which the victims' rights and privacy protections that exist on paper can rarely be accessed without a lawyer.”¹⁵⁶ In other words, victims may be prevented from protecting their privacy, rights, and interests because they do not have access to lawyers.¹⁵⁷ Therefore, independent lawyers play a crucial role in safeguarding victims' rights,¹⁵⁸ enabling victims to assert their agency and helping victims engage with—and effectively navigate—the criminal justice system.¹⁵⁹

146. See Garvin & Beloof, *supra* note 125, at 67–68.

147. See *id.* at 68.

148. See *id.* (“Crime victim agency . . . at its core is the right and power of individuals to make fundamental decisions about their lives.”).

149. See 18 U.S.C. § 3771(a)(2).

150. See *id.* § 3771(a)(4).

151. See Cassell & Joffe, *supra* note 101, at 167.

152. See *id.* at 182. Even if the victim's story at sentencing does not impart any new information to the court, the very chance to speak may itself be important. See *id.*

153. Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 452 (2008).

154. See Cassell & Joffe, *supra* note 101, at 183.

155. See Garvin & Beloof, *supra* note 125, at 72–75 (arguing that the military's Special Victim Counsel is a powerful illustration of how to provide for victim agency in a civilian criminal justice system).

156. *Id.* at 75.

157. See *id.*

158. See Rowland, *supra* note 93, at 194.

159. See Garvin & Beloof, *supra* note 125, at 75.

2. A Victim's Lawyer's Extrajudicial Statements

Victims have multiple interests that might be vindicated through extrajudicial comments made by their lawyers. First, the victim has an interest in retribution—or in seeing the case resolved justly.¹⁶⁰ Thus, a victim may, in certain situations, want the attorney to speak out about the case to secure harsher punishment or place pressure on a court or even on the jury.¹⁶¹ For example, if there is a plea deal being considered, the victim might seek to galvanize public support against the deal.¹⁶² In such cases, the public's outrage at the harm suffered by the victim might lead the prosecution to take the case to trial.¹⁶³ Victims might also want their lawyers to speak out on their behalf when they want the prosecution to succeed, whether because the victim wants retribution or restitution or just to take an allegedly dangerous person off of the streets.¹⁶⁴

160. See Gittler, *supra* note 128, at 140–42; see also Abrahamson, *supra* note 96, at 565 (“The victim’s—and the public’s—interest is to apprehend the offender, prosecute promptly and impose a fair penalty considering the offender, the offense, the victim and the public.”).

161. See Chemerinsky, *supra* note 53, at 870–71 (noting that attorneys might speak to the press to encourage settlement or to ensure that public scrutiny leads to a careful and fair judgment).

162. Although victims have enhanced status in the trial and may have the opportunity to consult with the prosecutor, they still lack power to control the prosecutor’s decisions during the plea disposition process. See Gershman, *supra* note 141, at 574. Notably, federal prosecutors have argued that, under the CVRA, prosecutors are not required to notify victims about plea dispositions prior to formal charges being pressed. See Garvin & Belooof, *supra* note 125, at 81. The Justice Department took this position in defending its decision not to notify Epstein’s victims about a secret nonprosecution agreement it reached with Epstein, claiming that there was no obligation to notify victims about the deal since Epstein was never formally charged. See *id.* When this eventually came to light, it sparked outrage; if the victims had known about the plea deal being negotiated, even if they had no formal CVRA rights to provide their input, they could have spoken out about it publicly, both personally and through their lawyers, to bring attention to the case and garner support against the deal. See generally Patricia Mazzei, *Prosecutors Broke Law in Agreement Not to Prosecute Jeffrey Epstein*, *Judge Rules*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/us/jeffrey-epstein-judge-prosecution-agreement.html> [<https://perma.cc/S39L-ZXWP>].

163. Studies, however, have shown that the prosecution often already has judgments about the likelihood of securing a conviction in a given case prior to meeting with the victim. See Bazelon & Green, *supra* note 16, at 310 n.76. However, the prosecution’s judgment about a case’s success is often based on the likely reaction of the jury to the evidence. See *id.* Thus, a victim’s lawyer could shift the public’s opinion and perception about a case in favor of the victim through extrajudicial statements, especially if those comments are disseminated widely. See, e.g., Howard, *supra* note 28, at 63 (noting “what a powerful litigation tool the media can be . . . in shaping pretrial public opinion, and thus potential jurors’ opinions on a criminal case”).

164. Such statements might speak to the credibility of the defendant or merits of the case. See, e.g., *supra* note 12. Similarly, victims might want their lawyers to initiate an investigation, such as in the Epstein case, where the Justice Department sought information from Prince Andrew, Duke of York, regarding his connection to Epstein. See, e.g., *Prince Andrew ‘Falsely Portraying Himself as Willing’, US Prosecutor Claims*, BBC NEWS (June 9, 2020), <https://www.bbc.com/news/uk-52973219> [<https://perma.cc/7NK6-NKBE>]. Gloria Allred, a lawyer for several of Epstein’s victims, believes that Prince Andrew has “very little credibility” and has implored him to testify under oath. *Id.* Her statements appear to be geared toward furthering the investigation on behalf of her clients.

In addition, victims have an interest in protecting their reputation and their privacy.¹⁶⁵ If, for example, the media or the defense counsel opine on the victim's character or personal details, the victim's lawyer might have a legitimate reason to speak to the press, either to rehabilitate the client's reputation or prevent discussions about private information.¹⁶⁶ Relatedly, the victim has an interest in avoiding harassment by the defendant.¹⁶⁷ For example, a defendant may argue that the victim provoked the alleged incident, calling into question the victim's character.¹⁶⁸ Particularly in cases involving sexual assault, the defense may attempt to discredit a victim with negative character evidence.¹⁶⁹ In such cases, the victim's lawyer might, by speaking to the media, seek to set the story straight or to preserve the victim's dignity by ensuring that the victim's public image is not tarnished.¹⁷⁰

Victims also have an interest in avoiding revictimization through contact with the criminal justice system, which can cause psychological trauma.¹⁷¹ Victims are often retraumatized in court when they are called as witnesses, especially when their integrity and character might be scrutinized.¹⁷² Retraumatization can chill victim participation in criminal proceedings, resulting in distrust in the judicial system among the victim community.¹⁷³ Often, retraumatization is the result of victim-blaming attitudes and practices, which can result in additional trauma.¹⁷⁴ Victims are likely to feel blamed by the defendant or the defendant's attorney in criminal trials.¹⁷⁵ Aside from cross-examination, which is designed to undermine the victim's credibility,¹⁷⁶ victims might find their credibility brought into question outside of the courtroom, as well. In such cases, victims' attorneys might

165. See Gittler, *supra* note 128, at 142.

166. See Chemerinsky, *supra* note 53, at 869; Garvin & Beloof, *supra* note 125, at 77 (noting that victims of crime are subject to privacy intrusions and arguing that attorneys can help protect clients' privacy interests). Much like defendants, who may not want to wait until acquittal and allow irreparable injury to their reputations in the meantime, victims may not want to wait until the trial is over to protect their reputations from the press. See generally L. Cooper Campbell, *Gentile v. State Bar and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pretrial Publicity*, 6 GEO. J. LEGAL ETHICS 583, 604–05 (1993).

167. See Gittler, *supra* note 128, at 142.

168. See *id.*

169. See *id.* at 142 n.88.

170. See, e.g., Elizabeth Wagmeister, *Gloria Allred Rips Apart Weinstein's Defense Team for 'Putting the Blame on Women'*, VARIETY (Jan. 28, 2020, 7:59 AM), <https://variety.com/2020/biz/news/gloria-allred-miriam-haley-harvey-weinstein-sexual-assault-trial-1203483664/> [<https://perma.cc/9V8B-CZXK>] (“[W]e’ve heard every rape myth practically in the book today . . . Obviously the defense is playing that old script line that the only victim in this is Harvey Weinstein . . . I guess that all of the witnesses so far must be lying because they can’t remember every single detail.”).

171. See Katirai, *supra* note 132, at 84–85.

172. See *id.* at 84.

173. See *id.* at 96.

174. See *id.* at 88.

175. See *id.* at 91.

176. See *id.* at 102.

seek to preserve their clients' reputation and dignity as a means of avoiding retraumatization at the hands of a particularly intrusive media.¹⁷⁷

Further, victims have an interest in telling their stories.¹⁷⁸ Victims can rarely, if ever, tell their stories during trial.¹⁷⁹ Importantly, victims may not wish to wait until sentencing to tell their stories or to respond to other parties' statements to the media.¹⁸⁰ Instead, victims might want to tell their stories earlier on in the proceedings; this could be particularly important for their sense of agency.¹⁸¹ Therefore, victims might lean on their attorneys to protect them through extrajudicial commentary. Still, as the next part examines, it is unclear whether Rule 3.6 serves as a bar to such a form of client representation.

