SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by KATHERINE E. WONE, **Plaintiff,** **v.** **JOSEPH R. PRICE, *et al.*** **Defendants**	**Civil Action No. 0008315-08** **The Honorable Brook Hedge** **Next Event: February 11, 2001** **Deadline for Discovery Requests**

DEFENDANTS' RESPONSE TO MOTION TO INTERVENE

Defendants Joseph Price, Victor Zaborsky and Dylan Ward, by undersigned counsel, respond to the Media Intervenors' Motion to Intervene. As the arguments asserted by the Media Intervenors are similar to those asserted by the Plaintiff in its Opposition to Defendants Motion to Enjoin Legal Counsel from Making Extrajudicial Statements Regarding Litigation, Defendants specifically adopt its arguments contained in their Memorandum of Points and Authorities that was filed with that Motion, and will respond to the collective arguments raised by both the Media Intervenors and Plaintiff.

INTRODUCTION

When Defendants' right to a fair and impartial trial by a jury of their peers is threatened by a party or her counsel's inflammatory and fallacious public utterances to the press, it is not only proper, but necessary, for the Court to impose restraints upon such comments. Counsel does not have the right to state, imply or otherwise suggest through the use of the press something that is patently untrue simply to gain or garner sympathy for a party's lawsuit. The

public may have the right to know the unbiased facts, but that right does not extend learning counsel's biased and erroneous slant on what those facts reveal.

The Media Intervenors and Plaintiff argue that a less restrictive approach should be taken. A less restrictive approach is unworkable, however, based upon the nature and bent of comments already made to the press. When patently untrue statements are made, and published by the press, the damage is already done. The substantial prejudice and harm to Defendants' right to a fair and impartial trial is immediately and irrevocably jeopardized, if not destroyed. A reminder of counsel's obligations under D.C. Bar Rule 3.6 is simply not enough, as any post-comment discipline that might be imposed for a violation of D.C. Bar Rule 3.6 does not repair the extreme prejudice that will have already been incurred.

Defendants are not seeking to prevent the press from reporting about this lawsuit. Defendants do not seek a gag order on the press, and do not seek to try to exclude the press from courtroom proceedings. Defendants merely seek to restrict counsel for the parties from providing statements to the press, especially ones that are inflammatory and fallacious. Counsel for the parties should restrict their arguments to those presented in Court and not try to garner an advantage through the press in advance of trial.

ARGUMENT

I. DEFENDANTS' MOTION IS NOT A PRIOR RESTRAINT OF FIRST AMENDMENT RIGHTS AS IT RELATES TO THE MEDIA INTERVENORS.

The rights asserted in the Media Intervenors' Motion to Intervene should scrutinized under a different standard than what otherwise would apply to Plaintiff, as the intervenors are outside parties. While the issue has not been decided by the District of Columbia, different courts follow different standards in regard to restrictions on outside parties' First Amendment Rights. *See In re Application of Dow Jones & Co.,* 842 F.2d 603**,** 608 - 609 (2nd Cir. 1988), *cert.*

denied 488 U.S. 946 (1988). There is a fundamental difference between a gag order challenged by the individual targeted by the order and one challenged by a third party. *Radio & Television News Asso. v. United States Dist. Court for Central California*, 781 F.2d 1443, 1446 - 1447 (9th Cir. 1986). An order that is challenged by a party to the order is often characterized as a prior restraint of speech, while an order challenged by a third-party is not. *Id.*[1]

In a nearly identical case,[2] an organization representing broadcast journalists filed a petition, attempting to compel the U.S. District Court to vacate its restraining order, which merely limited ***counsel*** from making extrajudicial statements to members of the news media. *Id.*. The Court stated:

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[1] Admittedly, some Circuits, such as the Sixth, hold that that the press is subject to a direct prior restraint upon freedom of expression, regardless of whether they are named as a party to the injunction. *See, e.g.*, *CBS Inc. v. Young*, 522 F. 2d 234, 239 (1975).

