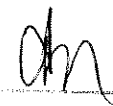


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FIFTH DISTRICT COURT

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WASHINGTON COUNTY



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IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

<p>STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant.</p>	<p>MEDIA INTERVENORS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE CAMERAS IN COURTROOM</p> <p>Criminal No. 061500526</p> <p>Judge James L. Shumate</p>
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Intervenors the Associated Press ("AP"), Deseret News Publishing Company, publisher of the *Deseret Morning News* ("*Morning News*"), *The Salt Lake Tribune* ("*Tribune*"), *The*

Spectrum, Bonneville International Corporation d/b/a KSL-TV ("KSL-TV"), Four Points Media Group of Salt Lake City, Inc. d/b/a KUTV 2 News ("KUTV"), the Utah Media Coalition (the "Coalition"), and the Utah Headliners Chapter of the Society of Professional Journalists (the "Society") (collectively the "Media Intervenors"), through their undersigned counsel, hereby submit this Memorandum in Opposition to Defendant's Motion to Exclude Cameras from Courtroom.

ARGUMENT

Defendant contends that the *Morning News* acted improperly when it published the contents of a note that Mr. Jeffs wrote in open court, held up, attempted to give to the Court, and a portion of whose content was then read and corroborated by multiple law enforcement sources. Now claiming that this note was actually a privileged communication between Mr. Jeffs and his counsel, Defendant asks the Court to punish the news media, and the public as well, by banning all still photography from this public judicial proceeding.

There is no question that public observers of court proceedings should act responsibly and not snoop or eavesdrop on privileged communications between parties and their counsel. This applies not just to media photographers, but to any member of the public in attendance who could listen in on conversations or peer over an attorney's shoulder. At the same time, the courtroom is not an attorney's private office, and the mere potential for eavesdropping has never been a reason to close the courtroom to public access. Mr. Jeffs' prosecution is a public court proceeding, and

the parties' conduct in court takes place in public. Not every document held up in court is a privileged communication, no matter how embarrassing its content may be. Indeed, most such documents are not privileged, particularly those that a party seeks to lodge with the Court.

The photograph of Mr. Jeffs' note was one of several shot that day in court by a *Morning News* photographer, acting as the media pool photographer. The *Morning News* photographer did not take the photograph with the intent to digitally enhance it or otherwise learn the content of the note. Contrary to Defendant's assertion, no special lens or equipment was used. This was not a case of a media pool photographer sneaking around the courtroom surreptitiously shooting pictures of the attorneys' or judge's notes or engaging in conduct in violation of Rule 4-401. Rather, the photographer was simply fulfilling his constitutional role of covering this case and reporting on its proceedings to the public.

After reviewing the images back in the newsroom, a *Morning News* reporter discovered that several letters in Mr. Jeffs' note appeared to be visible in one of the images. After digital enhancement and analysis of the photograph, portions of the note were legible, which confirmed the information received from confidential law enforcement sources, who also knew of its content.

At that point, the question became whether the note was intended as a privileged communication by Mr. Jeffs, or whether it was the same as any other public event in these proceedings and a legitimate subject on which to report. The *Morning News* examined this issue

carefully and concluded that none of the facts available to the *Morning News*, including the eyewitness observations of those in the courtroom, suggested that the note was intended as a confidential attorney-client communication. That conclusion was based on the following:

- The note was not written by Mr. Jeffs in a meeting with his counsel where he was seeking legal advice. It was written in open court after Mr. Jeffs asked to approach the bench, and it clearly appeared that Mr. Jeffs intended to give the note to the Court. Mr. Jeffs never expressed any indication that he intended to give the note to his attorneys. In fact, his conduct was exactly the opposite.
- No part of the content of the note discerned by the *Morning News* gave any indication that it was a communication from Mr. Jeffs to his counsel, much less a communication that Mr. Jeffs intended to keep confidential, as Utah Rule of Evidence 504(a)(6) requires.
- The conduct of Mr. Jeffs' counsel when Mr. Jeffs attempted to give the note to the Court is inconsistent with the assertion that it was a communication from Mr. Jeffs to his counsel. Indeed, Mr. Jeffs' attorneys concede in their memorandum that they stopped Mr. Jeffs from doing so and read the note "for the first time."
- The content of the note was disclosed to third parties even before publication of the *Morning News*' story. It is undisputed that the content of the note was known to individuals other than Mr. Jeffs' counsel, namely, law enforcement sources, who independently informed the news media of its content.

Based on these facts, the *Morning News* had no reason to believe, and in fact did not believe, that the note was intended as a confidential attorney-client communication. In light of Mr. Jeffs' position as leader and president of the Fundamentalist LDS Church, his enormous influence and power over the lives of its members, the serious nature of the criminal charges against him, and the significance of the revealed information, the *Morning News* determined the content of the note was newsworthy and should be reported to the public.

This was not a snap decision, as evidenced by the week delay in reporting the story. The decision was made only after days of careful consideration and discussion, sometimes heated, by *Morning News* reporters and editors, and it was based on the *Morning News*' conclusion that the document was never intended as a privileged communication and that its content was corroborated by independent sources. As Defendant notes in his memorandum, the *Morning News* also spoke with Mr. Jeffs' counsel and invited her to explain why the note at issue was a privileged communication and should not be published. In that meeting, she provided the *Morning News* with no additional facts demonstrating that the note was intended by Mr. Jeffs as a privileged communication, nor with any legal explanation that changed the *Morning News*' conclusion. Indeed, to this day, Defendant has not come up with any such explanation, other than the assertion that the note was embarrassing to Mr. Jeffs, and therefore it is *ipso facto* privileged.

As the Court knows, the attorney-client privilege does not apply to every word uttered or written by a defendant, nor does it cover documents simply because they are embarrassing to a party. It only applies to communications that the client intends to keep confidential between himself and his counsel. Utah R. Evid. 504(a)(5), (a)(6), (b). Nothing in this case suggests that Mr. Jeffs' note meets this definition. Mr. Jeffs' attorneys may have preferred that the note not be publicly disclosed because it was contrary to their defense in this case, but that preference does

not mean the document is privileged, nor does it justify curtailing the public's ability to view these proceedings.

Defendant also makes much in his memorandum of the fact that the photograph was "digitally enhanced" by the *Morning News*, suggesting that such enhancement is somehow untoward. This argument is a red herring. If the media had no reason to believe that the document it photographed was privileged – and it did not – then there is no impropriety in enhancing the photograph. The *Morning News* did not use digital enhancement to glean privileged information; it did so to confirm what it had already been told by law enforcement officials and to more accurately report the content of what was not a privileged communication.

In obtaining and publishing this information, the *Morning News* certainly intended no disrespect to this Court or the attorneys and litigants in this case. It simply believed the information was newsworthy and should be reported to the public, and it had no factual basis to believe that the information was covered by any applicable privilege. The Media Intervenors agree that still photography should not be used as a means to intentionally invade the privileged communications between parties and their counsel, or to intentionally discern the content of obviously privileged documents. But that is not what happened here, and the mere fact that technology could potentially be abused has never been a justification to abandon that technology altogether. Otherwise, all court proceedings would be closed to everyone but the parties and their counsel, and the public's constitutional right of access would be severely compromised.

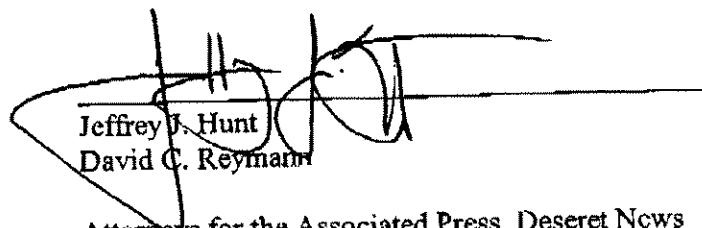
This case is a matter of significant public interest, not only to the general public, but also to the thousands of individuals whose lives and families have been and will be affected by Mr. Jeffs. Still photography is not as effective as full video coverage, as some states allow, but it is nevertheless an important means of conveying these events to the general public and promoting greater public understanding of the judicial process. This Court's Decorum Order reflects those interests, and it need not be revisited.

Even if the Court were concerned with the potential use of photography to invade the attorney-client privilege, however, that issue can be addressed within this Court's considerable discretion under Rule 4-401 without banning still photography entirely. For example, the Court can amend the Decorum Order to prohibit the use of still photography for the purpose of discerning the contents of privileged communications between parties and their counsel. The Media Intervenor has no intention of doing so, and did not do so with respect to Mr. Jeffs' note, but they have no objection to such a clarification of the Decorum Order. Such an amendment fully addresses Defendant's concerns and is clearly preferable to banning photography entirely and significantly impairing the public's right to observe these proceedings.

For all of the foregoing reasons, the Media Intervenor respectfully request that Defendant's Motion to Exclude Cameras in Courtroom be denied.

RESPECTFULLY SUBMITTED this 18 day of May 2007.

PARR WADDOUPS BROWN GEE & LOVELESS



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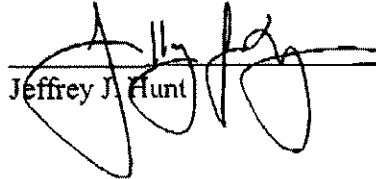
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of May 2007, a true and correct copy of the foregoing **MEDIA INTERVENORS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE CAMERAS IN COURTROOM** was sent via United States mail, postage prepaid, to:

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