

<b>DISTRICT COURT</b> <b>EAGLE COUNTY, COLORADO</b> 885 E. Chambers Road P.O. Box 597 Eagle, Colorado 81631	<p style="text-align: center;">σCOURT USE ONLYσ</p>
<b>Plaintiff:</b>  PEOPLE OF THE STATE OF COLORADO.  <b>Defendant:</b>  KOBE BEAN BRYANT.	
	Case Number: 03 CR 204  Div.: R
<b>AMENDED ORDER RE PRETRIAL PUBLICITY</b>	

I.

On August 3, 2004, the defense filed *Mr. Bryant's Motion to Ban All Extrajudicial Statements and Disclosures by All Trial Participants and Their Lawyers Until the Trial is Concluded* ("Motion"). Defendant set forth numerous extrajudicial statements made by Mr. Clune, acting as counsel for the alleged victim, and also by Mr. Wood, who has publicly expressed that he also represents the alleged victim.<sup>1</sup> As a result, Defendant requested an absolute ban on all extrajudicial comment based on Defendant's right to a fair trial.

Upon review of the extrajudicial statements, along with consideration of the proximity of the trial date of August 27, 2004 and the Court's obligation to maintain the process by which a fair trial may be preserved, the Court entered its *Order Re Extrajudicial Comments by Trial Participants* on August 4, 2004 ("August 4 Order"). The August 4 Order prohibited extrajudicial comment and afforded those subject to the Order the opportunity to object. As the extrajudicial statements had greatly escalated in frequency and acrimony in recent weeks, the intent of the August 4 Order was to immediately, yet temporarily, prohibit all extrajudicial comment while the Court considered the issues presented in Defendant's Motion.<sup>2</sup>

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<sup>1</sup> On August 3, 2004, Mr. Wood filed a motion seeking the Court's permission to practice *pro hac vice* in this case. That motion has been taken under advisement and is still pending.

<sup>2</sup> The Order of August 4, 2004 will be vacated upon entry of this order.

The following objections were received on August 5, 2004: (1) *News Media's Opposition to the Court's Blanket Gag Order Entered August 4, 2004*; (2) the People's Motion to Reconsider; (3) the alleged victim's *Objection and Memorandum of Law of Victim to the Blatantly Unconstitutional, Unfair and Overbroad Gag Order Entered by This Court on August 4, 2004 Without Due Process of Law*<sup>3</sup>; and (4) *David C. Lugert's Objection to Order (of 8-04-04) Re Extrajudicial Comments by Trial Participants*.<sup>4</sup> On August 6, 2004, the defense filed *Defendant's Combined Response to Objections to the Court's August 4 Order Re Extrajudicial Comments by Trial Participants*. On August 12, 2004, the alleged victim filed *Victim's Supplemental Objection to the August 4, 2004 Order Banning All Extrajudicial Comments*.

No objections were made by any participant as to extrajudicial statements, if any, of the District Attorney, counsel for the defense or counsel for the media. In consequence, the current Motion addresses only the extrajudicial statements of counsel for the alleged victim. Although the alleged victim asserts in her supplemental objection that a defense witness has made extensive comment, no evidence of the alleged statements was presented. Thus, there is nothing before the Court for review.<sup>5</sup>

Defendant cites the previous *Order Re Pretrial Publicity* entered on July 24, 2003 by the Eagle County Court, the *Order Re Pretrial Publicity* entered by this Court on October 31, 2003 ("October 31 Order") and the *Order Reiterating Limited Pretrial Publicity* entered by this Court on March 12, 2004. Defendant contends the extrajudicial statements made by counsel for the alleged victim violate both the letter and spirit of the existing pretrial publicity orders. More specifically, Defendant points to purportedly improper comment that:

- (1) concerned the credibility, character and expected testimony of Defendant and the alleged victim;
- (2) concerned the guilt or innocence of Defendant; or
- (3) disparaged and impugned the integrity of the Court.

Defendant further contends that counsel for the alleged victim, through the use of inflammatory language directed at Defendant, Defendant's counsel and the Court, has improperly attempted to influence the jury pool, thereby potentially jeopardizing Defendant's right to a fair trial. As the comments were made notwithstanding the pre-existing October 31 Order, Defendant contends that Order is inadequate to preserve Defendant's fair trial rights.

Counsel for the alleged victim claim the extrajudicial statements are permitted comment in that counsel has the right to criticize the Court and has a right of reply based on the release of the transcripts of the testimony of Defendant's expert. They further contend the imposition of

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<sup>3</sup> The alleged victim's *Notice of Amendment to Response* was filed on August 6, 2004.

<sup>4</sup> Mr. Lugert's objection was addressed by separate order entered on August 9, 2004.

