

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:08-cv-119

EDWARD CARRINGTON, CASEY J.)
CARROLL, MICHAEL P. CATALINO,)
GALE CATALINO, THOMAS V.)
CLUTE, KEVIN COLEMAN, JOSHUA)
R. COVELESKI, EDWARD J. CROTTY,)
EDWARD S. DOUGLAS, KYLE DOWD,)
PATRICIA DOWD, DANIEL)
FLANNERY, RICHARD GIBBS)
FOGARTY, ZACHARY GREER, IRENE)
GREER, ERIK S. HENKELMAN,)
STEVEN W. HENKELMAN, JOHN E.)
JENNISON, BEN KOESTERER, MARK)
KOESTERER, JOYCE KOESTERER,)
FRED KROM, PETER J. LAMADE,)
ADAM LANGLEY, CHRISTOPHER)
LOFTUS, DANIEL LOFTUS,)
BARBARA LOFTUS, ANTHONY)
MCDEVITT, GLENN NICK, NICHOLAS)
O'HARA, LYNND A O'HARA, DANIEL)
OPPENDISANO, SAM PAYTON, JOHN)
BRADLEY ROSS, KENNETH SAUER,)
III, STEVE SCHOEFFEL, ROBERT)
SCHROEDER, DEVON SHERWOOD,)
DANIEL THEODORIDUS, BRET)
THOMPSON, CHRISTOPHER TKAC,)
TRACY TKAC, JOHN WALSH, JR.,)
MICHAEL WARD, ROBERT H.)
WELLINGTON, IV, WILLIAM)
WOLCOTT, MICHAEL YOUNG,)

Plaintiffs,)

v.)

DUKE UNIVERSITY, DUKE)
UNIVERSITY HEALTH SYSTEM, INC.,)
RICHARD BRODHEAD, PETER)

**Motion Regarding Attorney-
Initiated and Attorney-Sanctioned
Contact with the Media**

**EXPEDITED REVIEW
REQUESTED**

LANGE, LARRY MONETA, JOHN)
 BURNES, TALLMAN TRASK,)
 SUZANNE WASIOLEK, MATTHEW)
 DRUMMOND, AARON GRAVES,)
 ROBERT DEAN, TARA LEVICY,)
 THERESA ARICO, J. WESLEY)
 COVINGTON, KATE HENDRICKS,)
 VICTOR DZAU, CITY OF DURHAM,)
 LINWOOD WILSON, MARK)
 GOTTLIEB BENJAMIN HIMAN,)
 PATRICK BAKER, STEVEN)
 CHALMERS, RONALD HODGE, LEE)
 RUSS, STEPHEN MIHAICH, BEVERLY)
 COUNCIL, JEFF LAMB, MICHAEL)
 RIPBERGER, AND DAVID ADDISON,)
)
 Defendants.)

This motion is not intended as a responsive pleading and therefore does not waive any rights or defenses under the Federal Rules of Civil Procedure. The Duke Defendants specifically reserve the right to plead and assert such defenses at the appropriate time under the Federal Rules of Civil Procedure.

Pursuant to Local Rules 83.1(d) and 83.10i, this Court’s inherent authority to ensure compliance with its Local Rules, and for the reasons stated in the accompanying Memorandum, Defendants Duke University, Richard Brodhead, Peter Lange, Larry Moneta, John Burness, Tallman Trask, Suzanne Wasiolek, Matthew Drummond, Aaron Graves, Robert Dean, Kate Hendricks, and Victor Dzau, as well as Defendants Duke University Health System, Inc., Tara Levicy and Theresa Arico (hereinafter the “Duke Defendants”) move this Court for an order regarding attorney-initiated and attorney-sanctioned contact with the media. In particular, the Duke Defendants are concerned that

statements have been made and will likely be made in the future that have a substantial likelihood of materially prejudicing an adjudicative proceeding in this matter.

In support of this motion, the Duke Defendants show the following:

1. The above-captioned lawsuit was filed in the Middle District of North Carolina shortly after 1:00 pm on Thursday, 21 February 2008.
2. Counsel for the Duke Defendants learned of the anticipated 21 February 2008 filing from a media alert issued on 20 February 2008 around 3:00 pm. This media alert is attached to this motion as Exhibit 1.
3. Around this same time, counsel for the Duke Defendants learned that Plaintiffs had set up a website, www.dukelawsuit.com, which is described as “the official source of information about their lawsuit.” The website promises that “[i]t will be updated as regularly as the case progresses,” and users are urged to “[c]heck back for updates.” This website, as it appears as of the date of the filing of this motion, is attached to this motion as Exhibit 2.
4. From the media alert, counsel for the Duke Defendants learned, “On Thursday, February 21, 38 Duke lacrosse players and their parents will hold a news conference at 1 p.m. at the National Press Club in Washington, D.C., to announce the filing of a lawsuit against Duke University and a number of other entities and individuals. Charles J. Cooper, attorney for the players will explain the complaint and answer questions from the media.” The media alert also invites members of the press to a luncheon immediately before the press conference.

