SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Estate of ROBERT E. WONE, by KATHERINE E. WONE **Plaintiff,** **v.** **JOSEPH R. PRICE, VICTOR ZABORSKY and DYLAN WARD,** **Defendants.**	**C.A. No.: 2008 CA 008315 B** **The Honorable Brook Hedge** **Next Court Event: February 14, 2011 – Witness Lists Due**

MOTION TO INTERVENE

WhoMurderedRobertWone.com, *The Washingtonian*, and Allbritton Communications Company on behalf of WJLA-TV, NewsChannel 8 and TBD.com ("the Media Interveners"), by counsel and pursuant to D.C. Sup. Ct. Rule 24(b), hereby move this court for permission to intervene in the above-captioned matter for the narrow and limited purpose of opposing Defendants' Motion to Enjoin Legal Counsel From Making Extrajudicial Statements Regarding Litigation (the "Motion") and the Motion's Proposed Order (the "Gag Order"), and in support thereof states the following:

1. This case and its related, but concluded, criminal matter have generated substantial public interest in the last four years and have, consequently, engendered extensive local and regional media coverage. *See, e.g.*, Defendants' Motion at ¶ 1.

2. Defendants filed their Motion and Gag Order on October 8, 2010, seeking to prevent all counsel in this matter, known and unknown, from speaking to the media or "making any other extrajudicial public statement concerning this litigation."

3. Media Interveners are members of the local and regional media who have a First Amendment right to gather news. *See, e.g., CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975).

4. The Gag Order, if granted, would constitute a prior restraint on speech that would strip Media Interveners' First Amendment rights by barring them from speaking with either party's counsel to gather information about the case.

5. To safeguard their constitutionally protected rights to gather and report on news, which would be obliterated if the Gag Order is entered, Media Interveners respectfully move this Court for permission to intervene under Rule 24(b) so they can oppose the Gag Order's overbroad and unconstitutional prior restraint of speech.

6. Media Interveners' limited participation in this case as described herein would neither prejudice any party nor delay the proceedings.

7. In support of this Motion to Intervene, Media Interveners have attached hereto an accompanying Memorandum of Points and Authorities and adopts it as if fully set forth herein.

WHEREFORE, Media Interveners respectfully request an Order granting them permission to intervene for the limited purpose of protecting their First Amendment rights by opposing Defendants' Motion and Gag Order.

Respectfully submitted,

November 1, 2010
Date

/s/ Charles M. English, Jr.
Charles M. English, Jr. (DC Bar # 386572)
cenglish@ober.com
Michael A. Hass (DC Bar # 985620)
mahass@ober.com
Ober, Kaler, Grimes & Shriver,
A Professional Corporation
1401 H Street, N.W., Suite 500
Washington, D.C. 20005
(202) 326-5009
(202) 326-5209 facsimile

Attorneys for Media Interveners

Rule 12-I Certificate

Media Interveners have contacted both parties seeking their consent. Plaintiffs do not object to Media Interveners Motion, but Defendants informed Media Interveners that they do not consent to this Motion.

/s/ Charles M. English, Jr.
Charles M. English, Jr. (DC Bar # 386572)
cenglish@ober.com
Michael A. Hass (DC Bar # 985620)
mahass@ober.com
Ober, Kaler, Grimes & Shriver,
A Professional Corporation
1401 H Street, N.W., Suite 500
Washington, D.C. 20005
(202) 326-5009
(202) 326-5209 facsimile

Attorneys for Media Interveners

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I hereby certify that on November 1, 2010, I caused a copy of the foregoing Media Interveners' Motion to Intervene to be served by CaseFileXpress on the following:

Benjamin J. Razi
Stephen W. Rodger
Brett C. Reynolds
Covington & Burling, LLP
1201 Pennsylvania, Ave., N.W.
Washington, DC 20004
brazi@cov.com
srodger@cov.com
breynolds@cov.com

Patrick M. Regan
Regan, Zambri, & Long, PLLC
1919 M Street, N.W., Suite 350
Washington DC 20036
pregan@reganfirm.com

Counsel for Plaintiff

Craig D. Roswell
Brett A. Buckhalter
Heather B. Nelson
Niles, Barton, & Wilmer LLP
111 S. Calvert Street, Suite 1400
Baltimore, MD 21202
cdroswell@nilesbarton.com
hbnelson@nilesbarton.com
babuckwalter@nilesbarton.com