II. RULE 3.6'S APPLICATION TO VICTIMS' LAWYERS

The victims' rights movement brought attention to victims and their privately retained attorneys in criminal proceedings. Given the concerns about pretrial publicity and the unusual position that victims' lawyers occupy, this part addresses whether victims' lawyers must adhere to Rule 3.6. Part II.A considers whether Rule 3.6's text and purpose support its application to victims' lawyers. Part II.B evaluates the various policy concerns driving the victims' rights movement and victims' rights laws and whether these policies also support the application of Rule 3.6 to victims' lawyers.

A. *The Uncertain Meaning and Application of the Rule*

This section shows that the application of Rule 3.6 to victims' lawyers in cases where their public statements would materially prejudice criminal proceedings is unclear. First, this section closely reviews Rule 3.6's text.

177. See, e.g., Elizabeth Wagmeister, *Gloria Allred Slams Weinstein's Lead Attorney for Making Statements to the Media That Are 'Insulting to Women'*, VARIETY (Feb. 19, 2020, 1:10 PM), <https://variety.com/2020/biz/news/gloria-allred-donna-rotunno-media-interviews-gag-order-1203508143/> [<https://perma.cc/YZ9E-48NM>]. In responding to Donna Rotunno, Harvey Weinstein's defense attorney, who suggested that she had never been a victim of sexual assault because she never put herself "in that position," Gloria Allred said, "I think it's insensitive, and it's blaming victims for their own rape or sexual abuse so I don't think it's appropriate." *Id.*

178. See generally Bazelon & Green, *supra* note 16, at 296, 312, 328 (emphasizing that victims may want to choose how and when to share their stories).

179. See *id.* at 317 ("[V]ictims have no control . . . over how they or the lawyers at trial tell their story."). Generally, the victim's story is not the victim's own throughout the criminal process; instead, once the prosecution calls the victim as a witness, the victim's story is shaped by the attorneys. See *id.*; see also Katirai, *supra* note 132, at 107 ("The formalism of our legal system . . . requires survivors to fit their narratives into specific rules and procedures . . . which limit their ability to tell their own story as a meaningful narrative.").

180. Under Rule 3.6, victims' lawyers could theoretically speak out in response to statements made by other attorneys in the proceeding. See MODEL RULES OF PRO. CONDUCT r. 3.6(c) (AM. BAR ASS'N 2020). Such a carveout, however, requires that another attorney make the negative statements first. See *id.*

181. See generally Bazelon & Green, *supra* note 16, at 316–17; Garvin & Beloof, *supra* note 125, at 71.

After conducting a textual analysis, this section considers whether the application of Rule 3.6 to victims' lawyers aligns with its original purpose.

1. Looking to Rule 3.6's Text

As previously discussed, a victim's lawyer might make extrajudicial comments for various reasons.¹⁸² Rule 3.6, on its face, is not a total bar against such statements. Rather, the Rule bars statements made by a lawyer who is "participating" or "has participated in" the investigation or litigation of a matter.¹⁸³ Further, Rule 3.6 bars statements that a lawyer should reasonably know would be disseminated publicly and will have "a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."¹⁸⁴ Thus, regardless of whether the victim's lawyer is participating in the proceeding or not, certain statements will not violate Rule 3.6 because they do not materially prejudice the proceeding.¹⁸⁵

Rule 3.6's current language is markedly different from its original language, as the original rule was modified to address constitutional concerns of vagueness and overbreadth.¹⁸⁶ However, in addition to the previous "reasonable likelihood" standard, Rule 3.6's precursor, Disciplinary Rule 7-107 of the Model Code of Professional Responsibility ("DR 7-107"), applied to all lawyers "associated with" the investigation of a criminal matter¹⁸⁷ and "associated with" the prosecution or defense once criminal proceedings began.¹⁸⁸ Thus, in *People v. Buttafuoco*,¹⁸⁹ a state trial court judge in New York found that the attorney for the defendant's wife was associated with the criminal proceeding¹⁹⁰ and ultimately directed "all attorneys associated with this case . . . to assiduously comply" with DR 7-107.¹⁹¹ This holding expanded DR 7-107's terms, as the phrase "associated with" was held to cover lawyers who were not only attorneys of record but were significantly tied to the proceeding.¹⁹² Nonetheless, it is

182. See *supra* Part I.C.2.

183. MODEL RULES OF PRO. CONDUCT r. 3.6(a).

184. *Id.*

185. See *id.* r. 3.6(b); see also *id.* r. 3.6 cmt. 4 (noting that the statements in Rule 3.6(b) "would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not . . . be considered prohibited"). This Note assumes that the victim's lawyer will be making materially prejudicial statements, since Rule 3.6 would simply not apply otherwise. See *id.* r. 3.6(a).

186. See Lynn S. Fulstone, Note, *Gentile v. State Bar of Nevada: Trial in the "Court of Public Opinion" and Coping with Model Rule 3.6—Where Do We Go from Here?*, 37 VILL. L. REV. 619, 630 & n.54 (1992); see also *id.* at 624–30 (detailing the development of DR 7-107 and the subsequent development of Rule 3.6).

187. MODEL CODE OF PRO. RESP. DR 7-107(A) (AM. BAR ASS'N 1980).

188. *Id.* DR 7-107(B).

189. 599 N.Y.S.2d 419 (Nassau Cnty. Ct. 1993).

190. See *id.* at 422 (finding that DR 7-107's "associated with" language did not limit its scope to only attorneys who represented parties).

191. *Id.* at 424.

192. See Joan C. Bohl, *Extrajudicial Attorney Speech and Pending Criminal Prosecutions: The Investigatory Commission Meets A.B.A. Model Rule 3.6*, 44 U. KAN. L. REV. 951, 956 n.23 (1996) (highlighting two New Jersey Supreme Court cases concluding that Rule 3.6's

unclear whether the drafters had anticipated the rule applying to anybody other than litigants, given the limited history and paucity of judicial decisions interpreting the language of the Rule.

Moreover, the ABA later changed this language, instead focusing Rule 3.6's scope on participation.¹⁹³ And, while regulation of participating lawyers' extrajudicial statements has been approved by the Supreme Court, there is no suggestion that the Rule could regulate a nonparticipating lawyer's commentary.¹⁹⁴ While the Rule's plain text seems to limit its scope,¹⁹⁵ a broad reading could cause the language to serve as a blanket prohibition on all lawyer communication covering any lawyer who is in any way associated with the proceeding.¹⁹⁶

Further, Rule 3.6 does not specify whether an attorney is a participant by virtue of representing a participant or if the attorney must *actively* participate in the proceeding to be covered by the Rule.¹⁹⁷ A victim's attorney actively participates in the proceeding when, for example, the attorney enters an appearance on the record on behalf of the victim.¹⁹⁸ However, Rule 3.6 does not appear to be so limited in its application.

predecessor should apply to attorneys who have significant contacts with the matter, even if not attorneys of record (first citing *In re Hinds*, 449 A.2d 483, 496 (N.J. 1982), then citing *In re Rachmiel*, 449 A.2d 505, 512 (N.J. 1982)).

193. See MODEL RULES OF PRO. CONDUCT r. 3.6(a) (AM. BAR ASS'N 2020). As noted above, Rule 3.6 was promulgated to resolve constitutional concerns with DR 7-107's language. See *supra* note 186 and accompanying text. However, it is not clear that the "associated with" portion of DR 7-107 had been changed to limit the rule's application. MODEL CODE OF PRO. RESP. DR 7-107. Nonetheless, this ambiguity raises concerns about the application of Rule 3.6 to third parties.

194. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072 n.5 (1991) ("We express no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made.").

195. This argument can be drawn from the text of the Model Rule and the additional commentary thereto. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.6(a) (focusing on "participat[ion]" in the investigation or litigation of the matter); *id.* r. 3.6 cmt. 3 ("[T]he rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case . . .").

196. The Rule's commentary is clear about the danger of pretrial publicity and the importance of drawing a balance between attorneys' right to speech and the general right to a fair trial. See MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 1. Arguably, lawyers even remotely associated with a legal proceeding could potentially threaten this precarious balance by making extrajudicial comments. Still, the drafters of the Model Rules have expanded the reach of rules limiting extrajudicial commentary to anybody "associated with" the prosecutor in the trial, including investigators and other law enforcement personnel. *Id.* r. 3.8(f). It is therefore possible that the ABA could have similarly specified everybody to whom Rule 3.6 applied, rather than limiting the Rule's application to participating attorneys. Compare *id.* with *id.* r. 3.6.