[2] The underlying case at issue involved former special agent Miller with the FBI, charged with espionage. *See Levine v. United States Dist. Court for Cent. Dist*., 764 F.2d 590, 591 (1985). The criminal proceedings against Miller received extensive local and national media coverage. *Id.* at 592. Early in the proceedings, the district court became aware that both government officials and defense attorneys had engaged in "on the record" interviews with media representatives. *Id.* Months before trial, the district court admonished counsel not to engage in pretrial publicity. *Id.* The government sought an order that would specifically proscribe the making of any extrajudicial statement to the press concerning matters related to the prospective trial of the defendants. *Id.* The motion was denied in December, but the district court again had to admonish counsel to maintain an atmosphere in which a fair trial could be conducted. *Id.* The court sought the cooperation of counsel. *Id.* Defense counsel advised the court that they might "at some future time deem it necessary in the interest of our client to make a statement outside the courtroom." *Id.*

Shortly before the beginning of the trial of two Co-Defendants, the LA Times published an article that quoted numerous statements attributed to defense attorneys. *Lawyers Contend FBI Exaggerated Evidence in Spy Case, L.A. Times*, Mar. 3, 1985, pt. 1, at 3. *Id.* Statements by counsel gave the defense theory in great detail and attacked the basis of the prosecutors' case. *Id.* at 592-593. The US Atty's Office did not comment, however, they renewed its motion for a restraining order regarding extrajudicial statements – requested that it restrict all parties, attorneys, witnesses, and all their representatives and agents of counsel and the parties. *Id.* at 593. The Court implemented the Order (in June 1985), however, used the language to only restrict attorneys for the government and the defendants. *Id.*

An organization representing broadcast journalists, "RTNA," filed a petition for writ of mandamus, on appeal, compelling the district court to dissolve the restraining order prohibiting the attorneys from communicating with the media regarding the merits of the case. *Radio & Television News Assoc.,*, 781 F.2d 1443-1444 (1986). The Ninth Circuit denied the media organization's request for writ. *Id.* at 1448. The Court held that the restraints on the statements of trial participants did not infringe freedom of the press. *Id.* at 1447. The media's desire to obtain access to certain sources of information, that otherwise might be available, was not a sufficient interest to establish an infringement of freedom of the press. *Id.*

> In contrast, the district court's order in this case is not directed toward the press at all. On the contrary, the media is free to attend all of the trial proceedings before the district court and to report anything that happens. In fact, the press remains free to direct questions at trial counsel. Trial counsel simply may not be free to answer. In sum, the media's right to gather news and disseminate it to the public has not been restrained.

Id. at 1446 (*citing Levine v. United States Dist. Court for Cent. Dist.,* 764 F.2d 590, 594 (9th Cir. 1985)).

Here, Defendants merely seek to enjoin counsel from speaking to the press. They do not seek to enjoin the press itself from reporting on this lawsuit. The Order Defendants seek is simply not as broad and all encompassing as the Media Intervenors suggest. As a third-party intervenor, this Honorable Court has much wider latitude in considering restraints on speech when the gag order itself does not directly apply to those third-parties. The Order sought by Defendants may serve as a prior restraint or speech to Counsel; however, it is not a prior restraint on the speech of the media. The District of Columbia should follow the example of the Ninth Circuit, and Circuits like it, and apply a lower standard than that of anything filed by Counsel. The Court would follow the "reasonable likelihood" standard of possible prejudice, rather than the "clear and present danger standard." *See. Radio & Television News Assoc.,*781 F.2d at 1448.

Moreover, the Media Intervenors criticize Defendants for failing to mention the "leading U.S. Supreme Court precedent severely limiting courts' abilities to impose prior restraints of this kind." Motion to Intervene, p. 3. The facts of *Nebraska Press Ass'n v. Stuart*, 527 U.S. 539 (1976) are distinctly different than the facts of the present case. *Nebraska Press Ass'n* involved the trial concerning the murder of six persons. The District Court issued a gag order that went far beyond what Defendants are seeking in the present lawsuit. There, the gag order restrained the press from publishing or broadcasting accounts of confessions or admissions made by the accused, or facts that strongly implicated him. *Nebraska Press Ass'n*, 527 U.S. at 542, 545. The

Supreme Court held that the order prohibiting reporting or commentary on judicial proceedings held in public was clearly invalid, and that to the extent to which it prohibited publication based on information gained from other sources, the heavy burden imposed as a condition to securing a prior restraint was not met. *Nebraska Press Ass'n*, 527 U.S. at 541 - 542.

