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9

FILED  
03 JUN -4 PM 3:39  
CLERK OF THE SUPERIOR COURT  
COUNTY OF STANISLAUS  
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7 STANISLAUS COUNTY SUPERIOR COURT  
8 STATE OF CALIFORNIA  
9

-----oOo-----

10 D.A. No.1056770  
11 THE PEOPLE OF THE STATE OF CALIFORNIA ) No.1056770  
12 )  
13 Plaintiff, ) POINTS AND  
14 ) AUTHORITIES IN  
15 vs. ) SUPPORT OF LIMITED  
16 ) PROTECTIVE ORDER  
17 )  
18 SCOTT LEE PETERSON, ) Hrg: 6-<sup>6</sup>03  
19 Defendant. ) Time: 8:30 a.m.  
20 ) Dept: 2 / 8  
21 )  
22 -----oOo-----

23 Comes now the People of the State of California to submit  
24 the following POINTS AND AUTHORITIES IN SUPPORT OF A LIMITED  
25 PROTECTIVE ORDER:  
26

27 **FACTS**

28 On May 2, 2003, the court advised the parties to ensure that  
they comply with California Rule of Professional Responsibility  
5-120 in view of the media coverage surrounding this case. Both  
the People and the defense argued to keep records sealed and the  
court found that those records should be sealed or risk harm to  
both the People and the defense. In spite of the court's sealing  
order, information has repeatedly been leaked to the media.  
Media reports have occasionally identified which "side" was

1 the source of their information, but have refused to disclose the  
2 source of leaks. Almost all leaks to the media have been false,  
3 misleading or biased in some way.

4 On 5-27-03, the court asked the parties to submit their  
5 written views on the issue of a Protective Order.

6 ARGUMENT

7 The "media" has asserted its right to be heard in this case  
8 and the People take no position on this point. The People  
9 disagree with the "media" that this court cannot impose a "gag"  
10 order.

11 A California case, cited by the media, dealing with a "gag  
12 order" has said:

13 "Orders which restrict or preclude a citizen from speaking  
14 in advance are known as "prior restraints," and are  
15 disfavored and presumptively invalid. Gag orders on trial  
16 participants are unconstitutional unless (1) the speech  
17 sought to be restrained poses a clear and present danger or  
18 serious and imminent threat to a protected competing  
19 interest; (2) the order is narrowly tailored to protect that  
20 interest; and (3) no less restrictive alternatives are  
21 available. The trial court must make express findings  
22 showing it applied this standard and considered and weighed  
23 the competing interests." [Footnotes omitted.]

19 Hurvitz v. Hoefflin, (2000) 84 Cal.App.4th 1232, 1241 -1242.

20 It is clear that this court would have to navigate a narrow  
21 and twisting path to craft an enforceable protective order  
22 applicable to anyone with information in this case. However,  
23 attorneys and their agents are a different subject.

24 Another case cited by the media states:

25 "We think that the quoted statements from our opinions in In  
26 re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473  
27 (1959), and Sheppard v. Maxwell, supra, rather plainly  
28 indicate that the speech of lawyers representing clients in  
pending cases may be regulated under a less demanding

1 standard than that established for regulation of the press  
2 in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct.  
3 2791, 49 L.Ed.2d 683 (1976), and the cases which preceded  
4 it. Lawyers representing clients in pending cases are key  
5 participants in the criminal justice system, and the State  
6 may demand some adherence to the precepts of that system in  
7 regulating their speech as well as their conduct. As noted  
8 by Justice Brennan in his concurring opinion in Nebraska  
9 Press, which was joined by Justices Stewart and MARSHALL,  
10 "[a]s officers of the court, court personnel and attorneys  
11 have a fiduciary responsibility not to engage in public  
12 debate that will redound to the detriment of the accused or  
13 that will obstruct the fair administration of justice." Id.,  
14 at 601, n. 27, 96 S.Ct., at 2823, n. 27. Because lawyers  
15 have special access to information through discovery and  
16 client communications, their extrajudicial statements pose a  
17 threat to the fairness of a pending proceeding since  
18 lawyers' statements are likely to be received as especially  
19 authoritative. See, e.g., In re Hinds, 90 N.J. 604, 627, 449  
20 A.2d 483, 496 (1982) (statements by attorneys of record  
21 relating to the case "are likely to be considered  
22 knowledgeable, reliable and true" because of attorneys'  
23 unique access to information); In re Rachmiel, 90 N.J. 646,  
24 656, 449 A.2d 505, 511 (N.J.1982) (attorneys' role as  
25 advocates gives them "extraordinary power to undermine or  
26 destroy the efficacy of the criminal justice system"). We  
27 agree with the majority of the States that the "substantial  
28 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."