197. Cf. NAT'L CRIME VICTIM L. INST., THE VICTIM'S ATTORNEY AND THE MEDIA: RULES OF PROFESSIONALISM REGARDING EXTRAJUDICIAL STATEMENTS 1 (2017), <https://law.lclark.edu/live/files/25188-ncvli-newsletter---the-victims-attorney-and-the> [https://perma.cc/T9P9-GALC] (noting that the likelihood of Rule 3.6's application to victims' lawyers is increased when they file a notice of appearance in the case).

198. See generally Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 616-17 (2005).

Although Rule 3.6 does not provide any guidance on who is a participant, the adversarial nature of the criminal trial supposes that the two parties and their attorneys are participants.¹⁹⁹ Therefore, since the CVRA confers neither party nor intervenor status to victims,²⁰⁰ victims likely cannot be true participants, reflecting the traditional understanding of the adversary system.²⁰¹ Indeed, the adversary system does not anticipate victims challenging the well-established two-party scheme.²⁰²

It is unclear, however, that limiting participation under Rule 3.6 to only the prosecution and defense would comport with the Rule itself. While the Rule is ambiguous, the comments to the Rule clearly state that commentary by nonparticipants will have a small likelihood of prejudice.²⁰³ The emphasis on participation is rooted in the fact that participating attorneys are often privy to important details about the case.²⁰⁴ By virtue of this specialized knowledge, the participating attorneys are not only able to impart more information to the media but can also cause more damage, as they are perceived to be authorities regarding the case.²⁰⁵ These concerns underlying the emphasis on participation are explored in greater detail below.

2. The Purpose of the Rule and Its Limitation to Participants

Rule 3.6's text does not clearly specify whether the victim's lawyer is a "participant" in a proceeding and thus subject to the Rule's limitation on extrajudicial commentary. Considering the application of Rule 3.6 to victims' lawyers therefore requires looking beyond the Rule's text to consider its underlying purpose.

Rule 3.6 limits its scope to participants in part because statements by participating lawyers are particularly prejudicial, as the Supreme Court has noted.²⁰⁶ Participating lawyers' intimate knowledge and connection to the case presumes that they have specialized information and speak from a place of authority.²⁰⁷ Statements by nonparticipants, on the other hand, are not as likely to be prejudicial since there is no presumption of intimate knowledge.

199. See Blondel, *supra* note 120, at 239.

200. See *id.* at 240.

201. At least one federal district court has expressed concern when applying the CVRA, noting that if it were to involve itself in a dispute concerning the victims' right to fairness, respect, and dignity, it would "potentially compromis[e] its ability to be impartial to the government and defendant, *the only true parties to the trial.*" United States v. Rubin, 558 F. Supp. 2d 411, 428 (E.D.N.Y. 2008) (emphasis added).

202. See Blondel, *supra* note 120, at 240.

203. See MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 3 (AM. BAR ASS'N 2020).

204. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991).

205. See *id.*

206. See *id.*

207. See *id.* ("Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.").

For instance, Rule 3.6 does not apply to legal news commentators, who can speak to the press regarding the potential merits of a case.²⁰⁸

Thus, the victims' lawyers would need to speak with the same authority as the prosecutors or defense counsel to fall within Rule 3.6's scope. Nonetheless, the victim's attorney could be seen as more like a public commentator, as the victim's lawyer does not have the same access to the prosecutor's case-in-chief and its accompanying evidence.²⁰⁹

On the other hand, one can argue that the victim's lawyer is similar to the prosecution, especially since the victim's lawyer often shares similar goals with the prosecution. The victim's lawyer also has access to relevant facts pertaining to the victim's experience, which could be prejudicial if shared prior to or outside a criminal proceeding.²¹⁰ Further, the victim's lawyer might try to work with the prosecution, and in that case, the lawyer would likely be in a position of similar authority.²¹¹ Indeed, victims often provide investigative, financial, and tactical assistance to prosecutors.²¹² Moreover, a victim's attorney speaking on behalf of the victim about the case arguably presents a much more personal view than the prosecutor, who represents the government.²¹³

Beyond participation, Rule 3.6 highlights the important principle behind limiting extrajudicial statements: the defendant's constitutional right to a fair trial by an impartial jury.²¹⁴ The defendant's right to a fair trial is so fundamental that the Supreme Court has held that it outweighs participating lawyers' constitutionally protected free speech rights.²¹⁵

It might be argued that the interests of a defendant in a criminal proceeding outweigh the victim's interests. After all, defendants' life or liberty is on the line, and extrajudicial commentary could endanger their freedom.²¹⁶ In criminal jury trials, defendants are presumed innocent until proven guilty, so allowing any lawyer to call that innocence into question through extrajudicial commentary could strip the defendant of the right to a fair trial.²¹⁷ If the

208. See Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303, 1315–16 (1996) (noting that commentators are not covered by Rule 3.6's rationale).

209. Although the CVRA grants victims the right to confer with the prosecution, there is no suggestion that the victim or the victim's attorney is entitled to all of the government's case files and information. See generally 18 U.S.C. § 3771(a)(5).

210. The victim's lawyer knows facts about the victim's experience, some of which may be inadmissible in court as hearsay or character evidence. Inadmissible evidence is particularly prejudicial if publicly released. See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“[The defendant’s] verdict must be based upon the evidence developed at the trial.”).

211. See, e.g., *supra* note 164 and accompanying text.

212. See Gershman, *supra* note 141, at 560 n.4.

213. Although the prosecutor likely has information about the victim's experience, the prosecutor does not represent the victim and likely has a different approach to the victim's testimony than the victim's attorney. See generally *supra* notes 140–41 and accompanying text.

214. See MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 1 (AM. BAR ASS'N 2020); see also *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

215. See *Gentile*, 501 U.S. at 1074–75.

216. See generally Gregg, *supra* note 55, at 1326–27.

217. See *id.* at 1327.

defendant was wrongly accused, the victim's lawyer's statements could continue to haunt the defendant and permanently ruin the defendant's reputation, even if the charges are eventually dropped.²¹⁸

Thus, there are legitimate concerns in applying Rule 3.6 to the prosecution and defense counsel, while excluding victims' lawyers from its purview. Attorneys' extrajudicial statements, including those made by victims' lawyers, could be particularly threatening to the fairness of a proceeding, as lawyers' statements could be perceived as especially authoritative.²¹⁹ With limits on both the prosecution and defense under Rule 3.6 and its state counterparts,²²⁰ allowing victims' attorneys to speak freely could help the prosecution build a case within the public realm, while keeping the defense silent.²²¹ Helping the prosecution build a case publicly in this way could erode the defendant's right to a fair trial by overwhelming the jury with information that presupposes the defendant's guilt.²²² Accordingly, when considering the application of the Rule to victims' attorneys, examining the purpose of Rule 3.6 highlights arguments for both interpretations of the Rule.

3. The Victim's Lawyer as a Participant

Rule 3.6's emphasis on participation is likely based on the unique knowledge and authority participation inherently entails and the danger this could pose to the defendant's fair trial.²²³ This section considers the underlying concerns in the interpretation of Rule 3.6's text and when, for purposes of the Rule, a victim's lawyer might be participating in the proceeding.

218. *See id.* (“[E]xtensive media coverage of a targeted party can often destroy that party's reputation, irrespective of the ultimate verdict.”).

219. *See supra* notes 206–07 and accompanying text. Arguably, extrajudicial commentary by a victim's attorneys could harm the defendant's case, since it could likely speak to the harm suffered by the victim, which might presuppose the defendant's guilt. *See* MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 5(4).

220. The prosecution and defense counsel are both participating attorneys and are subject to Rule 3.6. *See supra* Part I.A.2.

221. *See, e.g.,* Wagmeister, *supra* note 177 (“[Defense Attorney] Cheronis claimed that Allred is essentially a megaphone for the prosecution's case, repeatedly speaking to the media about her three clients . . . who have all testified against Weinstein in the New York criminal trial.”). In the criminal case against Harvey Weinstein, Justice James M. Burke of the New York County Supreme Court ruled that the defense and prosecution should refrain from speaking about the witnesses to the media—but he denied a gag order to the same effect for Gloria Allred, the attorney for the three victims. *See id.* Justice Burke said he did not have the authority to grant the gag order. *See id.* When asked about public commentary by the defense and prosecution, Allred said, “I don't think the prosecution should do it. I can do it because I'm a private attorney.” *Id.* Allred's statements suggest that she likely would not consider Rule 3.6 to limit her ability to speak freely to the press.