In *Nebrask Press Ass'n*, the media was the subject of the gag order. In the present lawsuit, Defendants are not seeking to restrain the press from gathering or reporting facts about this case. Defendants do not seek to prohibit the press from observing any pretrial hearings, or from attending the trial. Defendants are only seeking to enjoin counsel for the parties from speaking to the press, especially in fallacious and inflammatory manners, in order to ensure that they can obtain a fair and impartial jury. As such, the restrictions that Defendants request are nowhere near the level that the Supreme Court held were overbroad in *Nebraska Press Ass'n*.

II. A COMPLETE BAN ON STATEMENTS BY COUNSEL TO THE PRESS IS NECESSARY TO ENSURE DEFENDANTS' RIGHT TO A FAIR AND IMPARTIAL TRIAL

The Media Intervenors and Plaintiff are correct that the Order Defendants seek would represent a prior restraint of speech of counsel for the parties. The flaw in their arguments, however, is that not every prior restraint of speech is facially unconstitutional.

Attorneys and trial participants are held to a differing standard in terms of First Amendment restrictions. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, ___ (1991). The paramount concern of the Courts is to ensure due process rights of parties to receive a fair and impartial jury free from all outside prejudice. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). Modern communications create a severe hurdle of preventing prejudicial publicity from tainting the perspective of the jurors, therefore, "…the trial courts must take strong measures to ensure that the balance is never weighed against the accused." *Sheppard*, 384 U.S. at 365. The Sixth Amendment rights of the Defendants are at such risk when counsel are permitted to make

fallacious and inflammatory statements to the press that such statements must be prevented, even at the minor cost of slightly restricting counsel's First Amendment rights. All counsel will be free to make whatever statements they so choose, after the trial has finished. As stated in *Sheppard*, "our system of law has always endeavored to prevent even the probability of unfairness." *Sheppard* at 352 (citing *Court In re Murchison*, 349 U.S. 133, 136 (1955)).

The Media Intervenors and Plaintiff exaggerates the unconstitutional nature of a prior restraint. While the burden to maintain such a prior restraint may be high, it is not an insurmountable one. Prior restraint of speech will be upheld if the party can establish that the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest. *United States v. Brown*, 218 F. 3d 415 (2000). The serious and imminent threat to a protected competing interest in the present case are the Defendants' Sixth Amendment rights to a fair and impartial jury trial, thus satisfying the standard.

As stated in Defendants' original Motion to Enjoin Counsel from Making Extrajudicial Statements, several statements have been made by the Wone family attorneys to the press, which are not only misleading, but salacious and slanderous. Additionally, the Wone family attorneys have made comments that misinterpret the law, and paint the Defendants in an extremely derogatory and negative light. These comments have been published in several local and national periodicals, blogsites, televised, and disseminated broadly across the area. The particular statements that have been made by Plaintiff's Counsel have the ability to influence potential jury panel members, and have the potential to destroy the pillar of our justice system: "Innocent until proven guilty."

