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News, the Utah Media Coalition, and the Utah Headliners
Chapter of the Society of Professional Journalists

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

ASSOCIATED PRESS, CNN, DESERET
NEWS PUBLISHING COMPANY, publisher
of the *DESERET MORNING NEWS*, *THE
SALT LAKE TRIBUNE*, *THE SPECTRUM*,
THE DAILY HERALD, BONNEVILLE
INTERNATIONAL CORPORATION d/b/a
KSL-TV, FOUR POINTS MEDIA GROUP
OF SALT LAKE CITY, INC. d/b/a KUTV 2
NEWS, THE UTAH MEDIA COALITION,
and THE UTAH HEADLINERS CHAPTER
OF THE SOCIETY OF PROFESSIONAL
JOURNALISTS,

Intervenors.

**MEMORANDUM IN SUPPORT
OF MEDIA INTERVENORS'
MOTION TO AMEND
DECORUM ORDER**

(Oral Argument Requested)

Criminal No. 061500526

Judge James L. Shumate

Media Intervenors the Associated Press, CNN, *Deseret Morning News*, *The Salt Lake Tribune*, *The Spectrum*, *The Daily Herald*, KSL-TV, KUTV 2 News, the Utah Media Coalition, and the Utah Headliners Chapter of the Society of Professional Journalists (collectively the “Media Intervenors”), through their undersigned counsel, respectfully submit this Memorandum in Support of their Motion to Amend Decorum Order, filed concurrently herewith.

INTRODUCTION

On May 29, 2007, this Court amended its Decorum Order in the above-captioned matter to address concerns that the pool photographer could take pictures of privileged documents and discern their content. In briefing these issues previously, the Media Intervenors suggested that the Decorum Order could be amended to clarify that the pool photographer is not permitted to take pictures of documents not in the public record in order to discern their content or to invade privileged communications. Rather than proscribing what the pool photographer could shoot, however, this Court took a different approach in its Amended Decorum Order, instead proscribing what the media may *publish*:

8. Any enhancement, publication, or dissemination of any document, conversation, or writing at counsel table for either party that is not officially part of the record of the Court’s proceedings is prohibited. There will be no disclosure by any member of the media of any conversations or writings at counsel table while the Court is in session. The media will respect the attorney-client and attorney work product privileges.

[Amended Decorum Order ¶ 8.]

The distinction between these two approaches is subtle, but it has enormous constitutional significance. Dictating what the pool photographer may or may not photograph while in the

courtroom is authorized by Rule 4-401 of the *Utah Code of Judicial Administration*. Attempting to bar the media from publishing information once it is in their possession is a prior restraint, which is almost always unconstitutional. This is why Rule 4-401 permits the court to regulate what the media may *photograph* (i.e., prohibiting photographs of jurors), and what the media in may do inside the courtroom (i.e., prohibiting in-court interviews), but does not authorize the court to issue an order prevent the media from *publishing* information that it has obtained.

The Media Intervenors are certain the Court did not intend to amend the Decorum Order in a way that created an unconstitutional prior restraint, particularly the seemingly perpetual and sweeping restraint in the current order. The Court's goals of protecting the content of privileged documents and communications can be addressed in a more narrowly-tailored fashion that does not run afoul of the Constitution and fully protects the rights of everyone involved. The Media Intervenors respectfully request that the Decorum Order be amended for that purpose.

ARGUMENT

I. PRIOR RESTRAINTS ARE UNCONSTITUTIONAL.

Prior restraints on speech and publication have long been recognized as “the most serious and least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791 (1976). As the Utah Supreme Court has held, “any restraint on expression bears ‘a heavy presumption against its constitutional validity,’ and the government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint.’” *KUTV, Inc. v. Conder*, 668 P.2d 513, 522 (Utah 1983) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 2149 (1971)). In the history of First Amendment

jurisprudence, that burden has almost never been met, with exceptions “narrowly drawn in theory and rarely applied in practice.” *Id.*

The United States Supreme Court has shown little tolerance for prior restraints, with Justice White expressing “grave doubt” that such restrictions could ever be justified. *Nebraska Press*, 427 U.S. at 570. Indeed, “the main purpose of the First Amendment is to prevent all such prior restraints and publications as had been practiced by other governments.” *Id.* at 557 (citations omitted). *See also New York Times*, 403 U.S. at 724 (“The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”) (Douglas, J., concurring).

Where a prior restraint concerns events and information in public court proceedings, as the Decorum Order here does, the restraint is even less tolerable and virtually always unconstitutional. In *Nebraska Press*, the United States Supreme Court announced an absolute rule against restraints on publication of events that occur in open court:

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: “[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom.”

Nebraska Press, 427 U.S. at 568 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966)).

As the Court has explained, the rationale for this rule is grounded in fundamental principles of our open court system:

A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig v. Harney, 331 U.S. 367, 374 (1947).