222. *See* Chemerinsky, *supra* note 53, at 868. Thus, if a victim is speaking to the press and helping the prosecution's case, the defense counsel should have the right to counter these statements. *See id.* Anything less would lead to precisely the sort of bias that Rule 3.6 seeks to avoid, especially if the victim's lawyer is not barred from making prejudicial statements that speak to the defendant's guilt or potentially reveal evidence that would not otherwise make it to trial. *See* MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 5(4)–(5).

223. *See supra* notes 35–39, 206–08 and accompanying text.

Although a nonparty, victims now have certain procedural rights, enforceable in court, granted by both the CVRA and its state counterparts.²²⁴ As such, if participation were limited to only parties, the victim's lawyer would be excluded from Rule 3.6's strictures. Rule 3.6, however, does not explicitly limit its reach to parties,²²⁵ so participation is not as easily delineated. Since the ABA could have limited the Rule to parties,²²⁶ this conscious choice might suggest that the ABA sought to cover a greater range of lawyers within the Rule's scope.²²⁷ Accordingly, determining participation warrants a deeper look into the victim's role—and consequently the victim's lawyer's role—in the proceeding. The Rule's text is unclear regarding what being a participant means: whether the attorney is a participant solely by virtue of representing a participant or if the attorney must actively participate.²²⁸ Yet it is even less clear when the victim's attorney is simply representing a victim; then the question might be whether the *victim* is a participant.²²⁹

Victims in the proceeding are “passive actors in supporting roles,”²³⁰ as the prosecutor dictates the victim's participation in the trial.²³¹ At the early stages of the proceeding, the victim's role is largely defined by whether the victim chooses to report the crime and then whether the prosecutor chooses to make a formal charging decision.²³² Victims rarely have much input on charging decisions, as this is seen to be uniquely within the purview of the prosecutor.²³³

Still, despite being nonparties, victims are not entirely foreclosed from participating during the criminal trial. For instance, victims could be considered participants as they are often called upon to be witnesses in the proceeding.²³⁴ Moreover, even if the victim does not wish to testify, the victim may be compelled to do so, thus confirming an important and

224. See *supra* notes 101–14 and accompanying text.

225. See *supra* Part II.A.1.

226. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.4. Model Rule 3.4 is titled “Fairness to Opposing Party & Counsel.” *Id.* Its text limits the lawyer's obstruction of another “party's” access to evidence. *Id.* r. 3.4(a). Model Rule 4.2, in restricting contact, previously limited its language to “parties” but was later changed to “persons” to cover those who were not named parties to the formal suit yet still retained counsel. See *generally* ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-396 (1995) (noting the ABA's disagreement with case law that suggested Rule 4.2 applied only to named parties in formal proceedings).

227. This would appear to comport with the goals of limiting trial publicity and Rule 3.6 at large. See *supra* Part I.A.1.

228. See *supra* Part II.A.1. But see NAT'L CRIME VICTIM L. INST., *supra* note 197, at 1 (arguing that even with limited involvement, victims' attorneys are covered by the Rule).

229. See NAT'L CRIME VICTIM L. INST., *supra* note 197, at 1–2 (stating that the 1994 revisions to Rule 3.6 were intended to bring it into compliance with *Gentile* and “the language in *Gentile* is generally applicable to speech by any attorney representing any trial participant”).

230. Bazelon & Green, *supra* note 16, at 327.

231. See *id.* at 327–28.

232. See *id.* at 316–17.

233. See *id.* While prosecutors can defer to victims, and indeed are required to confer with victims about plea agreements under the CVRA, the prosecutor still retains discretion. See *generally id.*

234. See *id.* at 312 n.81.

somewhat consistent level of participation.²³⁵ Victims who wish to avoid testifying are left in an uncomfortable position, as victims may be brought into the trial against their will.²³⁶

Similarly, victims often exercise their chance to make their voices heard by submitting an impact statement.²³⁷ Victims have the right to submit their statements, either in writing or orally, prior to the sentencing.²³⁸ These statements are perceived to help inform the sentencing authority about how the victim has been impacted by the crime.²³⁹ However, impact statements are often submitted after the defendant has already been convicted,²⁴⁰ so submitting the impact statement appears to have little effect on the actual trial outcome.²⁴¹ In that sense, the victim appears to have little input prior to the conviction.²⁴² In fact, the sentencing stage of the proceeding might be when victims participate the most and also when victims have the greatest chance to tell their stories in their own words.²⁴³

Still, even if this participation comes after the trial is over, the statement's influence on the sentencing could not be understated. For example, in the case against Lawrence G. Nassar—a former doctor for the U.S. Women's Artistic Gymnastics National Team who was sentenced to forty to 175 years

235. *See id.* at 313–14 (explaining that the prosecutor can subpoena a victim to testify and threaten the victim with jail time if the victim ignores the subpoena).

236. *See id.*

237. The CVRA explicitly provides victims with the right to be reasonably heard at any public proceeding involving sentencing. *See* 18 U.S.C. § 3771(a)(4). The Supreme Court has held that victim impact evidence is not barred by the Eighth Amendment, even in cases involving a capital sentencing jury. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In his concurrence, Justice Antonin Scalia explicitly invoked the victims' rights movement. *See id.* at 834 (Scalia, J., concurring) (noting that case precedent barring such statements conflicted with “a public sense of justice” that has found its voice in the victims' rights movement).

238. *See Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1016–17 (9th Cir. 2006) (holding that victims have the right to be heard under the CVRA and thus may choose to speak at the sentencing proceeding, as opposed to only submitting a written statement).

239. *See Payne*, 501 U.S. at 825 (explaining that “[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question”). *But see Bazon & Green*, *supra* note 16, at 328 (noting that the impact statement allows victims to attempt to influence the sentence).

240. Impact statements are presented at sentencing—after the defendant has been found guilty. *See generally* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611 (2009).

241. *See id.* (noting that victim impact statements “promote justice without interfering with any legitimate interests of criminal defendants” and without “unfairly prejudicing defendants in any tangible way”). Moreover, victim impact statements might not even have any effect on sentencing. *See id.* at 634–36 (highlighting various studies that suggest that victim impact statements have no effect on sentence severity).

242. *See Bazon & Green*, *supra* note 16, at 327–28.

243. *See* Jamie Balson, *Therapeutic Jurisprudence: Facilitating Healing in Crime Victims*, 6 PHX. L. REV. 1017, 1031 (2013) (“[T]he primary function of a victim impact statement has been expressive or therapeutic; to provide crime victims with a voice regardless of the impact it may have on the sentence itself.” (footnote omitted)). *But see* Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 C. CAL. INTERDISC. L.J. 17, 25 (2000) (“Because the victim impact statement offers an account of grief that can neither be challenged nor verified, even its most eloquent defenses fail to convince.”).

in state prison after pleading guilty to sexually abusing seven female gymnasts²⁴⁴—Judge Rosemarie Aquilina allowed over one hundred victims to speak out about the impact Nassar’s abuse had on them.²⁴⁵ When the victim impact statements, particularly in such a large volume, are broadcast online or discussed repeatedly in the media, the sentencing panel could be influenced by the public’s horror at the victims’ suffering—this, however, might not be what Rule 3.6 is concerned with.²⁴⁶ Thus, although the right to be heard undoubtedly reflects a level of participation granted to the victim,²⁴⁷ the victim’s actions at the sentencing proceeding may not necessarily make the victim a participant for purposes of Rule 3.6, especially when sentencing proceedings are open to many victims.²⁴⁸

Finally, the victim is undoubtedly the subject of the trial. It is worth considering whether the victim could be a full participant solely by virtue of being the subject of the discussion, even if the victim does not meaningfully participate or plan to. On the one hand, the victim, as a subject of the discussion, appears central to the case. On the other hand, the victim’s importance in the case falls to the side during the trial, as all focus shifts to the defendant and determining the defendant’s guilt or innocence.²⁴⁹ A court may venture into restricting permissible speech if it were to restrict the speech of those who are merely the subject of the proceeding. Indeed, if the victim is only the subject of the discussion, then the victim’s attorney’s statements are closer to those of a commentator, rather than a participant—and so, the statements cannot be restricted by Rule 3.6.²⁵⁰

As this section makes clear, there are strong arguments for applying Rule 3.6 when the victim’s lawyer actually participates in the criminal trial, along with equally strong arguments for not applying the Rule when neither the victim nor the victim’s lawyer participates in any meaningful way during the actual course of the trial. Yet, in all of these contexts, the Rule’s scope is uncertain. Thus, as examined in Part II.B, looking to the criminal justice policies behind victims’ rights, there are strong arguments for exempting

244. See Scott Cacciola & Victor Mather, *Larry Nassar Sentencing: ‘I Just Signed Your Death Warrant,’* N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/larry-nassar-sentencing.html> [https://perma.cc/AC86-ZXT4].

