SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by KATHERINE E. WONE, as Personal Representative, *Plaintiff*, v. JOSEPH R. PRICE, VICTOR J. ZABORSKY, and DYLAN M. WARD, *Defendants*.	Civil Action No. 008315-08 The Honorable Brook Hedge Next Court Event: February 14, 2011 Deadline for Discovery Requests

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO ENJOIN COUNSEL FROM MAKING EXTRAJUDICIAL STATEMENTS

In an effort "to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression," Rule 3.6, cmt. 1, the D.C. Court of Appeals promulgated Rule 3.6 of the Rules of Professional Conduct, which provides:

> A lawyer engaged in a case being tried to a judge or a jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass communication and will create a serious and imminent threat of material prejudice to the proceeding. Rule 3.6 (emphases added).

As the first Comment to the Rule explains, "litigants should be allowed to present their side of the dispute to the public, and the public has an interest in receiving information about matters that are in litigation." Rule 3.6, cmt. 1.

In their motion to enjoin all extrajudicial statements by counsel, Defendants would have this Court throw out the nuanced and measured requirements of Rule 3.6 in favor of a blanket ban on public statements. Defendants' implicit contention seems to be that after more

than four years of loudly trumpeting their supposed "innocence," Mrs. Wone and her counsel should have to remain silent. In addition to being grossly unfair, such a prior restraint on speech would be unconstitutional. It would also be unwarranted. Lawyers on both sides of this case have, at one time or another, presented their view of the case -- or aspects of it -- to the media. But all have complied with Rule 3.6 and, with trial almost a year away, there is no reason to believe that any more restrictive measures are necessary.

BACKGROUND

For more than four years, Defendants and their counsel have actively sought to use the media to convince the public that their clients had no involvement in Robert Wone's murder and its cover-up. It would not be productive to recycle here all of the many public statements about this case by Defendants' counsel. But here are a few highlights:

In the days after Robert Wone's murder in August 2006, Defendants had at least two of their lawyers working the press:

- "[David] Schertler, a former homicide chief for the U.S. Attorney in the District, said Ward had nothing to do with Wone's slaying. Schertler said Ward told police that neither of the other two men was involved, either." "Schertler also said the slaying was committed by an intruder." *Washington Post*, August 16, 2006.

- "Kathleen E. Voelker, an attorney for one of the townhouse residents, said the three men have told police 'unequivocally that none of them were involved' in the slaying." *Washington Post*, August 24, 2006.

When the Defendants were arrested in the fall of 2008, their counsel took to the airwaves again:

- "The prosecution's case is pure fantasy. My client is innocent. There is no basis for these charges . . . ." *ABC News*, October 20, 2008, remarks by David Schertler.

- "'Our clients are completely innocent,' says Schertler, former chief of the Homicide Section in the U.S. Attorney's Office here. 'What the prosecution has done is cobbled together a variety of circumstantial and forensic evidence that can

be interpreted in a completely different way than the prosecution has chosen to interpret it.'" *Law.com*, November 3, 2008, statement by David Schertler.

Nor have Defendants' counsel hesitated to comment on Mrs. Wone's civil claims when they thought doing so might advance their public relations strategy:

- "[David] Schertler, Ward's attorney, said [Mrs. Wone's] lawsuit was 'misguided,' and that none of the three men was involved in 'any type of cover-up.'" *Washington Post*, November 26, 2008.

- "Price's attorney, Bernard Grimm, called the timing of the lawsuit 'unseemly.'" *Id.*

Defendants' protestations of "innocence" have continued into 2010:

- "As we have said since the murder of Mr. Wone, Mr. Ward is completely innocent of any wrongdoing in this matter." *The National Law Journal*, June 30, 2010, statement by David Schertler.

Plainly, Defendants have enjoyed their "right to present their side of a dispute to the public," D.C. Rule of Professional Conduct 3.6 cmt. 1. Mrs. Wone should not now be denied that same right.

ARGUMENT

An order prohibiting counsel from speaking publicly about the case is a prior restraint on speech. *See Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 609 (2d Cir. 1988) ("[A] gag order challenged by the individual gagged . . . is properly characterized as a prior restraint . . . ."). As such, it carries "a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Because of these First Amendment concerns, courts have routinely rejected proposed restraints on the speech of counsel. *See United States v. Salameh*, 992 F.2d 445 (2d Cir. 1993) (trial court improperly issued blanket restriction without evaluating whether less restrictive measures would be adequate to protect defendant's right to fair trial); *United States v. Scarfo*, 263 F.3d 80 (3d Cir. 2001) (gag order was improper because attorney's comments did not pose threat to fairness of trial); *see also*

Bailey v. Systems Innovation, Inc., 852 F.2d 93, 98-99 (3rd Cir. 1988) ("Prior restraints are the most drastic, [] not necessarily the most effective, judicial tool for enforcing the right to a fair trial.") (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 572-73 (1976)).

Although the speech of an attorney may be subjected to greater limitations than that of the press, *see Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072-74 (1991), any limitation on an attorney's speech should be "no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." *Salameh*, 992 F.2d at 447. The *Gentile* Court itself emphasized that it was upholding a restraint that was "narrowly tailored" and "limited on its face to preventing only speech having a substantial likelihood of materially prejudicing th[e] proceeding." 501 U.S. at 1076.

Here, Defendants have not even attempted to show why a complete ban on all extrajudicial communication is necessary to ensure a fair trial, or why that end could not be accomplished with less restrictive measures. Assuming for the sake of argument that Defendants are correct in suggesting that a juror who has been exposed to a comment from counsel a year before trial will be prejudiced, *voir dire* will be enough to ensure an impartial panel. As the Supreme Court has explained, "[t]hrough *voir dire* . . . a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 15 (1986). Because Defendants have failed to address less restrictive measures like *voir dire* or a more narrowly tailored order, their proposed order would violate the First Amendment law and should be rejected. *See Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (any restriction must be "no greater than is essential to the protection of the particular governmental interest involved").

Even if Defendants had confined their motion and proposed order to the language of the D.C. Rules of Professional Conduct, Defendants have not demonstrated that the relatively moderate press coverage of this case to date and the statements which counsel for both parties have contributed to it constitute a "serious and imminent threat of material prejudice." Counsel have done no more than "present their side of a dispute to the public." D.C. Rule of Professional Conduct 3.6 cmt. 1. Moreover, a jury will not be seated in this case for nearly a year from now, so none of the statements of Plaintiff's counsel cited by Defendants could possibly meet the rule's imminence requirement. As Justice Kennedy explained in his opinion in *Gentile*, while "a statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury . . . <u>exposure to the same statement six months prior to trial would not result in prejudice</u>, the content fading from memory long before the trial date." 501 U.S. at 1044 (emphasis added). Here, the statements cited by Defendants all occurred more than a year prior to the scheduled trial. As such they cannot have "imminently" threatened a fair trial.

The extraordinary and unconstitutional reach of Defendants' proposed order is evident in comparison to the two orders that they attach to their papers. *See* Def. Mem., Exs. 6 and 7. Defendants purportedly "ask this Court to issue an Order similar to those issued in other high profile cases in this and the neighboring jurisdictions, enjoining the parties' counsel from making any extrajudicial statements regarding this lawsuit." Def. Mem. at 4. In support, they cite and attach orders from *United States v. Libby*, and *Estate of Atban v. Blackwater*. Yet those orders did <u>not</u> actually enjoin counsel from making extrajudicial statements; they merely cautioned counsel to adhere to court rules and the Rules of Professional Conduct. Mrs. Wone's counsel have done so to date and intend to do so going forward. No more restrictive order is

warranted, nor would any more restrictive order be constitutional. *See, e.g.*, *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987) (rejecting an order that banned all "extrajudicial statements").

CONCLUSION

For the foregoing reasons, Defendants' Motion to Enjoin Extrajudicial Statements should be denied.

Respectfully submitted,

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ORDER

Upon consideration of Defendants' Motion to Enjoin Extrajudicial Statements, the Plaintiff's opposition thereto, and for good cause shown, it is by the Court this ___ day of _____ 2010, hereby:

ORDERED that Defendants' Motion is DENIED.

_____
BROOK HEDGE
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2010, I caused a copy of Plaintiff's Opposition to Defendants' Motion to Enjoin Extrajudicial Statements to be served via CaseFileXpress on the following counsel:

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