5. On 20 February 2008 at 6:23 pm, Jamie Gorelick, counsel for the Duke Defendants, sent an email to Mr. Cooper, in which Ms. Gorelick notified Mr. Cooper, as a courtesy, of what counsel for the Duke Defendants believe to be the practice of this Court regarding attorneys discussing their cases with the press. Mr. Cooper replied to Ms. Gorelick at 7:23 pm on 20 February 2008. This email exchange is attached to this motion as Exhibit 3.
6. On 21 February 2008 at 9:47 am, Plaintiffs issued a news release and posted a case summary on the website. The news release is attached to this motion as Exhibit 4, and the case summary is attached to this motion as Exhibit 5.
7. On 21 February 2008 at 1:00 pm, the previously announced press conference was held at the National Press Club in Washington, DC. The conference began with a statement by Robert Bork, Jr., who introduced himself as the Plaintiffs' publicist. Charles J. Cooper, Plaintiffs' attorney,¹ then introduced Plaintiff Steven Henkelman, who is also the father of one of the unindicted lacrosse players-plaintiffs. Mr. Henkelman then made a statement. Following Mr. Henkelman's statement, Mr. Cooper took questions from the press. The conference lasted for almost an hour. A transcript of this press conference, including Mr. Bork's and Mr. Henkelman's statements, is attached to this motion as Exhibit 6.

¹ Mr. Cooper has not made an appearance in the above-captioned lawsuit. His name, however, is included in the signature block of the Complaint, with a notation indicating that a motion for special appearance will be filed forthwith.

8. In addition to his presence at the above-described press conference, Mr. Bork has also been quoted in various news articles as a spokesman for the Plaintiffs.

According to Mr. Bork's website, www.bork.com,

Bork Communication Group . . . helps . . . clients use the techniques of modern communication to . . . win litigation In every instance we work closely with counsel to carefully craft and test messages that resonate with critical audiences and support courtroom and negotiation strategies. We pride ourselves on our ability to insert facts into the noise and confusion of a lawsuit, to establish corporate credibility, clarity of message and critical mass of opinion. We tell our client's story so that it is heard, understood and remembered.

This website, as it appears as of the date of the filing of this motion, is attached to this motion as Exhibit 7. Included on this website is an E-brochure, which is attached to this motion as Exhibit 8.

9. In the face of this publicity and believing that a statement was required to protect the Duke Defendants from the substantial undue prejudicial effect of this publicity which was initiated by the Plaintiffs, the Duke Defendants issued a statement. The statement includes a sentence recognizing that the Rules of this Court prohibit the Duke Defendants from making further comment. That statement, issued by Pamela Bernard who is Vice President and General Counsel for Duke University, is attached to this motion as Exhibit 9.

10. After the above-described press conference, a basic internet search was conducted that revealed significant local and national media coverage resulting from the Plaintiffs' publicity efforts. The Caswell Declaration is attached as Exhibit 10.

11. Local Rule 83.10e(b) provides that the Middle District of North Carolina has adopted the North Carolina Rules of Professional Conduct.
12. Rule 3.6 of the North Carolina Rules of Professional Conduct prohibits a lawyer “who is participating or has participated in the investigation or litigation of a matter” from making a statement that the “lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” The rule has an exception that provides that “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.” 98 Formal Ethics Opinion 4 makes clear that if an attorney uses its client as a conduit to make statements that the attorney could not make, then the attorney violates Rule 3.6. The Rule does not address whether creating a website or holding a press conference would be violations.

Given the high-profile nature of the underlying allegations in the above-captioned lawsuit, and given the unusual level of attorney-initiated and attorney-sanctioned communication regarding the filing of this lawsuit, the Duke Defendants respectfully request that this Court enter an order declaring that the existing website, the press conference on 21 February 2008, and the press release issued on 21 February 2008, violate Rule 3.6 and giving such other relief as the Court deems appropriate.

Given the nature of this motion, the Duke Defendants further move for expedited review of this motion.

This 28th day of February 2008.

/s/ J. Donald Cowan, Jr.

J. DONALD COWAN, JR.

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*Counsel for Defendants Duke University Health
System, Inc., Tara Levicy and Theresa Arico*

CERTIFICATE OF SERVICE

I hereby certify that on 28 February 2008, I electronically filed the foregoing Motion Regarding Attorney-Initiated and Attorney-Sanctioned Contact with the Media with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel:

Counsel for the Plaintiffs

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As of the date of this filing, the following attorneys have not entered notices of appearance for this case, and they are being served by U.S. Mail:

Counsel for the Plaintiffs

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Brian S. Doukoutchos
Nicole Jo Moss (N.C. Bar # 31958)
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As of the date of this filing, no attorney has made an appearance on behalf of the following Defendants. Based on information and belief, the following Defendants are represented by counsel as indicated below and are being served by email:

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As of the date of this filing, no attorney has made an appearance on behalf of any of the following Defendants. I hereby certify that I served the following Defendants by U.S.

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This 28th day of February 2008.

/s/ J. Donald Cowan, Jr.

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