245. See Scott Cacciola, *Victims in Larry Nassar Abuse Case Find a Fierce Advocate: The Judge*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/sports/larry-nassar-rosemarie-aquilina-judge.html> [https://perma.cc/547Y-A4AD].

246. Rule 3.6 appears primarily concerned with jury trials. See MODEL RULES OF PROFESSIONAL CONDUCT r. 3.6 cmt. 1 (AM. BAR ASS’N 2020). The comments note that nonjury hearings are less likely to be affected by prejudicial statements. See *id.* at cmt. 6. Further, the sentencing stage occurs after the defendant has either pleaded guilty or has been convicted at trial, long after the “litigation of a matter.” *Id.* r. 3.6(a).

247. See *Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006).

248. See generally Rajini Vaidyanathan & Roland Hughes, *Larry Nassar Case: The 156 Women Who Confronted a Predator*, BBC NEWS (Jan. 25, 2018), <https://www.bbc.com/news/world-us-canada-42725339> [https://perma.cc/EAP6-R5D7].

249. The defendant is on trial, and so the focus falls on them, while the victim falls into a passive role that is scripted and limited. See Bazelon & Green, *supra* note 16, at 308.

250. See Chemerinsky & Levenson, *supra* note 208, at 1315–16.

victims' lawyers from the Rule's scope altogether, without regard to their participatory status and notwithstanding their ability to make statements that are materially prejudicial to the criminal proceeding.

B. Policy Concerns Underlying the Victims' Rights Movement and Legislation

As noted above, Rule 3.6's text does not clearly indicate whether victims' lawyers must abide by the Rule when the lawyers make extrajudicial statements. Similarly, the Rule's underlying purpose provides limited insight about the Rule's application to victims' lawyers. The Model Rules only offer guidance and can be interpreted during disciplinary proceedings by courts in different manners.²⁵¹ Thus, the application of the Model Rules depends on the interpretation of the text by the disciplinary body, which has authority to give weight to broad policy considerations beyond those of the Rule's drafters.²⁵² Drawing upon this understanding of the Model Rules, this section considers the various policy concerns underlying the victims' rights movement and related legislation and explains how such concerns might affect the application of Rule 3.6 to victims' lawyers.

1. Helping Victims' Lawyers Be Effective Advocates

Limiting Rule 3.6's applicability to victims' lawyers could enable them to be better advocates for their clients.²⁵³ The Model Rules are clear about lawyers' duty to advocate zealously on behalf of their clients.²⁵⁴ As the modern-day trial extends beyond the courtroom walls,²⁵⁵ it becomes more important to ask whether advocating zealously on behalf of a client requires a lawyer to engage in extrajudicial commentary.²⁵⁶ At least one scholar has argued that attorneys may be obligated to engage in so-called "litigation public relations" when circumstances and customs might create an implied contract for such services.²⁵⁷ Some victims might not wish to speak to the media on their own and might retain attorneys to assist with managing the

251. See generally MODEL RULES OF PRO. CONDUCT pmb. & scope 14.

252. Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 558 (1989) (arguing that courts do not have to interpret unclear Model Rules to carry out the drafter's intent, but rather "[c]onsistent with their traditional authority to regulate the bar, courts can and should act as policy-makers when they interpret ambiguous provisions").

253. See generally Chemerinsky, *supra* note 53, at 867 (arguing that lawyers may be required to make statements to the press to effectively represent their clients).

254. See MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

255. See Howard, *supra* note 28, at 63–64 (examining the media's role in trials).

256. See Chemerinsky, *supra* note 53, at 868 ("[A] lawyer who is zealously representing a client, at times, should be making statements to the media.").

257. John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM'N L. & POL'Y 77, 101 (2002) ("By custom, contract and existing law there appears to be grounds for courts and bar associations to require attorneys to serve their clients' interests in the court of public opinion as well as the courts of law.").

press.²⁵⁸ Thus, much like defense attorneys advocating for their clients and navigating the media on their behalf, victims' lawyers seem to have a similar duty.²⁵⁹

Under this argument, victims are often limited in their ability to speak in the courtroom,²⁶⁰ so victims' lawyers should have the ability to speak on their clients' behalf in the "court of public opinion" and help their clients achieve their voices there.²⁶¹ The very nature of the criminal trial and the two-party adversary system presupposes that both the prosecution and defense go head-to-head and present their cases and versions of the overall story.²⁶² Lost in this battle is the victim, whose story is typically shaped by the prosecution in setting up its case and by the media eagerly reporting on each detail as it emerges.²⁶³ However, as noted earlier, the prosecutor does not represent the victim and likely does not consider the victim's interests in presenting the story to the court and to the media.²⁶⁴ And, although media outlets may empathize with a victim's story, the media's goal is attracting viewership,²⁶⁵ and the story that sells might not necessarily comport with the victim's actual story and interests. If Rule 3.6 were to prevent victims' privately retained lawyers from speaking to the media on behalf of their clients, it could quash much of the attorneys' ability to advocate for the victims, especially when they were retained for that very purpose.

2. Preserving the Right to Be Heard

Keeping victims' lawyers out of Rule 3.6's scope could comport with the goal of victims' rights laws and would protect the victims' interest in having a voice, and thus, autonomy.²⁶⁶ Every client has a particular interest in the trial, and victims especially have an interest, tied to the CVRA, in having a voice and being heard.²⁶⁷ Thus, victims may have a specialized interest in

258. See *supra* Part I.C.1.

259. See Gregg, *supra* note 55, at 1329 ("Lawyers' speech can often serve an essential function, and denying a lawyer access to the media can result in substantial injustice. Lawyers owe a duty of zealotry to their clients and should not be denied an avenue to advocate their clients' causes without strong reason.").

260. Although the victim is called as a witness, the victim's testimony is often scripted. See generally Bazelon & Green, *supra* note 16, at 317. The other two ways the CVRA gives the victim the right to be heard—in plea discussions and at sentencing—occur outside the actual trial. See Cassell & Joffe, *supra* note 101, at 167.

261. Fulstone, *supra* note 186, at 662 ("The need for an attorney to speak out in the 'court of public opinion' to protect his client . . . may at times become paramount to the possibility of prejudicing an upcoming trial.").

262. See Pizzi, *supra* note 16, at 350.

263. See Bazelon & Green, *supra* note 16, at 317.

264. See *supra* notes 139–42 and accompanying text; see also Bazelon & Green, *supra* note 16, at 310 n.76, 317.

265. See Howard, *supra* note 28, at 62.

266. See generally Bazelon & Green, *supra* note 16, at 297 (noting that the traditional "adversary process denies victims autonomy and puts them at risk of further psychological harm and invasion of privacy").

267. See 18 U.S.C. § 3771(a)(4) (noting that victims have the right to be heard at public proceedings); see also 150 CONG. REC. 22,952 (2004) (statement of Sen. Jon Kyl) ("This bill intends for this right to be heard to be an independent right of the victim."). Although the

seeking lawyers to help give them a voice, not only in the courtroom but also outside it.²⁶⁸ Victims' stories are often manipulated and shaped by the prosecution and defense counsel when they build their own cases-in-chief or defenses,²⁶⁹ and this story is then retold by the media, which may have its own agenda and goals in reporting on the story.²⁷⁰ Particularly in today's climate, in which the media plays a large role in disseminating information about cases,²⁷¹ victims may not wish to take a back seat and face secondary victimization as their stories are retold and manipulated by the media. If the victims do not wish to speak to the media on their own, speaking through the lawyer could be their only opportunity to tell their stories from their perspective and to have their unique voices heard by the public.²⁷²

3. Protecting Victims' Dignity and Privacy

Limiting Rule 3.6's scope could foster the goals of victims' rights laws by helping victims' attorneys preserve their clients' dignity and privacy in public. Notably, the CVRA reflected an adoption of these interests when the CVRA granted victims the explicit right to be treated with fairness and with respect for their dignity and privacy.²⁷³ However, outside the trial and especially in high-profile cases, victims' attorneys could seek to preserve victims' dignity within the media.²⁷⁴ For example, in cases of sexual assault, the victims' mental or physical state at the time of the assault becomes the focus of intense scrutiny.²⁷⁵ The defense may seek to blame the victim and may do so through extrajudicial commentary.²⁷⁶ Moreover, even if the defense counsel does not seek to use such a defense, the media may inquire into the backstory on its own.²⁷⁷ Therefore, victims' lawyers might need to engage in pretrial publicity to protect their clients and the clients' rights.