Even when a defendant's right to a fair trial is at stake, as it typically is in open criminal proceedings, prior restraints are routinely struck down. For example, in both *Nebraska Press* and *KUTV*, the United States Supreme Court and Utah Supreme Court held that, notwithstanding the compelling Sixth Amendment rights at issue, the trial court's imposition of a prior restraint upon the news media prohibiting publication of information prejudicial to the defendant was unconstitutional under the First Amendment. *Nebraska Press*, 427 U.S. at 570; *KUTV*, 668 P.2d at 524-25. To hold otherwise, and thereby categorically elevate the accused's fair trial rights over the First Amendment, would be "to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it." *Nebraska Press*, 427 U.S. at 561.

II. THE AMENDED DECORUM ORDER CONSTITUTES AN UNLAWFUL PRIOR RESTRAINT.

Though surely not intended, this Court's Amended Decorum Order infringes on these constitutional principles and constitutes a prior restraint because it is directed at what the media may *publish*, rather than the media's conduct in the courtroom. Read literally, the Order categorically and permanently prohibits the media from publishing any information about "any document, conversation, or writing at counsel table," regardless of whether that document or conversation is intended to be confidential or privileged, or whether the media acquires that information through other means. [Order ¶ 8.] This prohibition is overbroad and could have unintended consequences. For example, counsel for Defendant may choose to speak to the media and to disclose the content of a conversation he had at counsel table, or of a document that was

not formally entered into evidence. Under the current Order, the media would be prohibited from publishing that information, despite the fact that it is not covered by any applicable privilege and is obviously not confidential.

Likewise, if the information at issue somehow becomes part of the public domain, either through voluntary disclosure or otherwise, the Order would still prohibit the media from publishing that information, apparently in perpetuity, even though there would no longer be any compelling interest in such a restraint.

Equally problematic is the prohibition on “enhancement” of any document or writing. The photographs taken by the pool photographer are digital, and they are routinely cropped, resized, or enhanced before being published. Read literally, the Order would prohibit this type of enhancement if a “document . . . or writing at counsel table” were somewhere in the photograph, no matter how incidental. This concern is not hypothetical. Following issuance of the Amended Decorum Order, editors have inquired whether such resizing of courtroom photographs in which documents are visible would constitute a violation of the Order.

Finally, the Order no longer regulates only the decorum of those in attendance in the courtroom, but now purports to regulate every media outlet that covers this case, possibly worldwide. This restriction goes well beyond the stated purpose of the Decorum Order, which is to “govern the expectations of the people involved in the trial and those observing the trial,” Order at 1, and enters the dangerous territory of invading the newsroom and having the government dictate what content the media may and may not publish.

III. THE DECORUM ORDER SHOULD BE AMENDED.

There is a constitutional way to achieve the Court's laudable goals of protecting the attorney-client and work product privileges without creating a prior restraint. That approach is suggested by Rule 4-401 itself, which regulates the conduct of those in the courtroom, rather than what they may do with the information they obtain. The Media Intervenors suggest that paragraph 8 of the Decorum Order be amended to state as follows:

The pool photographer is not permitted to take pictures of documents or writings not in the public record for the purpose of discerning their content or invading privileged communications. Individuals in attendance at the trial may not intentionally attempt to overhear confidential communications between counsel and their clients while the Court is in session.

This approach accomplishes the same purposes as the current Amended Decorum Order – protecting confidential communications, ensuring respectful conduct by those in attendance, and preserving the attorney-client and work product privileges – all without unconstitutionally reaching beyond the courtroom to restrict what content the media may publish. It also has the added benefit of being enforceable if it is violated, while an unconstitutional prior restraint does not.

For these reasons, the Media Intervenors respectfully request that the Court amend the Decorum Order and remove the prior restraint in paragraph 8.

CONCLUSION

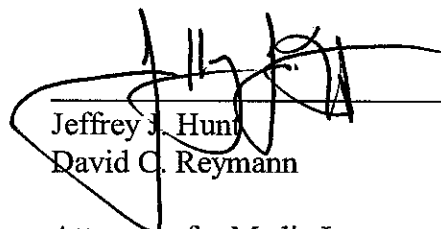
Justice White observed decades ago that “[w]e have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding

the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Nebraska Press*, 427 U.S. at 560-61 (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring)).

This Court has a real and legitimate interest in protecting privileged communications in the courtroom. But that protection need not be at the expense of the First Amendment. For all of the foregoing reasons, the Media Intervenors respectfully request that their Motion to Amend Decorum Order be granted.

RESPECTFULLY SUBMITTED this 22 day of June 2007.

PARR WADDOUPS BROWN GEE & LOVELESS



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CERTIFICATE OF SERVICE

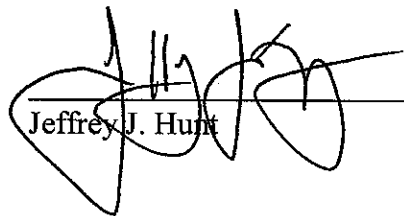
I HEREBY CERTIFY that on the 22 day of June 2007, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MEDIA INTERVENORS' MOTION TO AMEND DECORUM ORDER** was sent via United States mail, postage prepaid, to:

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