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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	]	
	]	
v.	]	**CR-03-BE-0530-S**
	]	
RICHARD M. SCRUSHY,	]	
	]	
Defendant.	]	
	]	

ENTERED

APR 13 2004

MEMORANDUM OPINION

This matter comes before the court on Motion by the United States for a protective order restricting extrajudicial statements by parties and counsel (doc. # 140). This issue has been briefed by both sides and the court held a hearing on the issue on April 9, 2004, at which time the defense joined in the Motion, and the parties consented to the entry of a stipulated order. For the reasons stated below, the court finds that a substantial likelihood exists that continued extrajudicial comments of the type previously made by both sides could prejudice a fair trial in this case. Based on these concerns and with the parties' agreement, the court will enter a narrowly-tailored order restricting extrajudicial statements by participants in this case. The joint Motion is granted.

The court notes at the outset that neither party seeks a restraining order directed to the media. Indeed, if the parties sought prior restraint against the media's First Amendment rights, the court would be faced with a more stringent legal standard. *See, Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 2808 (1976); *cf. Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720, 2743-44; *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1512-13 (11th

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Cir. 1991). The court acknowledges, however, the constant media attention to all the intricacies of the civil and criminal matters involving HealthSouth. The exhibits to the Defendant's response to the motion contain some, but not all, of the news articles that have appeared not only locally but around the country. The court is personally aware of the widespread publicity of this case in the print media, on radio talk shows, and on television news programs.[1] Furthermore, the court is cognizant of the media and the public's interest in information about this case and other matters involving HealthSouth. The court intends to keep those interests in mind in evaluating this matter and other issues that come up in this case.

However, the primary and overriding interest of this court must be Mr. Scrushy's Sixth Amendment right to a fair trial. Due process requires that Mr. Scrushy, like all defendants, receive a fair trial by an impartial jury, free from outside influences. The court will do everything it can legally do to ensure that Mr. Scrushy's constitutional right to a fair trial is protected.

The basic tenet of our criminal justice system that every defendant is presumed innocent until proven guilty beyond a reasonable doubt in a court of law could potentially be jeopardized in this case because of extensive publicity. However, the court recognizes that the Defendant is not the only entity entitled to a fair trial. The public and the Government have an interest in seeing that justice is administered fairly. *See United States v. Brown*, 218 F.3d 415, 424 (5th Cir. 2000). "Few, if any, interests under the Constitution are more fundamental than the right to a fair

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[1]Because of concerns about emphasizing again for public dissemination the highly prejudicial statements previously made, the court has refrained from listing them here and has ordered the parties' submissions sealed. To air those statements again would exacerbate the problem sought to be remedied..

trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that right." Gentile, 501 U.S. at 1075. To ensure a fair trial in this case, the parties seek a limited restriction upon extrajudicial comments by all participants. The court agrees that now is the proper time to impose such restrictions.

The Government, through press conferences, press releases, and statements created and/or played to the intense publicity surrounding the SEC investigation and civil suits, the guilty pleas of various former HealthSouth officers and employees, and the indictment of Mr. Scrushy. Consequently, in the court's estimation, fairness called for an opportunity for some response from the defense. Therefore, the court did not initially impose any restrictions upon extrajudicial statements.

For the most part, counsel in this case – prosecution and defense – have complied with the ethical obligations imposed on them to refrain from making prejudicial and/or improper comments about this case. Those ethical obligations should be sufficient restraint without the need for a protective order. *See* Alabama Rules of Professional Conduct 3.6, and 3.8. For example, Rule 3.6 prohibits a lawyer from making an out-of-court statement that will be publicly disseminated and that will have a substantial likelihood of materially prejudicing a proceeding. The rule elaborates that certain kinds of statements are presumed to have a substantial likelihood of material prejudice. Included in that list are statements relating to the "character, credibility, reputation, or criminal record of . . . a witness . . . or the expected testimony of a party or witness . . .," and "any opinion as to the guilt or innocense of a defendant . . .," and information that would be inadmissable as evidence and that would "create a substantial risk of prejudicing an impartial trial. . . ."

However, whether any attorney in this case has violated ethics rules does not fall within the purview of this court, but instead rests with the Alabama Bar Association and its various review and disciplinary boards. Further, whether the ethics rules have been violated does not create the standard by which this court must determine whether to impose a protective order precluding or limiting extrajudicial comments.