CVRA is limited to only public proceedings, it reflects a victim's broader interest in having a voice, regardless of the procedural merits of such statements. *See generally supra* notes 237–43 and accompanying text. Thus, even though the CVRA does not endorse extrajudicial statements on behalf of victims, it does tacitly endorse the victim's interest in being heard.

268. *See generally* Bazelon & Green, *supra* note 16, at 318 (noting that “victims are on their own” but that it is “axiomatic that individuals with legal rights need lawyers”).

269. *See id.* at 295 (“In the rare case where there is a trial, the victim's narrative is shaped by the prosecutor, the victim must undergo cross-examination by the defense attorney, and the matter of punishment is up to the judge.”).

270. *See* Howard, *supra* note 28, at 62.

271. *See id.* at 61–62.

272. *See generally* Bazelon & Green, *supra* note 16, at 312 (“[The victim] didn't want someone else deciding where and how her story would be told—and certainly not in court, in response to lawyers' questions, piecemeal, confined by rules of evidence, punctuated by objections. The victim wanted an empathetic audience . . .”).

273. 18 U.S.C. § 3771(a)(8).

274. *See* Chemerinsky, *supra* note 53, at 869 (arguing that “at times attorneys must speak out to protect their clients' reputations”).

275. *See* Pizzi, *supra* note 16, at 355. The defense may attempt to suggest that the victim is lying or has ulterior motives. *See id.*

276. *See, e.g., supra* note 177 and accompanying text.

277. *See* Howard, *supra* note 28, at 62.

4. Considering the Efficacy of Rule 3.6

Rule 3.6 might not be an effective method of limiting trial publicity,²⁷⁸ and if this is so, then victims' attorneys should not be hindered in their advocacy efforts by it.²⁷⁹ For instance, there is little evidence that juries are actually influenced by pretrial publicity and similarly little evidence to suggest that lawyers' extrajudicial statements pose a particular threat when such statements are just a fraction of the general media stories.²⁸⁰ And, since Rule 3.6 only bars those statements that the lawyer should reasonably know are prejudicial, one scholar has argued that the Rule places a burden on the attorney to resolve situations when statements might be materially prejudicial—leaving the attorney at the mercy of the disciplinary board, which may or may not share the attorney's view.²⁸¹

Similarly, some scholars have argued that Rule 3.6 presents a weak attempt at preventing juror bias pretrial—one that is not necessary and is overreaching.²⁸² At least one scholar has argued that jurors should not be treated like they are incapable of filtering information and logically weighing evidence.²⁸³ Keeping jurors in a vacuum, the argument goes, does little to preserve a defendant's right to a fair trial.²⁸⁴ Taking this argument to heart, it might be reasonable to allow victims' lawyers to advocate on behalf of their clients where the rule barring extrajudicial statements may do little to preserve the sanctity of the jurors anyway.²⁸⁵ Regardless of pretrial publicity, jurors come to the trial with inherent biases and assumptions,²⁸⁶ and there are procedural safeguards, such as voir dire, to ensure a jury pool is not entirely biased coming into the trial.²⁸⁷ Similarly, tailored gag orders imposed on a case-by-case basis could be less imposing, while still allowing

278. *See supra* notes 54–59 and accompanying text. This is especially so in high-profile cases, where “[e]ven if no attorney or participant in the case ever spoke to the media, there would still be intense coverage.” Chemerinsky, *supra* note 53, at 869.

279. In cases with extensive publicity, it is unclear that additional statements by the lawyer would make any difference. *See* Chemerinsky, *supra* note 53, at 869.

280. *See* Gregg, *supra* note 55, at 1365.

281. *See id.* at 1366.

282. *See, e.g.,* Kelly, *supra* note 54, at 501 (“Restricting attorney speech is not necessary to ensure a fair jury verdict, because keeping jurors in a vacuum is not a viable option to preserve a defendant’s right to a fair trial.”); *see also* Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003, 1053–54 (1984) (arguing that Rule 3.6 is a harmful form of prior censorship).

283. *See* Kelly, *supra* note 54, at 501–02.

284. *See id.*

285. *See generally id.* at 501 (“An attorney is paid . . . by his client . . . to advocate his client’s position, and preventing a lawyer from voicing his views does little to preserve jury impartiality.”).

286. *See id.* at 501–02.

287. *See id.* *But see* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (noting that even if such safeguards could ensure a fair trial, they entail “serious costs to the system” and may not be entirely effective).

the judge to take appropriate measures where particular statements are inappropriate.²⁸⁸

Accordingly, as evidenced above, the policies guiding the victims' rights movement, related legislation, and Rule 3.6 itself could provide some guidance in interpreting the Rule's application to victims' lawyers, where neither the text itself, nor its purpose, sheds any light on the matter.

III. BEYOND THE TEXT: GIVING VICTIMS THEIR VOICE

This Note argues that Rule 3.6, as it is currently written, should not apply to victims' lawyers. The text of the Rule is ambiguous. And, although the purpose behind Rule 3.6 might support limiting victims' lawyers' extrajudicial statements, as Part III.A notes, the policy concerns underlying the victims' rights movement do not support such an interpretation. Therefore, as examined in Part III.B, the Rule should not apply to victims' attorneys.

Further, as proposed in Part III.C, the CVRA and other state legislation should be modified to affirmatively grant victims the right to have counsel speak extrajudicially on their behalf. Finally, as this Note concludes in Part III.D, the Model Rules should be amended to consider victims' attorneys, who hold a unique position in criminal trials. Such modifications will prevent further confusion about the application of the Model Rules to this growing body of attorneys.

A. Victims' Lawyers Should Be Permitted to Advocate for Their Clients' Interests

The victims' rights movement seeks to give victims a voice in criminal proceedings. Reflecting the goals of this movement, the CVRA established several rights for victims throughout the trial process.²⁸⁹ However, these enumerated rights did not make victims parties, nor did they give victims the ability to tell their stories in their own words during the trial.²⁹⁰ Thus, victims' lawyers should be allowed to speak publicly on behalf of their clients. Both the limited participatory status of victims under victims' rights laws and the goals of these laws support victims' lawyers being permitted to publicly advocate for their clients.

1. Victims' Rights Laws Limit the Victim's Ability to Participate

Rule 3.6 is limited to lawyers who are participating in the proceeding.²⁹¹ Although not limited to parties, the Rule's text does appear to be somewhat limited, since it does not apply to all lawyers. The Rule's text, in its current

288. See Gregg, *supra* note 55, at 1363–64. Gag orders may be preferable to Rule 3.6, as they can be narrowly tailored to the specific case circumstances. See *id.* at 1364.

289. See *supra* notes 108–14 and accompanying text.

290. See *supra* notes 120–24, 179 and accompanying text; *supra* text accompanying notes 138–40.

291. MODEL RULES OF PRO. CONDUCT r. 3.6(a) (AM. BAR ASS'N 2020).

form, does not define what it means for a lawyer to participate in legal proceedings—specifically, whether active participation in the proceeding is required or if representing a participant is sufficient.²⁹² Regardless, under either interpretation, the victim would not be a full participant for purposes of the Rule.

Under the first interpretation, victims' lawyers would rarely be true participants in the proceeding. The CVRA reflects Congress's careful considerations about which rights ought to be afforded to victims in criminal proceedings. Yet, those participatory rights are inherently tied to the CVRA.²⁹³ Under a rigid interpretation of participation, the victim's lawyer would be incredibly limited in the ability to appear in court on behalf of the victim—indeed, the lawyer would only appear to enforce the rights of the victim if they were infringed.²⁹⁴ Otherwise, the lawyer would merely be present but would likely not be actively participating.

Under the second interpretation of participation, the victim's lawyer is similarly not a participant, since the lawyer does not represent a true participant. Despite all of the substantive rights afforded by the CVRA and the interests that have been acknowledged, the CVRA did not transform victims into formal parties to the proceeding.²⁹⁵ By giving victims only certain procedural rights but withholding party status, Congress kept victims at the boundaries of the criminal trial. Accordingly, victims are not true participants in the same way that the defendant or the government is. Instead, the victim is a moving figure—at times central to the particular procedural checkpoint in the trial and, at others, a bystander with large interests at stake.²⁹⁶

Victims are still passive actors in the criminal trial, and the scope of their participation is severely limited and, indeed, almost entirely dictated by the prosecutor and various victims' rights laws.²⁹⁷ The victim's participation in the trial is largely limited to participating as a witness and submitting a victim impact statement.²⁹⁸ The opportunity to submit a victim impact statement is an important right for victims; indeed, it affords victims the ability to confront defendants, tell their stories, and begin to heal.²⁹⁹ But, as noted earlier, victim impact statements are submitted after the trial has already ended.³⁰⁰ Any impact that the victim's words have is limited at that point. Even in cases in which multiple victims submit victim impact statements, their impact on the trial does not appear to be strong enough to deem them full participants. And, although the victim is the subject of the trial, the trial is hardly focused on the victim alone. Instead, the trial is almost entirely

292. *See supra* Part II.A.1.

