**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**
**No. 1:08-cv-119**

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| EDWARD CARRINGTON, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | **Plaintiffs' Response to City Defendants' Joinder in Duke Defendants' Motion Regarding Attorney-Initiated and Attorney-Sanctioned Contact with the Media** |
| DUKE UNIVERSITY, et al., | ) | |
| | ) | |
| Defendants. | ) | |

## NATURE OF THE MATTER BEFORE THE COURT

Defendants City of Durham, *et al.* (collectively the "City Defendants") have joined the Duke Defendants' Motion Regarding Attorney-Initiated and Attorney-Sanctioned Contact with the Media ("Duke Mot."), adopted Duke's arguments, *see* City Defendants' Brief ("City Def. Br.") 1-3, and also filed a brief of their own.

## STATEMENT OF FACTS

Plaintiffs in this action, 38 members of the 2006 Duke University Lacrosse team and several parents of certain members, incorporate by reference the "Statement of Facts" set forth at pages 1 through 4 of their Response to [Duke] Defendants' Motion Regarding Attorney-Initiated and Attorney-Sanctioned Contact with the Media ("Response to Duke's Motion") (Docket No. 38).

## QUESTION PRESENTED

Plaintiffs incorporate by reference the "Question Presented" at page 4 of their Response to Duke's Motion (Docket No. 38).

## ARGUMENT

Most of the points made by the City Defendants were answered in Plaintiffs' Response to Duke's Motion, and therefore Plaintiffs wish to make only a few short points in further opposition to the City Defendants' motion.

*First*, the City Defendants, like Duke, object to statements made at the press conference that merely reiterate the Complaint. The City Defendants identify two statements by Mr. Cooper, the first of which is taken almost verbatim from paragraph 3 of the Complaint and second of which is virtually identical to paragraph 5. *See* City Def. Br. 2. The City's motion, like Duke's, therefore collides headlong with Rule 3.6(b)(1) and (2), which expressly provide that, "[n]otwithstanding" the more general prohibition on attorney statements set forth in paragraph (a), a lawyer is free to state publicly "the claim, offense or defense involved" and any "information contained in a public record." Mr. Cooper's statements, which were lifted directly from Plaintiffs' complaint, obviously qualify for Rule 3.6(b)'s explicit safe-harbor. Indeed, most—perhaps all—of this material was in the public record even before the filing of the Complaint in this case due to the similar allegations and claims made in the two separate complaints previously filed on behalf of the three indicted members of the lacrosse team (Messrs. Evans, Finnerty

and Seligmann) and on behalf of team members Ryan McFayden, Matthew Wilson and Breck Archer.

*Second*, the commentary published with Rule 3.6(b) confirms that the safe-harbor provision is just as broad as it appears. Comment Four explains that "[p]aragraph (b) identifies specific matters"—the plaintiffs' claims and any other public-record information—"[that] *should not in any event be considered prohibited by the general prohibition of paragraph (a)*." (Emphasis added). There is no room here for Defendants' proposed "incendiary language" exception to the safe-harbor provision. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 109 (3 ed., 2004) ("[L]awyers in civil cases can freely discuss any information contained in complaints, answers, motions to dismiss, motions for summary judgment, and any other pleadings or discovery documents that have been filed with the Court and that are not subject to a protective order.").[1] This is further supported by Comment One to the Rule, which recognizes that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has … a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern." Surely few matters are of

[1] Indeed, Professor Freedman has commented on the merits of Duke's Motion, noting: "There is nothing wrong with trying a case in the press. Speech about a pending case is constitutionally protected. *See* Freedman & Smith , Understanding Lawyer's Ethics 104-109 (3 ed., 2004). And see MR 3.6(b)(2), permitting a lawyer to state publicly any information contained in a public record (and not subject to a protective order)." Legal Ethics Forum, at http://legalethicsforum.typepad.com/blog/2008/03/website-as-extr.html.

greater public concern than the conduct of government and its agents in the investigation and prosecution of alleged crimes—particularly where, as here, the state's attorney general has been compelled to take over a local government's criminal prosecution and has then castigated local law enforcement officials for appalling abuses of power.

*Third*, the City Defendants, like the Duke Defendants, have not disputed that it is *their* burden to *prove* that the challenged statements to the media "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 3.6(a). *See, e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1037-38 (1991) (plurality opinion of Kennedy, J.); *Doe v. Zeder*, 782 N.Y.S.2d 349, 355 (Sup. Ct. N.Y. 2004). Yet the City, like Duke, makes no effort whatsoever to shoulder this burden, offering only conclusory assertions that parrot the language of the rule. *See, e.g.,* City Def. Br. 5.

*Fourth*, like Duke, the City Defendants fail to offer *even one case* where Rule 3.6 has been applied to sanction or to restrict attorney speech in a civil case. Instead, the City relies—inexplicably—on *Gentile*, a *criminal* proceeding where sanctions against an attorney for statements to the press were *overturned* and the state bar's disciplinary rule restricting speech was held *unconstitutional*. *See* 501 U.S. at 1048-49 (opinion of Kennedy, J., for the Court); *id.* at 1082 (O'Connor, J., concurring).

*Fifth*, the City Defendants completely ignore *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (*en banc*), where the Court of Appeals noted the utter "dearth of evidence that lawyers' comments taint civil trials" and concluded that "the rule's restrictions on freedom of speech are not essential to fair civil trials." *Id.* at 373.

*Sixth*, and finally, we are constrained to say that the City Defendants' effort to silence the Plaintiff lacrosse players gives new meaning to the concept of gall. The tsunami of negative national media publicity and commentary that engulfed the lacrosse players for months in 2006 was fueled in large measure by negative public comments and information from the City of Durham and its agents, including members of the City Council, City spokesmen, Durham Police Department spokesmen and officers, and of course, District Attorney Michael Nifong, to whom the City had delegated control over the rape investigation. *See* Motion to Change Venue, *North Carolina v. Seligmann, et al.*, Nos. 06 CRS 4334-36, 4331-33, 5581-83 (General Ct. of Justice, Super. Ct. Div.), Dec. 15, 2006 (a copy of the venue motion is attached to our Response to Duke's Motion). Indeed, in disbarring Nifong, the Disciplinary Hearing Commission of the North Carolina State Bar found that Nifong's "conduct was, at least, a major contributing factor in the exceptionally intense national and local media coverage the Duke Lacrosse case received and in the public condemnation heaped upon the [lacrosse players]. As a result of Nifong's misconduct, these young men experienced heightened public scorn and loss of privacy while facing very serious criminal charges of which the Attorney General of North Carolina ultimately concluded they were innocent." Amended Findings of Fact, Conclusions of Law and Order of Discipline, Finding No. 4, 06-DAC35 (July 24, 2007) (a copy of the Disciplinary Hearing Commission's order is attached hereto as Exhibit A). As noted in our Response to Duke's Motion, the Plaintiffs' press release, press conference, and website are plainly within Rule 3.6(c)'s authorization of attorney speech

designed "to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[2]

## CONCLUSION

For these reasons and for those set forth in Plaintiffs' Response to the Duke Defendants' motion, the motion regarding attorney contact with the media should be denied.

April 7, 2008

Respectfully submitted,

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[2] Rule 3.6(c) "means that the lawyer may, with impunity, defend her client's reputation, regardless of whether the harmful statements about the client had been made by the other side or by third persons." FREEDMAN & SMITH, UNDERSTANDING LAWYERS' ETHICS 108.

-and-

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## CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2008, I electronically filed the foregoing "Plaintiffs' Response to City Defendants' Joinder in Duke Defendants' 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:

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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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This 7th day of April 2008.

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