Exactly what standard to apply to this determination, however, is not entirely clear. Neither the United States Supreme Court nor the Eleventh Circuit have addressed the precise issue. In fact, in *The News-Journal Corp. v. Foxman*, the Eleventh Circuit acknowledged the split in authority among the circuits, noted that the state trial judge in that case applied the "reasonable likelihood" standard, but refused to determine the appropriate standard; instead, the court affirmed the district court's abstention from the matter under the *Younger* doctrine. 939 F.2d at 1515 n. 18.

Two Supreme Court decisions do provide some guidance. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court criticized the extensive publicity surrounding the murder of the wife of Dr. Sam Sheppard and his trial. In cataloging the many abuses by the attorneys and the media, the Court noted that the trial judge could have taken action to "proscribe[ ] extrajudicial statements by any lawyer, party, witness, or court official, which divulged prejudicial matters . . . ." 384 U.S. at 361. The Court further commented that "[h]ad the judge, the other officers of the court and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom – not pieced together from extrajudicial statements." *Id.* at 362. The Court emphasized the threat of pervasive pretrial publicity to the constitutional right to a fair trial and stressed the role of the

trial court:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. *Due process requires that the accused receive a trial by an impartial jury free from outside influences.* Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused . . . . *[T]he 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 officers 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.

384 U.S. at 362-363 (emphasis added). The Court thus recognized the need for a trial court to take affirmative action to control out of court statements that can prejudice a fair trial.

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030, (1991), the Supreme Court discussed limitations imposed by state bar ethics rules[2] on the speech of a lawyer involved in litigation. The Court, after quoting the above-quoted statement from *Sheppard*, acknowledged that it "contemplated that speech of *those participating before the courts* could be limited." 501 U.S. at 1072, (emphasis in original). The Court determined that its prior opinions in *In re Sawyer*, 360 U.S. 622, (1959) and *Sheppard*

> rather plainly indicate that the *speech of lawyers* representing clients in pending cases *may be regulated under a less demanding standard than that established for regulation of the press* in

[2] The Nevada rule under which the attorney was disciplined was identical to ABA Model Rule of Professional Conduct 3.6, which in turn is identical to Alabama Rule 3.6.

> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. H. 683 (1976). . . Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct . . . . 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 . . . . We agree with the majority of the States that *the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.*

501 U. S. at 1074-75 (emphasis added).

Admittedly, the Supreme Court did not have before it the issue of a court-imposed restraint on counsel's comments. The issue of the correct standard to apply to restrict out-of-court statements of participants has not been uniformly decided.[3] At least one circuit, however, favored the "substantial likelihood" test to evaluate the propriety of a protective order on trial participants. In *United States v. Brown*, 218 F.3d 415, 427 (5th Cir. 2000), the Fifth Circuit held "a district court may in any event impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial."

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[3]The Sixth, Seventh, and Ninth Circuits apply the more stringent tests of "clear and present danger" or "serious and imminent threat" of prejudicing a fair trial. *See United States v. Ford,* 830 F.2d 596, 600-02 (6th Cir. 1987) ("clear and present danger"); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975) *cert. denied sub nom Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976) ("serious and imminent threat"); *Levine v. U.S. Dist. Court for C.D. of Cal.,* 764 F.2d 590, 596 (9th Cir. 1985) ("clear and present danger"); *CBS Inc. v. Young*, 522 F.2d 234, 238-39 (6th Cir. 1975) ("clear and present danger.") As the Fifth Circuit noted, those decisions predated the *Gentile* decision that rejected such stringent standard for controlling the speech by trial participants. *See Brown,* 218 F.3d at 427. The Fourth and Tenth Circuits allow restrictions on trial participants upon a determination that such comments present a "reasonable likelihood" of prejudicing a fair trial. *See In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1984); *United States v. Tijerina*, 412 F.2d 661, 666-67 (10th Cir. 1969).

The Fifth Circuit in *Brown* acknowledged that the difference between "reasonable likelihood" and "substantial likelihood," was not clear, assuming that "substantial likelihood" required a stronger showing. 218 F.3d at 427, 428. It then declined to choose between the two standards because the trial court did identify a "substantial likelihood" that the extrajudicial statements would prejudice a fair trial. *Id.*

This court, likewise, cannot determine whether "reasonable likelihood" or "substantial likelihood" makes much difference regarding the proper standard. Assuming that "substantial likelihood" requires a stronger showing, the court will apply that standard. In applying that standard, the *Brown* case provides guidance as to how to determine whether a "substantial likelihood" exists that the extrajudicial comments of trial participants will affect the fair trial.