293. *See supra* notes 122–24 and accompanying text.

294. *See supra* notes 106–07, 114, 136 and accompanying text.

295. *See supra* notes 120–24 and accompanying text.

296. *See supra* Part I.B.2.

297. *See* Bazelon & Green, *supra* note 16, at 327–28.

298. *See supra* Part II.A.3.

299. *See supra* notes 237–43 and accompanying text.

300. *See supra* notes 241–43 and accompanying text.

focused on the defendant.³⁰¹ Thus, merely being the subject of the case does not warrant participatory status either.

For better or for worse, the victim is still not a full participant in a criminal proceeding, due largely to the procedural barriers that keep the victim on the sidelines.³⁰² Applying Rule 3.6 to victims' lawyers' extrajudicial statements runs counter to Congress's and the states' intents in enacting victims' rights laws, as it incorrectly classifies victims and their lawyers as full participants, thus denying victims effective representation. There was a legislative judgment to grant victims enumerated rights. The limited participatory status victims currently have under the CVRA and corresponding state laws should not serve to limit victims from a right they would otherwise have. Thus, a victim's independent lawyer should not be restricted from making extrajudicial statements in the same way that a prosecutor or defense attorney is.

2. The Victim's Interest in Having a Voice Has Been Recognized by Victims' Rights Laws

The CVRA's provision entitling victims to the right to be heard reflects the underlying policies of the victims' rights movement in giving victims a voice.³⁰³ Victims' having a voice, particularly when they have traditionally been prevented from asserting their own stories during criminal proceedings, would provide great benefits.³⁰⁴ This important interest was acknowledged by the victims' rights movement and was further echoed in the enactment of the CVRA.³⁰⁵

While victims have traditionally been kept silent, except for scripted testimony, the CVRA acknowledges the importance of victims' participatory rights,³⁰⁶ which, in turn, helps victims avoid retraumatization and ensures their satisfaction with the criminal process.³⁰⁷ And, though the CVRA does not specify whether the victim has an enumerated right to be heard before or after charges are brought, the mere existence of such a right suggests the CVRA acknowledges the importance of listening to victims and ensuring they feel recognized.³⁰⁸ Thus, this goal should be furthered by acknowledging the duty victims' lawyers have to speak on behalf of their clients outside of the courtroom.

301. *See supra* note 249 and accompanying text.

302. Although an examination of the sufficiency of the CVRA's approach to victims is beyond the scope of this Note, this approach, including the rights *not* granted to victims, speaks to the victim's role in the criminal trial.

303. *See supra* notes 150–54 and accompanying text.

304. *See supra* notes 96–100 and accompanying text.

305. *See supra* notes 99–101 and accompanying text.

306. *See supra* notes 118–19, 126–27 and accompanying text.

307. *See generally supra* notes 149–54 and accompanying text.

308. *See supra* note 267 and accompanying text.

B. Rule 3.6 Should Not Apply to Victims' Lawyers

Reflecting both the interests of victims and the limited participation they are afforded by victims' rights laws, Rule 3.6 should not apply to victims' lawyers. While Rule 3.6's concern of protecting the defendant's right to a fair trial is important, the importance of progressing victims' rights overwhelms the few documented benefits of Rule 3.6.

1. Victims' Attorneys Are Not Participating Attorneys

Rule 3.6 is limited to participants in the criminal trial.³⁰⁹ It is evident that victims' attorneys have limited rights to participate during the criminal trial; participation is limited to enforcing victims' statutory rights, rather than focusing on the trial itself.³¹⁰ Even if a victim's attorney is participating by virtue of representing a participant, as noted above, it is unclear when, if at all, victims are true participants in the criminal trial.³¹¹ Indeed, tying application of Rule 3.6 to victims' lawyers based on victim participation raises timing issues. The victim is not a participant at the start of the trial, which limits the two parties to the state and the defendant. This raises numerous questions: When are victims participants? Do victims become participants when they testify or speak at a plea bargaining proceeding? Can victims be participants to the criminal trial when speaking at sentencing, which occurs after the defendant has already been convicted? Further, if the victims' participation is tied to their testimonies, do they stop being participants after they leave the stand? Moreover, does limiting the victims' participation limit the reach that their attorneys' extrajudicial commentary has?

Viewing victims as participants raises these questions. Indeed, it is unfair to suggest that victims are participants for the duration of the trial in the same sense that the prosecution and defendant are. On the other hand, it is difficult to delineate when victims are true participants and how this ought to factor into an analysis under Rule 3.6. Yet, by making victims nonparticipants for the application of Rule 3.6, these concerns can be avoided. Given that there is no evidence that the Model Rule drafters had contemplated these concerns in drafting Rule 3.6, this approach avoids expanding the Rule beyond its drafters' intentions.

Nonetheless, even if considering victims' limited participatory rights and the text of Rule 3.6's application to participating attorneys, as discussed below, victims' attorneys should not be subject to Rule 3.6 for multiple reasons.

309. See MODEL RULES OF PRO. CONDUCT r. 3.6(a) (AM. BAR ASS'N 2020).

310. See *supra* Part II.A.3.

311. See *supra* Parts II.A.3, III.A.1.

2. Victims' Interests and Their Attorneys' Unique Roles in Criminal Trials

Rule 3.6 should be interpreted so it does not apply to victims' lawyers. Although a victim's lawyer may make materially prejudicial statements, a victim's lawyer is fundamentally different from the prosecution and defense, having limited opportunities to advocate on the client's behalf inside the courtroom. Defense counsel, for example, even if limited in their extrajudicial commentary, are still able to tell their clients' stories inside the courtroom.³¹² Victims' lawyers do not have the same opportunity during most of the trial.³¹³ Instead, the victim's story is shaped by the prosecution during direct examination and then reshaped by the defense during cross-examination.³¹⁴ The unique position victims hold in the criminal trial makes it difficult for victims to proceed through the litigation with a true sense of agency.³¹⁵ This lack of agency is exacerbated when the victim's story is manipulated by the two parties and retold by the media.

Similarly, victims' lawyers do not have the same authority as the prosecution and defense, making their statements less likely to materially affect the proceeding. Although victims' lawyers have information pertaining to their clients, they do not have access to the prosecutor's or defense's case.³¹⁶ The public is unlikely to perceive victims' lawyers to be as authoritative as the lawyers representing the parties, since both the prosecution and defense will have access to testimony, investigatory details, and reports that would be inaccessible to the victim's attorney.

Further, applying the Rule to victims' lawyers would harm the furtherance of victims' rights. While the Rule contains a "right to reply" provision,³¹⁷ which allows an attorney to reply to adverse commentary,³¹⁸ this provision fails to cover the scope of extrajudicial commentary that the victim's lawyer should have. Although the language of Model Rule 3.6(c) theoretically allows victims' lawyers to respond to negative publicity, under this provision, victims' lawyers may only act to reduce the harm of the initial negative commentary.³¹⁹ This carveout better suits the defendant, where defense counsel has to mitigate the damage caused when the jury hears negative information before the trial and arrives with preconceived notions about the defendant's guilt.³²⁰ With victims, however, the concern is less

312. See generally *supra* note 262 and accompanying text.

313. See *supra* Part II.B.1.

314. See *supra* note 269 and accompanying text.

315. See *supra* notes 138–40 and accompanying text.

316. See *supra* note 209 and accompanying text.

317. Brown, *supra* note 56, at 387.

318. See MODEL RULES OF PRO. CONDUCT r. 3.6(c) (AM. BAR ASS'N 2020).

319. See *id.*

320. This right-to-reply provision can be utilized by the defense counsel if the victim's attorney's speech harms the defendant. See generally Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 858 (1996) (arguing that this provision "will likely protect most statements defense attorneys wish to make"). Still, arguments can be made for why limiting Rule 3.6's reach with respect to victims' attorneys may be harmful to defendants, irrespective of the defense's right to reply. See generally *supra* notes 214–22 and accompanying text. There seems to be no solution that allows victims the

about mitigating damage concerning a fair trial and is instead about preventing a victim's story from being exploited and manipulated in the first place.

Finally, Rule 3.6 faces multiple criticisms. Because Rule 3.6 is already insufficiently applied to participating lawyers,³²¹ its scope should not be expanded to include additional attorneys. For instance, the Rule is poorly applied to prosecutors, whose extrajudicial commentary is often incredibly damaging but who face few consequences.³²² Rule 3.6 has also been criticized as being ambiguous, making application difficult even in relatively clear-cut cases involving the participating attorneys.³²³ Given the Rule's inconsistent application and noted ambiguity, the Rule's reach should not be extended further.³²⁴

Rule 3.6 is also likely ineffective at preventing juror bias.³²⁵ With varying applications of the Rule,³²⁶ extrajudicial commentary is likely to reach the jury regardless. Moreover, growing media interest in criminal trials means that when the media writes about a case, it may be difficult to find a juror who has not heard of, or been affected by it, regardless of victims' lawyers' speech.³²⁷ Therefore, victims' attorneys should not be prevented from speaking on behalf of their clients—in one of the only forums they can—based on a faulty assumption that preventing this speech will help preserve the defendant's right to a fair trial by an impartial jury.

All of the foregoing reasons highlight why the interests of victims, as supported by victims' rights legislation, should outweigh the concerns motivating Rule 3.6. Thus, the Rule should be interpreted such that it does not apply to victims' lawyers; this would protect victims by allowing their

chance to make their stories heard through attorneys and defendants to have the opportunity for a truly unbiased jury. However, victims are unrestricted by the Model Rules, which apply only to attorneys; therefore, victims would likely speak regardless of whether their attorneys were limited by Rule 3.6. *See generally* MODEL RULES OF PRO. CONDUCT pmbl. & scope. Moreover, there are less restrictive options for preserving jury impartiality. *See supra* notes 287–88 and accompanying text.

321. *See supra* notes 57–58 and accompanying text.

322. *See supra* notes 57–58 and accompanying text.

323. *See supra* notes 54–55 and accompanying text.

324. Moreover, although not examined in depth in this Note, the Court has been careful to limit restrictions on attorneys' First Amendment rights. *See generally supra* notes 49–52 and accompanying text. Rule 3.6 and similar disciplinary rules limiting extrajudicial commentary are viewed as a necessary balance between protecting a defendant's right to a fair trial and an attorney's First Amendment right to speak freely. *See generally* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071–76 (1991). Nonetheless, such disciplinary rules have been criticized as overbearing restrictions on attorneys' First Amendment rights. *See supra* note 53. Expanding the reach of these rules to another group of attorneys would require contending with the victims' attorneys' First Amendment rights. The *Gentile* Court made clear that the holding was not speaking to third parties. *See Gentile*, 501 U.S. at 1072 n.5. Applying Rule 3.6 to victims' attorneys raises additional constitutional concerns, especially where the attorneys are not participating in the same manner as the defense or prosecution. Interpreting Rule 3.6 in a manner that avoids application to victims' attorneys avoids this constitutional question.

325. *See supra* notes 54–59 and accompanying text; *supra* Part II.B.4.

326. *See supra* notes 57–58 and accompanying text.

327. *See generally supra* notes 278–79 and accompanying text.

attorneys to zealously represent them. The compelling interest that defendants have in a fair trial is unlikely to be significantly prejudiced by the statements of an attorney who lacks the authority of the prosecution or defense. More importantly, victims' interests will be significantly furthered if their attorneys are not prevented by Rule 3.6 from making extrajudicial statements.

Beyond simply limiting Rule 3.6's scope, the ABA should acknowledge the important interests that victims have and the powerful way that extrajudicial statements could help them by affirmatively amending Rule 3.6 to reflect its nonapplication to victims' lawyers. Alternatively, the ABA should provide clear commentary to the Rule reflecting the same.

C. Victims' Rights Laws Should Codify the Right to Have Counsel Speak Extrajudicially

There is, of course, no guarantee that Rule 3.6 will be amended so it does not apply to victims' lawyers. However, considering the goals of the victims' rights movement and current victims' rights laws,³²⁸ the CVRA and its various state counterparts should be amended to provide victims an explicit right to have their lawyers speak publicly on their behalf. The CVRA, which was meant to serve as a guide for states to amend their victims' rights laws, provides only enumerated rights to victims.³²⁹ One of those rights is the right to be heard.³³⁰ However, there is no explicit right to be heard outside specific points in the proceeding, such as during plea bargaining or at sentencing.³³¹ And, while the CVRA affirms victims' right to retain private counsel,³³² it does not elaborate much further on the role of those attorneys.

Accordingly, victims should not be limited in their ability to be heard. The CVRA and other victims' rights laws should reflect the strong interest that victims have in telling their stories and the possibility that victims might want their attorneys to tell their stories publicly on their behalf. Enumerating the right to have victims' attorneys speak on their behalf publicly will not only further the goal of giving victims a voice but also allow attorneys to protect victims' dignity in the media. As trials are increasingly publicized in the media, it is time legislatures acknowledge that, under victims' rights laws as currently written, the public sphere may be the only place where the victim can be heard, outside the few specified points throughout the trial.

328. *See supra* Part I.B.1.

329. *See supra* notes 104–14 and accompanying text.

330. *See* 18 U.S.C. § 3771(a)(4).

331. *See, e.g., id.* (limiting the right to be heard to public proceedings “involving release, plea, sentencing, or any parole proceeding”).

332. *See generally supra* notes 114, 136, 143 and accompanying text.

D. The Bigger Picture: The Problem with Ambiguity in the Model Rules

Rule 3.6 is just one example of a Model Rule geared toward participants or parties.³³³ And, the Model Rules contain no rules that refer specifically to victims.³³⁴ As such, the growing group of lawyers who represent nonparties are left with the difficult task of parsing through the language of the Model Rules to determine the Model Rules' application. As evidenced by both the Epstein and Maxwell cases—both of which were brought in quick succession and received significant media coverage³³⁵—cases may involve multiple victims, many of whom will retain attorneys. Given these procedural factors, victims' lawyers might not even consider whether they are covered by Rule 3.6 or other Model Rules, as evidenced by Gloria Allred's comments in the Harvey Weinstein prosecution, noting that her extrajudicial commentary was not barred.³³⁶

At only seventeen years old, the CVRA's full scope is still being understood.³³⁷ However, more victims are likely to retain lawyers to help apprise them of their rights and protect their interests.³³⁸ Thus, the ABA must consider this growing body of lawyers in the next iterations of the Model Rules. The solution should be to amend the rules to add subsections addressing victims and victims' lawyers. Alternatively, the ABA should add commentary to the rules elaborating on their application to victims' lawyers during criminal trials. This approach would almost certainly remove any doubt about the application of the rules, without requiring any rewriting of the rules themselves.

Whether the ABA amends the Model Rules, or merely adds commentary, there must be an acknowledgment in the rules reflecting the growing reality that, even within the adversary system, there are often multiple interested nonparties with large interests at stake, especially in criminal trials.

CONCLUSION

High-profile cases, sometimes with multiple victims, reveal the growing number of lawyers who represent victims, both to vindicate victims' rights and help victims navigate the difficult experience of trial. These attorneys take on multiple roles, acting as legal advisors, representatives, and spokespersons for victims, for many of whom the trial and the ensuing media chaos brings renewed trauma. As the victims' rights movement only continues to grow and victims' lawyers begin to cement their place in the

333. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.4 (AM. BAR ASS'N 2020) ("Fairness to Opposing Party & Counsel"); *id.* r. 4.2 (governing communications about the subject of the representation with a person who is known to be "represented by another lawyer in the matter").

334. See Butler, *supra* note 106, at 26.

335. See *supra* notes 1–6 and accompanying text.

336. See *supra* note 221.

337. See Butler, *supra* note 106, at 22 ("Change is often difficult. The past course of dealings in criminal proceedings will continue to be what judges and practitioners know and expect.").

338. See *supra* Part I.C.1.

traditional adversary system, victims' lawyers will likely feel compelled, as advocates, to speak out on their clients' behalf in the media with more frequency. At the moment, Rule 3.6, which governs trial publicity, is unclear regarding its application to victims' lawyers. Ultimately, this Note argues that Rule 3.6 should not be applied to victims' lawyers. Finding the text of Rule 3.6 ambiguous and considering the policy concerns motivating the Rule and underlying the victims' rights movement and laws, this Note argues that applying Rule 3.6 to victims' lawyers would contravene the victims' rights movement and the goals of the CVRA, which grants victims participatory rights but denies them full party status. As long as victims are not traditional parties to the proceeding and as long as victims have limited procedural rights at trial, victims' lawyers should not be subject to Rule 3.6.