<sup>5</sup> Although allegations have been made throughout these proceedings of improper comment in court pleadings and in courtroom proceedings, the issues raised by Defendant's motion concern extrajudicial statements which have occurred in the past few weeks. Defendant seeks relief based on these recent events in light of the proximity of the trial date. The Court, therefore, will address only those matters.

any restrictions, beyond that of the October 31 Order, impermissibly infringes on the alleged victim's right to a fair trial, due process and the right to speak and reply. The People and the Media argue that the Order is overbroad as to both the content of the speech restricted and the range of persons subject to the Order.

The central issue raised by Defendant's Motion is whether preservation of Defendant's fair trial rights necessitates the imposition of a more restrictive pretrial publicity order than the October 31 Order. In addition, this is not a contempt or disciplinary proceeding. Consequently, it is not the Court's intention, in the context of this Order, to ultimately determine whether the extrajudicial statements of counsel for the alleged victim constitute violations of ethical principles and prior orders. Instead, the narrow focus of this Order is to address the fair trial implications raised by the parties and articulate, once again, the particular standards governing any extrajudicial statements that might be made by the trial participants in regard to this matter.

## II.

The offense for which Defendant is charged carries a maximum penalty of life imprisonment. It is a fundamental constitutional principle that the Defendant is entitled to a fair trial by impartial jurors. Extrajudicial statements, which are substantially likely to directly or indirectly interfere with that right, may constitutionally be prohibited.

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the United States Supreme Court addressed the obligation of courts to protect defendants from pretrial publicity, which deprived them of their right to a fair trial. After review of free speech and fair trial principles, the Court instructed as follows:

the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement offices coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

*Sheppard*, 384 U.S. at 363. In a later case, the U.S. Supreme Court elaborated as follows regarding the determinations that a trial court must make in this regard:

When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. The 'substantial likelihood' test ... is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an

untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements.... The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

*Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) (citations omitted).

Pretrial publicity orders typically conform to the Colorado Rules of Professional Conduct and the American Bar Association Standards for Criminal Justice, Fair Trial and Free Press (3<sup>rd</sup> ed.). The Rules and ABA Standards attempt to balance the directive of *Sheppard* and subsequent appellate decisions pertaining to First Amendment rights, in particular the *Gentile* decision. The October 31, 2003 Order was premised on these provisions. While no challenge has been made to the October 31, 2003 Order, the media contends the August 4, 2004 Order, which bans all comment, is not sufficiently narrow to serve the state interest in preserving a fair trial. The media further asserts that any action on this Court’s part to impose restrictions, greater than those stated in the October 31, 2003 Order, must be supported by specific findings.

The recent pattern of activity, which has occurred since the accidental release of the transcripts of the June 21-22 hearings, is of significant concern to this Court. The transcripts solely contained the opinion of Defendant’s expert, only because the People had chosen not to present their expert testimony. Upon release of the transcripts in response to the Orders of the Colorado and United State Supreme Courts, this Court had expressed its concern that prejudice could result from the premature release of the information without reference to the totality of the evidence. The assertions by the People and counsel for the alleged victim that they were entitled to reply is consistent with Colorado Rules of Professional Conduct 3.6(c). The Court notes though that the right of public reply has not been denied as to Dr. Johnson’s opinion. Counsel for the alleged victim did publicly deny the facts suggested by Dr. Johnson’s opinion. In addition, the People publicly filed the summary of a rebuttal witness, notwithstanding the fact that other expert summaries have been filed under seal to date.

Despite there being a right to reply under some circumstances, the right of reply is certainly not unlimited.

[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Colo. RPC 3.6(c).<sup>6</sup> The evidence of extrajudicial statements, presented by the Defendant, appears to include the following: (1) comment on the character and reputation of the alleged victim and Defendant; (2) comment on the credibility of the alleged victim and Defendant; (3) comment on the merits of the evidence of the case; (4) comment on the ultimate issue of fact to be determined by a jury and opinion on the guilt or innocence of Defendant; (5) comment on the motives of the participants; (6) comment on anticipated testimony; (7) comment suggesting that a fair trial may not be obtained in Eagle County; (8) comment directed to opposing counsel that utilizes inflammatory and denigrating language; and (9) inflammatory comment directed toward this Court regarding the effectiveness of the judicial system. The Court fully recognizes the extent of the publicity in this matter as well as the overwhelming breadth of comment in the media pertaining to all aspects of this case. However, it is axiomatic that statements made by counsel present a significantly greater threat of prejudice to the fairness of the proceedings.

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. ... 'attorneys' role as advocates gives them 'extraordinary power to undermine or destroy the efficacy of the criminal justice system.'

*Gentile*, 501 U.S. at 1076 (citations omitted).