17 Gentile v. State Bar of Nevada, (1991) 501 U.S. 1030, 1074-  
18 1075.

19 In California, attorneys are governed by Rule of  
20 Professional Responsibility (RPC) 5-120, which states:

21 "(A) A member who is participating or has participated in  
22 the investigation or litigation of a matter shall not make  
23 an extrajudicial statement that a reasonable person would  
24 expect to be disseminated by means of public communication  
25 if the member knows or reasonably should know that it will  
26 have a substantial likelihood of materially prejudicing an  
27 adjudicative proceeding in the matter.

28 (B) Notwithstanding paragraph (A), a member may state: (1)  
the claim, offense or defense involved and, except when  
prohibited by law, the identity of the persons involved; (2)  
the information contained in a public record; (3) that an  
investigation of the matter is in progress; (4) the  
scheduling or result of any step in litigation; (5) a

1 request for assistance in obtaining evidence and information  
2 necessary thereto; (6) a warning of danger concerning the  
3 behavior of a person involved, when there is reason to  
4 believe that there exists the likelihood of substantial harm  
5 to an individual or the public interest; and (7) in a  
6 criminal case, in addition to subparagraphs (1) through (6):  
7 (a) the identity, residence, occupation, and family status  
8 of the accused; (b) if the accused has not been apprehended,  
9 information necessary to aid in apprehension of that person;  
10 (c) the fact, time, and place of arrest; and (d) the  
11 identity of investigating and arresting officers or agencies  
12 and the length of the investigation.

13 (C) Notwithstanding paragraph (A), a member may make a  
14 statement that a reasonable member would believe is required  
15 to protect a client from the substantial undue prejudicial  
16 effect of recent publicity not initiated by the member or  
17 the member's client. A statement made pursuant to this  
18 paragraph shall be limited to such information as is  
19 necessary to mitigate the recent adverse publicity."

20 This court clearly can make an order that parallels this  
21 section and can make the order binding not only on the attorneys,  
22 but investigators, assistants and others working on the case for  
23 them. The People would oppose an order any broader than that  
24 because it would only work to the detriment of the People.

25 This court has "sealed" information to prevent release to  
26 the public. Some of that information has been leaked to the  
27 media which has forced the People to respond. The People's  
28 response was necessary to mitigate the recent adverse publicity;  
a broader order would deprive the People of the right to protect  
its case. The person or persons who have leaked sealed  
information will not be deterred by a court imposed protective  
order. However, a protective order will prevent an enjoined party  
from announcing from the courthouse steps information in  
violation of the RPC and the court's order.

It is the People's belief that once an order is put in  
place, responsible journalists will understand that leaked

1 information violates the court's order and is being spewed forth  
2 with an intent to circumvent justice. And if justice cannot  
3 protect the defendant then who will protect the media in the  
4 future?

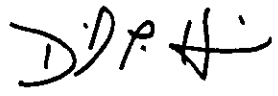
5 **Conclusion**

6 The People do not object to the court imposing a limited  
7 protective order as set forth above.

8  
9 Dated: June 4, 2003

10 Respectfully submitted,

11  
12 JAMES C. BRAZELTON  
13 District Attorney

14 

15  
16 By: David P. Harris  
17 Deputy District Attorney



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