Counsel for Defendant Joseph Price

Frank F. Daily
Sean P. Edwards
Larissa N. Byers
The Law Office of Frank F. Daily, P.A.
11350 McCormick Road
Executive Plaza III, Suite 704
Hunt Valley, MD 21031
info@frankdailylaw.com

Counsel for Defendant Victor Zaborsky

David Schertler
Robert Spagnoletti
Schertler & Onorato LLP
601 Pennsylvania Ave., N.W.
Washington, DC 20004
dschertler@scherlterlaw.com
rspagnoletti@schertlerlaw.com

Counsel for Defendant Dylan M. Ward

/s/ Michael A. Hass
Michael A. Hass

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
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MEDIA INTERVENERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO INTERVENE

WhoMurderedRobertWone.com, *The Washingtonian*, and Allbritton Communications Company on behalf of WJLA-TV, NewsChannel 8 and TBD.com ("the Media Interveners"), by counsel respectfully submit this Memorandum of Points and Authorities in Support of their Motion to Intervene to oppose Defendants' Motion to Enjoin Legal Counsel From Making Extrajudicial Statements Regarding Litigation (the "Motion") and the Motion's Proposed Order (the "Gag Order"), and states the following:

INTRODUCTION

The Media Interveners oppose the proposed Gag Order in this case. Defendants in this civil action seek to curtail the media's ability to gather the news concerning this matter through prior restraint of any statements made by an under-defined group of lawyers, singling out the media as the "improper" recipients of such statements. Defendants also seek to prevent these lawyers from making any extra-judicial statement about this case. As Justice Louis Brandeis

famously observed almost 100 years ago: "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." Brandeis, Louis D., *Other People's Money*, chapter 5 (Harper's Weekly, December 20, 1913). The United States Constitution's First Amendment provides the legal foundation for all kinds of light that this Gag Order, should it be granted; would extinguish, eviscerating the Media Interveners' constitutionally guaranteed right as the press to gather the news. The proposed Gag Order also significantly exceeds in scope the judicial order examples attached to Defendants' motion. As evidenced in Exhibits 6 and 7 to their own motion, if any judicial action may be taken here, it could be safely limited to a reminder that D.C. Bar Rule 3.6, and the comments thereto, applies to all attorneys. For these reasons and the further discussion below, the proposed Gag Order must be denied.

ARGUMENT

The Proposed Order seeks prior restraint of speech – it would prohibit speech before it is made rather than discipline attorneys for violations after the fact. The Proposed Order also would prevent the media from receiving information. In a line of cases beginning with *Near v. Minnesota*, 283 U.S. 697 (1931), the meaning of prior restraints has been found "to include judicial orders having an impact analogous to administrative censorship."

Any prior restraint of speech carries a "heavy presumption" of constitutional invalidity. *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968). Defendants' Gag Order is presumptively invalid because it would have this Court order "that all legal counsel for all parties in this matter, regardless of whether they have entered their appearance herein, are ordered to refrain from speaking to the media . . .or making any extrajudicial public statement concerning this litigation or any matter at issue herein." The scope of the Gag Order is breathtaking. First, the media are singled out for special status as being persons to whom

unnamed lawyers are "to refrain from speaking." At its very core, the First Amendment guarantees the media the same rights and benefits under it as it does to all people. *See CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975). Also, if granted, the Gag Order would prohibit the media from obtaining from an attorney *any* information about this case, even mundane matters such as the date of the next status conference or the expected length of trial. Second, the Gag Order runs counter to Comment 1 of D.C. Bar Rule 3.6: "litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation." *See also CBS*, 522 F.2d at 238 ("this order affected [CBS'] constitutionally guaranteed right as a member of the press to gather news.")

Defendants' motion fails to mention leading U.S. Supreme Court precedent severely limiting courts' abilities to impose prior restraints of this kind. "[P]rior restraints of speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (reversing a court order that enjoined, until the jury was impaneled, news coverage in connection with a criminal trial). Although there is an obvious tension between the right to a fair trial and First Amendment guarantees, no court may impose a prior restraint unless "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 562 (*quoting United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd* 341 U.S. 494 (1951)).[1]

[1] As this is a civil and not a criminal case, any higher standard the Sixth Amendment imposes simply does not apply here. Thus, while the legal principals enunciated in criminal cases where the First Amendment guarantees prevented entry of a Gag Order ought to lead the same result here, cases where the tension led to some relief for aggrieved parties in a criminal case (e.g. *Sheppard v. Maxwell*, 384 U.S. 333 (1966)) have limited, if any, application. At a minimum, the First Amendment protects the public right to know in both civil and criminal cases. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n. 17 (1980) ("historically both civil and criminal trials have been presumptively open").

This case is in its preliminary stages with a trial set a year from now. Ignoring all the statements made to date by Defendants' counsel, Defendants appear to set up the construct that there has been a pattern of improper statements by Plaintiffs' counsel, relying first on statements made by persons other than counsel (e.g. media coverage of statements made by the Metropolitan Police Department and the United States Attorneys Office) as a stepping stone for this Motion. Def. Mem. p. 3. The next stepping stones are innocuous comments such as: "another step in the effort to seek justice;" "[we've been sitting on the sideline for two years;" "[w]e are happy at long last that we can move this forward;" and"[u]nlike the defendants, Regan said Katherine Wone has no intention of waiving her right to a jury trial." *Id.* at 2 -3. Why and how these statements run afoul of D.C. Bar Rule 3.6 is at best a mystery, but they do not and cannot rise to the level of "serious and imminent threat of material prejudice to the proceeding" with a jury not to be selected for a year or more. D.C. Bar Rule 3.6.

Even the most recent statement made by one counsel to the media regarding the defendants' purported decision not to testify at the upcoming civil trial a year from now is insufficient to justify the Gag Order. Defendants' reliance on *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) is misplaced. If anything, that case, read carefully, should lead to the Proposed Order's rejection. First, the case involves after-the-fact attorney discipline, not prior restraint of attorney speech regarding a pending case. Second, the court opinion reversed the sanction in that case on the ground, *inter alia*, that the offending statement was made six months before the expected date for the jury trial; here the trial is at least a year away. Third, the *Gentile* Court concluded that the First Amendment, even in after-the-fact attorney discipline matters, demands a "substantial likelihood of material prejudice" before after-the-fact discipline may be imposed. Fourth, and perhaps most critically here, the Supreme Court expressed the view that

D.C. Bar Rule 3.6 adopts a standard "that arguably approximate[s] 'clear and present danger.'" *Gentile,* 501 U.S. at 1068. There is no clear and present danger justifying cutting off the media from its constitutional right to gather news.

Persons requesting a gag order clearly have the burden of showing that the speech to be restrained (here, all statements to the media) poses a "serious and imminent threat" of interference with the fair administration of justice ***and*** that the order is "tailored as precisely as possible to the exact needs of the case." *Carroll,* 393 U.S. at 184. *See also CBS,* 522 F.2d at 238 (vacating an order preventing parties to civil litigation from commenting to the press). Even if this Court were to conclude that some measure of protection were needed given the "statements," any relief must be drawn narrowly and precisely to protect the media's right to gather news "and cannot be upheld if reasonable alternatives are available having a lesser impact on the First Amendment freedoms." *Id.* But there is no evidence to support the Defendants' inchoate fears that the trial (still a year away) will in any way be affected, much less that there is serious and imminent harm. When the media's First Amendment rights in gathering the news are compared here to the interest in a fair, impartial, and efficient trial, the First Amendment freedoms must prevail because there has been no showing that counsel's speech now would harm the fairness, impartiality, or efficiency of this trial scheduled for the fall of 2011.

The Gag Order is not narrowly or precisely tailored; indeed it is extraordinarily broad in scope and wholly vague as to who may be covered. Far from protecting any First Amendment freedoms, the Gag Order singles out "media" as being specific persons to whom lawyers may not speak about anything (presumably related to this case, but grammatically, it reads more broadly). Nothing in the Gag Order complies either with any First Amendment jurisprudence or with D.C. Rule 3.6.

With a jury trial at least a year away – twice as long as found unproblematic in *Gentile* – the Media Interveners do not concede that this Court has sufficient evidence to take any action today that would adversely affect in any manner the media's constitutionally guaranteed right to gather news. Nonetheless, if this Court were to view this situation differently, Defendants have submitted in Exhibits 6 and 7 more narrowly tailored relief that comports with D.C. Bar Rule 3.6 and the comments thereto. The Media Interveners agree with that part of Comment 1 to D.C. Rule 3.6 expressly stating that "the public has an interest in receiving information about matters that are in litigation. Often a lawyer involved in litigation is in the best position to assist in furthering these legitimate objectives."

CONCLUSION

The Media Interveners urge this Court to vigilantly protect both their First Amendment guarantees and the parties' right to a fair trial without sacrificing either. The Proposed Order must be denied.

Respectfully submitted,

November 1, 2010
Date

/s/ Charles M. English, Jr.
Charles M. English, Jr. (DC Bar # 386572)
cenglish@ober.com
Michael A. Hass (DC Bar # 985620)
mahass@ober.com
Ober, Kaler, Grimes & Shriver,
A Professional Corporation
1401 H Street, N.W., Suite 500
Washington, D.C. 20005
(202) 326-5009
(202) 326-5209 facsimile

Attorneys for Media Interveners

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Benjamin J. Razi
Stephen W. Rodger
Brett C. Reynolds
Covington & Burling, LLP
1201 Pennsylvania, Ave., N.W.
Washington, DC 20004
brazi@cov.com
srodger@cov.com
breynolds@cov.com

Patrick M. Regan
Regan, Zambri, & Long, PLLC
1919 M Street, N.W., Suite 350
Washington DC 20036
pregan@reganfirm.com

Counsel for Plaintiff

Craig D. Roswell
Brett A. Buckhalter
Heather B. Nelson
Niles, Barton, & Wilmer LLP
111 S. Calvert Street, Suite 1400
Baltimore, MD 21202
cdroswell@nilesbarton.com
hbnelson@nilesbarton.com
babuckwalter@nilesbarton.com

Counsel for Defendant Joseph Price

Frank F. Daily
Sean P. Edwards
Larissa N. Byers
The Law Office of Frank F. Daily, P.A.
11350 McCormick Road
Executive Plaza III, Suite 704
Hunt Valley, MD 21031
info@frankdailylaw.com

Counsel for Defendant Victor Zaborsky

David Schertler
Robert Spagnoletti
Schertler & Onorato LLP
601 Pennsylvania Ave., N.W.
Washington, DC 20004
dschertler@scherlterlaw.com
rspagnoletti@schertlerlaw.com

Counsel for Defendant Dylan M. Ward

/s/ Michael A. Hass
Michael A. Hass

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PROPOSED ORDER

This matter coming before the Court on WhoMurderedRobertWone.com, *The Washingtonian*, and Allbritton Communications Company on behalf of WJLA-TV, NewsChannel 8 and TBD.com ("the Media Interveners")'s Motion to Intervene, upon consideration of any responses thereto, and good cause having been shown, it is hereby

ORDERED that the Media Intervener's may intervene for the limited purpose of opposing Defendants' Motion to Enjoin Legal Counsel From Making Extrajudicial Statements Regarding Litigation ("Defendants' Motion") and the corresponding Proposed Order; and it is

FURTHER ORDERED that, for the reasons stated in the Media Interveners' Motion to Intervene and accompanying Memorandum of Points and Authorities in support thereof, Defendants' Motion is hereby DENIED.

Entered this _____ day of _____, 2010.

_____
Judge Brook Hedge

Serve on:

Charles M. English, Jr.
cenglish@ober.com
Michael A. Hass
mahass@ober.com
Ober, Kaler, Grimes & Shriver,
A Professional Corporation
1401 H Street, N.W., Suite 500
Washington, D.C. 20005

Counsel for Media Interveners

Benjamin J. Razi
Stephen W. Rodger
Brett C. Reynolds
Covington & Burling, LLP
1201 Pennsylvania, Ave., N.W.
Washington, DC 20004
brazi@cov.com
srodger@cov.com
breynolds@cov.com

Patrick M. Regan
Regan, Zambri, & Long, PLLC
1919 M Street, N.W., Suite 350
Washington DC 20036
pregan@reganfirm.com

Counsel for Plaintiff

Craig D. Roswell
Brett A. Buckhalter
Heather B. Nelson
Niles, Barton, & Wilmer LLP
111 S. Calvert Street, Suite 1400
Baltimore, MD 21202
cdroswell@nilesbarton.com
hbnelson@nilesbarton.com
babuckwalter@nilesbarton.com

Counsel for Defendant Joseph Price

Frank F. Daily
Sean P. Edwards
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The Law Office of Frank F. Daily, P.A.
11350 McCormick Road
Executive Plaza III, Suite 704
Hunt Valley, MD 21031
info@frankdailylaw.com

Counsel for Defendant Victor Zaborsky

David Schertler
Robert Spagnoletti
Schertler & Onorato LLP
601 Pennsylvania Ave., N.W.
Washington, DC 20004
dschertler@scherlterlaw.com
rspagnoletti@schertlerlaw.com

Counsel for Defendant Dylan M. Ward