This Court has not previously attempted to impose restrictions, beyond those in the Colorado Rules of Professional Conduct and the ABA Standards, as set forth in the October 31, 2003 Order. The Court simply expected all counsel in this matter to conduct themselves in accordance with the professionalism and integrity attendant to the practice of law. However, as a result of the content and inflammatory language of recent extrajudicial comments as well as the lack of any reasonable alternative, this Court is compelled to intervene and prevent the substantial prejudice to the fairness of the trial that will result should the current pattern of advocacy continue.

This trial is set to commence in less than two weeks, and the passage of time will not alleviate any prejudice from such pretrial statements. Further, as noted in *Gentile*, a trial court is not required to permit unlimited comment with the expectation that any prejudicial effect can be mitigated through *voir dire* or change of venue. Even so, the extent of publicity in this matter negates any realistic expectation that *voir dire* or a change of venue would be an effective remedy. The Court's action is by no means intended to preclude all comment on this case or shield itself from criticism. As a public entity, the Court would not attempt to prohibit valid criticism pertaining to its own operation. However, inflammatory comments intended merely to undermine and impugn the integrity of the Court and the judicial process pose a substantial threat to the ability of the Court to conduct a fair trial. Accordingly, this Order is intended to restrict the comment of participants who are in a position to create the greatest potential for prejudice and also to ensure the participants remain cognizant of the absolute necessity to preserve a fair trial for both the Defendant and the People. Obviously, the public will not be deprived of information or comment pertaining to this case, since proceedings to date have been followed by

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<sup>6</sup> The Court notes that no such right of reply is contained in ABA Standard 8-1.1 which governs extrajudicial statements by attorneys.

media reportage of actual events, commentary by knowledgeable members of the legal profession (who are not trial participants), and commentary from other interested persons, such as victim advocates. The time has come for this matter to proceed to trial. In light of the foregoing, it is hereby ORDERED as follows.

1. A lawyer or law enforcement agency or officer who is participating or has participated in the investigation or litigation of this matter, the alleged victim, Defendant and witnesses shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer, law enforcement agency or officer, alleged victim or Defendant knows or reasonably should know that it will have a substantial likelihood of (1) materially prejudicing an adjudicative proceeding in this matter; or (2) interfering with the fair trial of the pending charges; or (3) otherwise prejudicing the due administration of justice.

2. Subject to paragraph 1, a lawyer, law enforcement agency or officer, the alleged victim, Defendant and witnesses may (1) state the scheduling or result of any step in litigation and identify any pending matters but shall not express any opinions as to the merits of the positions and arguments of any party or the expected result or actual result of pending or concluded matters.

3. In addition to paragraph 1, none of the lawyers, law enforcement agency or officers who are participating or who have participated in the investigation or litigation of this matter, the alleged victim, Defendant and witnesses shall not make an extrajudicial statement which a reasonable person would expect to be disseminated by any means of public communication, which relate to the following: (1) the character, credibility, reputation or criminal record of any party or witness; (2) the expected testimony of a party or witness; (3) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement; (4) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; (5) any opinion as to the guilt or innocence of Defendant, or the ultimate issue of fact to be determined by a jury; (6) the merits of the case and the merits of the evidence in the case; (7) information that has been ruled to be or is likely to be inadmissible as evidence in a trial; and (8) opinion as to the fairness of the proceedings or the existence or nonexistence of prejudice as to a party or witness.

4. No lawyer associated in a firm or government agency with a lawyer subject to the preceding paragraphs shall make a statement prohibited by the preceding paragraphs. The prohibitions contained herein shall apply to partners, associates, employees, representatives, and agents of the lawyer and law enforcement agency and officer, the alleged victim, Defendant and witnesses. The District Attorney shall exercise reasonable care to prevent investigators, law enforcement personnel, employees or other assisting or associated with the prosecutor in a criminal case from making any extrajudicial statement prohibited herein.

5. All persons who attended *in camera* hearings in any capacity are reminded that the information obtained at those hearings shall not be disclosed except as otherwise ordered.

6. Court personnel shall not disclose, to any unauthorized person, information relating to this matter that is not part of the public records of the Court and that may be prejudicial to the right of the prosecution or the defense to a fair trial.

7. This Order shall remain in effect until the trial is concluded.

IT IS THEREFORE ORDERED,

1. Upon reconsideration, *Mr. Bryant's Motion to Ban All Extrajudicial Statements and Disclosures by All Trial Participants and Their Lawyers Until the Trial is Concluded* is GRANTED in part and DENIED in part as set forth above.

2. The August 4 Order is hereby vacated.

Dated this 17<sup>th</sup> day of August 2004.

BY THE COURT

  
W. Terry Ruckriegle  
Chief District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I have, on this \_\_\_\_\_ day of \_\_\_\_\_, 2004, faxed a true and correct copy of the above ORDER to:

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