The Defendants have clearly demonstrated the "serious and imminent threat" to their Sixth Amendment right to a fair and impartial jury trial. When such a demonstration has been

met, prior restraints have been proper. *See generally, Brown, supra*. The serious and imminent threat of material prejudice is based on the high volume of media attention that has been paid to this case, and based on the Plaintiff's mischaracterization of the facts and law of the case. It is possible to use Mr. Regan's singular comment as an example. On September 17, 2010, Mr. Regan stated: "Defendants don't assert their fifth amendment rights if they are not guilty of something." *Washington Post*, "Wone roommates won't testify in trial," B04, washingtonpost.com (September 17, 2010), attached hereto as **Exhibit 8.**[3] One may discern the damage caused by such a comment, merely by scrolling through a sampling of the online comments following the article. For example, two comments read:

- "This is like the "OJ" trial all over- They know what happened, and may even be the murderers, but it looks as if they get away with it simply by refusing to cooperate." *Washington Post*, "Wone roommates won't testify in trial," washingtonpost.com (September 17, 2010), attached as **Exhibit 8.**

- "Ward, Price and Zaborsky have played the system and "won." These three know (much about) what happened that night and are not telling. Their secrets and conspiracies bind them. I doubt it will be soon, but at some point their unholy pact will unravel." *Washington Post*, "Wone roommates won't testify in trial," washingtonpost.com (September 17, 2010), attached as **Exhibit 8.**

The publicity given in the Washington Post is just one example of many already provided of the media obsession with this case. Additionally, the article provides an example of the negative effect that such ill conceived and prejudicial comments by Counsel has on the potential jury pool.

This type of negative public attention and publicity is enough to justify an injunction, as per the language of the D.C. Rules of Professional Conduct. See D.C. Rule of Professional Conduct 3.6. The Defendants' case is comparable to the situation in *Sheppard, supra,* in terms

[3] Exhibits 1 through 7 are attached to Defendants' Motion to Enjoin Counsel from Making Extrajudicial Statements. The Washington Post article was attached thereto as Exhibit 1, but for purposes of the present Motion, the reader commentaries were not included in that exhibit.

of the lurid and garish media attention, and the prejudice it caused the Defendant prior to, and during trial. Like these Defendants, throughout Sheppard's pre-trial period the "….newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence." *Sheppard,* 384 U.S. at 340. Likewise, the local news authorities have interviewed and published prejudicial, fallacious and biased statements made by Plaintiff's Counsel, while, as pointed out by Plaintiff, the Defense has attempted to respectfully speak to its own innocence.

Another parallel with *Sheppard* concerns the nature of the media criticism. For months prior to the *Sheppard* trial, newspapers emphasized Sheppard's refusal to take a lie detector test. *Id.* at 338. "Front-page newspaper headlines announced….that 'Doctor Balks At Lie Test; Retells Story.'" *Id.*. This type of negative attention is very similar to the press given to the Defendant's potential election to exercise their Fifth Amendment Rights, namely the Washington Post's headline, "Wone roommates won't testify in trial." *See Washington Post*, "Wone roommates won't testify in trial," washingtonpost.com (September 17, 2010), attached as **Exhibit 8**.

Sheppard was persecuted by the press about his refusals to take a lie detector test, when another periodical stated that he was "getting away with murder." *Sheppard* at 339. This is undeniably similar to the statement posted on washingtonpost.com, stating that "…They know what happened, and may even be the murderers, but it looks as if they get away with it simply by refusing to cooperate." *See Washington Post*, "Wone roommates won't testify in trial," washingtonpost.com (September 17, 2010), attached as **Exhibit 8**. Just as one should not interpret a refusal to take a lie detector test as a sign of guilt, more importantly, one should not

interpret a choice to invoke one's Fifth Amendment righst as an inference of guilt. Nonetheless, comments by the counsel, broadcasted by the local press, have caused public perception of guilt for these Defendants, much as Sheppard was prejudiced unfairly.

The only workable remedy to prevent an unfair trial through pollution of the jury pool is to enjoin counsel from further filtering prejudicial information into the press for public consumption. The injunction would not prohibit the press from reporting about this lawsuit, or from gathering facts from other sources. It just limits one of the sources that the media may otherwise utilize. The Media Intervenors and Plaintiff insists that a complete ban on all extrajudicial communication is unprecedented and unwarranted. On the contrary, cases have held that a blanket injunction on extrajudicial speech may be employed, after exploring, "…whether other available remedies would effectively mitigate the prejudicial publicity," and consider "the effectiveness of the order in question" to ensure an impartial jury. *United States v. Salameh,* 992 F.2d 445, 447 (1993).