The *Brown* case involved a defendant who was a state official implicated in the brokering of an alleged "sham" settlement of a threatened lawsuit by the State of Louisiana against the president of a failed insurance company. *Brown*, 218 F.3d at 418. At issue in that case was the district court's *sua sponte* restrictive order, based on extensive pre-trial media publicity, prohibiting attorneys, parties, or witnesses from discussing with "any public communications media" anything about the case "which could interfere with a fair trial," including statements "intended to influence public opinion regarding the merits of this case," with exceptions for matters of public record and matters such as assertions of innocence. 218 F.3d at 418.

Similarly, in this case, both the prosecution and the defense have made extensive use of media coverage. The United States attorney's office issued frequent press releases about the indictments and guilty pleas of other HealthSouth officers and employees and has made other

comments to the press.[4] Mr. Scrushy's defense team has called its own press conferences. One member of the defense team appeared on a popular radio talk show. The court also is aware that Mr. Scrushy appeared on "60 Minutes" and that he and his wife now host a morning talk show on a local television station. Both the United States Attorney's office and Mr. Scrushy have websites where each posts information about the case.

As the Fifth Circuit recognized in *Brown*, the First Amendment does not preclude limitations upon the speech of a defendant in a criminal trial. The interests of the public and the defense in the right to a fair trial are protected when a court vigilantly acts to prevent the prejudicial effects of pretrial publicity. *Brown*, 218 F.3d at 424. Freedom of speech does not grant the unfettered right to influence juries. *Pennekamp v. State of Florida*, 66 S. Ct. 1029, 1047 (1946) (Frankfurter, J., concurring). A criminal defendant's right to a fair trial should not be compromised by extrajudicial comments by any lawyer, party, or witness made for public dissemination. "A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena." *Estes v. Texas*, 381 U.S. 532 (1965).[5]

The court had previously privately admonished counsel that this case should be tried in

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[4]The press often is the court's source of information about a filing, as well, often receiving calls from the press before a motion has been docketed in the clerk's office. The court cannot conclusively determine that the press has received advance information about events and filings in this case, although strong inferences so indicate. Recognizing the great public interest in this case, the clerk's office, at the instruction of the court, established a special website for ease in accessing information about this case. Any special treatment of the press by the parties must cease. The press does not have a right, constitutional or otherwise, to special access to information not available to the general public. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

[5] Unlike most criminal defendants, Mr. Scrushy does have access to a "city arena" in the form of his morning television show. Mr. Scrushy is cautioned not to use that forum to make statements about the case that his lawyers would be precluded from making by the Rules of Professional Conduct as ordered by this court.

the courtroom, not in the media. Such informal admonishment proved to be insufficient. As the trial date draws nearer, the court has no reason to believe that comments by either side will lessen. If past conduct gives any indication, it supports a conclusion that the extrajudicial comments will only increase.

The tenor of the comments by both sides also leads the court to conclude that left unabated comments similar to those previously made present a substantial likelihood of prejudicing a fair trial in this case. The quantity and nature of the extrajudicial comments made by both sides convinces the court that it must act upon its "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *See Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

In considering any restraint, the court must consider whether it is the least restrictive means to accomplish the purpose of ensuring a fair trial. The order sought by the parties is not a broad ranging bar to fair comment, but is narrowly tailored and in line with restrictions on an attorney's speech that already exist under the Alabama Rules of Professional Conduct. As such, the narrowly-tailored restraint provides the least restrictive alternative.

As the Supreme Court has noted,

> [e]ven if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other devise, 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 [by trial participants]. 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.
>
> The restraint on speech is narrowly tailored to achieve those

> objectives. The regulation of attorneys' speech is limited – it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial.

Gentile, 501 U.S. at 1075-76. The Fifth Circuit has also recognized the limited efficiency and high costs associated with other alternatives:

> Like voir dire, "emphatic" jury instructions may be at best an imperfect filter, and would also fail to address the threat of a "carnival atmosphere" around the trial . . . . Delaying the commencement of the trial and sequestering the jury both impose well-known and serious burdens in their own right . . . . In short, all of these options carry with them significant costs without addressing the root cause of the district court's concern. . . .

Brown, 218 F.3d at 431 (citations omitted).

The court, thus, concludes that the best approach to "curing" the effects of pretrial publicity involves "those remedial measures that will prevent the prejudice at its inception." *Sheppard*, 384 U.S. at 362-63. While the court anticipates a rigorous voir dire and "emphatic" jury instructions, the prophylactic measure of a restraint on extra-judicial comments by the trial participants plays an essential role in ensuring a fair trial in this case.

A separate order detailing the precise restrictions will be entered.

DONE and ORDERED this 13th day of April, 2004.

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE