

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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POLK COUNTY, IA  
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CLERK DISTRICT COURT

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LISA KRAGNES, et al., )  
Plaintiffs, ) Equity No. 49273  
VS. )  
CITY OF DES MOINES, IOWA, ) RULING ON DEFENDANT'S  
Defendant. ) MOTION FOR GAG ORDER  
AND MOTION FOR SANCTIONS

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This matter came on for hearing before the Court on March 26, 2008. The plaintiff was represented by her attorneys, Brad Schroeder and Bruce Stoltze. The defendant was represented Mark Godwin, Deputy City Attorney. After listening to the testimony, the arguments of counsel, and reviewing the legal authority, the Court makes the following findings and ruling.

FINDINGS

1. Jamie Buelt is an owner of en Q strategies, a public relations firm located in Des Moines, Iowa. en Q strategies works with many clients in the Des Moines area who are involved in litigation of interest to the media. Her firm was retained by plaintiff through her counsel as a firm with media experience for the purpose of communication with the media concerning this case

An inquiry was made by a newspaper reporter inquiring of Jamie Buelt of any recent developments in the case. As a result of this inquiry, through her normal procedures, she prepared Exhibit B, the "Media Update", which is the subject matter of this motion.

2. Ms. Buelt had a contract writer with her firm prepare the Media Update and submit it to her for review and editing. Attorney Brad Schroeder reviewed it for accuracy and approved same. The Media Update was sent to various media organizations.

3. Defendant does not object to plaintiff's retention of the public relations firm or the fact that the public relations firm has a right to provide media updates concerning the case. The gravamen of defendant's complaint is that the update should not contain inaccuracies or half-truths as defendant alleges were contained in the media update in question.

4. Defendant, in its Motion for a Gag Order, sets forth the various parts of the update that defendant alleges to be in violation of Rule 32:3.6 Trial publicity and

32:8.4 Misconduct of the Rules of Professional Conduct governing attorneys in the State of Iowa.

## CONCLUSIONS OF LAW

Relevant portions of Rule 32:3.6 and 32:8.4 set forth as follows:

### Rule 32:3.6 Trial publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial 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.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; ....

### Rule 32:8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Iowa Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice; ...

The Court has reviewed the Supreme Court of Iowa decision in the case of *Iowa Supreme Court Board of Professional Ethics and Conduct versus Kevin J. Visser*, 629 NW2d 376 (2001). A number of legal principles set forth by the Iowa Supreme Court provide this trial court with the guidance it needs in its analysis and decision regarding defendant's motion for a gag order. Those principles are as follows:

1. Disciplinary rules restricting communications by lawyers are necessarily constrained by the First Amendment and a lawyer's out

of court statements regarding matters in litigation are entitled to First Amendment protection. *U.S.C.A. Const. Amend. 1.*

2. In applying attorney disciplinary rules prohibiting extrajudicial statements by a lawyer involved in civil litigation, the court is entitled to look to the facts surrounding the statements at the time they were made, and to ex post evidence that relates to the likelihood of prejudice. Making a partially true statement to a newspaper results in a violation of the attorney disciplinary rule prohibiting conduct involving misrepresentation.

The Court first addresses the issue of whether there was a violation of the rule against improper trial publicity as set forth in Rule 32:3.6.

There is no doubt that plaintiff's counsel are involved in litigation and that the update prepared by their public relations agent involves an extrajudicial statement. The question then is whether or not there has been a violation of 32:3.6(a) and if so, does one of the exceptions set forth in 32:3.6(b) apply in this case.

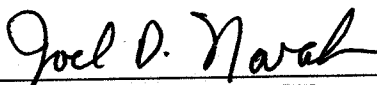
The Court concludes that it does not need to turn to the exceptions portion of the rule because for the Court's purposes the question is answered by sub paragraph (a). While the Media Update involves an extrajudicial statement by plaintiff's attorneys through their public relations agent that they knew would be disseminated by means of public communication, the Court does not believe this record establishes that plaintiff's counsel knew or reasonably should have known that there was a substantial likelihood that such communication would prejudice the adjudicative proceeding in this matter. This matter will be tried to a judge without a jury. The Court has no concern that the trier of fact in this case, the judge, has been materially prejudiced by the extrajudicial statement as it appears in the Media Update.

The Court next turns to whether plaintiff's attorney violated Rule 32:8.4 Misconduct. The crux of defendant's allegation of misconduct is based on defendant's belief that many of the statements contained in the Media Update, approved by plaintiff's counsel, involved misstatements, half-truths, and misrepresentation. There was no intent directly or indirectly on the part of plaintiff's counsel to engage in any misrepresentation or half truths in the media update. Furthermore, the Court cannot say that it interprets the comments in the update in the same manner as does the defendant, resulting in the type of misrepresentation that would constitute misconduct under the rule. For these reasons the Court does not find the defendant has established the claim of misconduct under the present record.

Due to the First Amendment implication, courts should be reluctant to grant a gag order except in the rarest of situations. This is not one of them. However, this does not mean that counsel for both sides need not pay attention to their communications through any source to the public that could result in a violation of the rules of conduct discussed above. This Court is satisfied that counsel will govern themselves accordingly.

RULING

IT IS HEREBY ORDERED that defendant's motion for a gag order is overruled.

  
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JOEL D. NOVAK, JUDGE  
FIFTH JUDICIAL DISTRICT OF IOWA

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