Once it is determined that inadequate alternative measures exist to protect Defendants' rights to a fair trial before an impartial jury, the Court may order the blanket injunction on speech. *Id.* Defendants reiterate that few interests under the Constitution are more essential than the right to a fair trial by impartial jurors. Costs and hardship would be incurred in employing other measures, such as a change of venue, and already a large jury pool will be necessary at trial in light of the extensive media coverage that has already been circulated regarding the criminal and civil trial. The Court should not tolerate comments by counsel that only serve to further pollute and prejudice the potential jury pool.

Counsel for Plaintiff has clearly indicated that they do not intend to stop trying their case through the media unless the Court restricts such comments. In Plaintiff's Response to

Defendants' Motion to Enjoin, counsel unabashedly states "Mrs. Wone should not now be denied the right" to present her side to the public. *See* Plaintiff's Opposition, pg. 3. Unfortunately, the public record shows that Mrs. Wone's "side of the story" results in untruths and creates bias and prejudice in the local public, the very pool that will constitute the jury venire.

Defendants contend that a blanket injunction on extrajudicial speech by counsel is an appropriate measure in this case. The Media Intervenors and Plaintiff counters by arguing that there is no imminence of the danger of such speech, pointing to the fact that the trial is nearly a year away. Cases have held, however, that comments and media coverage may create a long-lasting prejudice, months prior to trial. In *Sheppard*, *supra,* the U.S. Supreme Court noted:

> Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre.

Sheppard, 384 U.S. at 356. As the *Sheppard* Court recognized, pre-trial prejudice may occur, even at the pre-indictment stages of a trial, and may carry through until the actual proceedings at bar. *Id.*. There has been a similar sensationalism of the "suspense" and "sex" in Defendants' case, and the proceedings are even farther chronologically advanced in the process than when sanction was suggested in *Sheppard*. Moreover, modern media if far more advanced than it was in the days of *Sheppard*. Newspaper articles never truly go away, and are easily searchable on the internet by one with even a rudimentary knowledge of computers. What is written today will undoubtedly resurface and be reanalyzed as trial draws near.

Defendants have already been through a criminal trial, and now face their second, civil trial. Information, however inaccurate, about this case has been circulating for a long period of

time, giving rise to more chance for potential prejudice. The Defendants' case is in a similar posture to *KPNX Broadcasting Co. v. Arizona Superior Court*, 459 U.S. 1302 (1982), in which Justice Rehnquist denied requests for the stay of two restrictive Court Orders; one restricting the media, and one restricting all trial personnel from providing information to the press. There, the defendants were in their third trial arising out of the same murder and the crime allegedly involved several conspiracies, similar to the Defendants' case at bar. *Id.* The Court found that "The mere potential for confusion if unregulated communication between trial participants and the press at a heavily covered trial were permitted is enough to warrant a measure such as the trial judge took in this case." *Id*. at 1307.

Nothing short of a complete ban on extrajudicial statements by counsel for all parties to the press can secure Defendants' (and Plaintiff's) right to a fair and impartial jury trial.

III. ANY LESSER RESTRICTIONS MUST INCLUDE MORE THAN A REMINDER OF COUNSELS' OBLIGATIONS UNDER D.C. BAR RULE 3.6

Defendants urge the Court to issue a blanket injunction against all counsel from engaging in communication with the press. If this Court decides that a blanket injunction is inappropriate, there are less restrictive measures that the Court may pursue, in terms of the Order. Those lesser restrictions, however, need to be more than a reminder of counsels' obligations under Rule 3.6, as the Media Intervenors and Plaintiff suggests.

The Media Intervenors claim that such a reminder is all that is needed, pointing the Exhibits 6 and 7 of Defendants' Motion as proof. These exhibits were Orders from the United States District Court for the District of Columbia in *U.S. v. I. Lewis Libby*, Misc. No. 06-560 (RBW) and the *Estate of Himoud Saed Atban v. Blackwater, USA*, Civil Action No. 07-1831 (RBW). The Media Intervenors overlook the fact that in *Libby*, the Court had already cautioned Mr. Libby and counsel for the parties about making extrajudicial statements, noting that the

Court would not tolerate the case being tried in the media. *See* **Exhibit 6**, p. 1. The admonition by the *Libby* Court was in addition to an already imposed ban on extrajudicial statements to the press.

The difficulty in relying upon D.C. Bar Rule 3.6 is that the Rule itself is subject to interpretation. For example, Defendants truly believe that Plaintiff's counsel, Patrick Regan, in making the comment to the press which prompted the presented motion to be filed, certainly did not believe he was violating D.C. Bar Rule 3.6 when he made such comments. Defendants do not know whether such a statement violated D.C. Bar Rule 3.6, and are not suggesting the disciplinary action be taken against Mr. Regan. Defendants do assert that the statement was fallacious and inflammatory, and regardless of whether the statement violated D.C. Bar Rule 3.6, it threatens to prejudice their right to a fair and impartial trial. Rather than scrutinizing every statement counsel for either party makes to the press to determine whether it falls within the confines of D.C. Bar Rule 3.6, and waiting to disciplinary action to be taken ***after the statement has already been disseminated through the*** **press,** a blanket ban of statements to the press from counsel for the parties is the only viable solution to ensure that counsel focus on the legal issue before this Honorable Court, not on how it is portrayed by the press.

If the Court were to decided that a lesser restriction was warranted, however, the Court could place a restrictive order, only allowing "…the parties to state, without elaboration, matters of public record and to explain, without characterization, the substance of any motion or step in the proceedings." *In re Application of Dow Jones & Co.,* 842 F.2d 603**,** 606 (1988) (*cert. denied*, *Dow Jones & Co. v. Simon*, 488 U.S. 946 (1988)). The Court may also appoint a neutral representative to serve as a liaison with the media "to provide a unified and singular source for the media concerning these proceedings." *KPNX Broadcasting Co.,* 459 U.S. at 1303. The

appointment of such a figure would satisfy the press's need for information, but also present a nonaligned individual to exchange words. Such a representative would keep counsel out of the public eye, and lend more credibility and fairness to the proceedings of this trial.

While the Defendants believe that an entire restriction on extrajudicial speech would be the most appropriate measure, it presents with candor to the Court, some possible alternatives. Defendants reiterate, however, that the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than may be constitutionally be imposed on other citizens or on the press. *See Gentile,* 501 U.S. at ___. Counsel have certain responsibilities to protect the fairness of trial, *See Am. Sci. & Eng'g v. Autoclear, LLC*, 606 F. Supp. 2d 617, 625 (E.D. Va. 2008). Therefore, the Defendants already present a reasonable and compromising request, in merely requesting the Court only limit Counsel from their outside speech, and suggest that no other compromise is necessary in drafting an Order.

CONCLUSION

The issues raised by the Media Intervenors and the Plaintiff do not provide an adequate basis to deny Defendants' request that this Honorable Court enjoin counsel for all parties from making extrajudicial statements to the media. The restraint is limited to counsel for the parties, and does not seek to enjoin the press from reporting or otherwise gathering facts about this lawsuit from sources other than counsel for the parties. Such an injunction is necessary to ensure that the Defendants will obtain a fair and impartial jury trial free of the taint and pollution that is caused by statements such as the Plaintiff's counsel's fallacious and inflammatory statement that:

> "Defendants don't assert their fifth amendment rights if they are not guilty of something,"

A lesser restriction would not ensure that the potential jury pool is not further polluted by other biased and unsupported statements that might be made in the future.

Accordingly, Defendants respectfully request this Court grant their Motion and enter an order enjoining all counsel for parties from making extrajudicial statements to the press, at least until after the trial in this matter has occurred.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of November, 2010, copies of the foregoing Motion, Memorandum of Points and Authorities, and proposed Order were served via e-filing to:

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