FST-CR19–0148554-T	:	**SUPERIOR COURT**
STATE OF CONNECTICUT	:	**JUDICIAL DISTRICT**
V.	:	**OF STAMFORD/NORWALK**
FOTIS DULOS	:	**SEPTEMBER 12, 2019**

MEMORANDUM OF DECISION ON THE STATE'S MOTION FOR AN ORDER PREVENTING THE PARTIES FROM MAKING STATEMENTS TO THE MEDIA OR IN PUBLIC SETTINGS THAT POSE A SUBSTANTIAL LIKELIHOOD OF MATERIAL PREJUDICE

INTRODUCTION

The defendant, Fotis Dulos, was arrested on June 3, 2019, pursuant to a two count arrest warrant charging him with tampering with or fabricating physical evidence, in violation of General Statutes § 53a-155, and hindering prosecution in the first degree, in violation of General Statutes § 53a-165aa. On September 4, 2019, the defendant was arrested on a second warrant, charging an additional count of tampering with or fabricating physical evidence. All of the allegations against the defendant surround the May 24, 2019 disappearance of the defendant's estranged wife and mother of his children, Jennifer Dulos, who is still missing. The couple has also been involved in a lengthy and contentious divorce proceeding currently pending on the family court docket in this judicial district.

Now before this court is the state's motion dated August 7, 2019, seeking an order barring counsel from making public statements posing a substantial likelihood of material prejudice to this case. Specifically, the motion asks "the court to enter an order pursuant to the Rules of Professional Conduct, Rule 3.6 (a) preventing counsel for both sides from making an extrajudicial statement that the lawyer knows or 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 defendant objects to what he characterizes as the state's motion for a "gag order." The court heard from the parties on this issue at a hearing on August 9, 2019, at which time the court also granted the defendant's request for supplemental briefing. The court having now considered all the briefs and contentions of the parties, the motion is granted for the reasons stated herein. The terms of the court's order may be found at the conclusion of this memorandum.

Admittedly, this type of order would be unnecessary in most criminal cases. The issues raised by the state's motion must be viewed against the backdrop of the intense media interest in this case. That publicity has only grown since May 24, 2019, the day that Jennifer Dulos was first reported missing, and her home at 69 Welles Lane in New Canaan was considered a crime scene. The level of press coverage it has engendered in today's new social media environment has also seen the publication of many different opinions, theories masquerading as facts, and stories based upon unauthorized leaks of partial information, some apparently from law enforcement sources. The extent and the nature of the coverage is not merely a result of the public record of the case, but rather, it reflects the tendency of some to fan the flames of publicity by providing the media with salacious, inadmissible, and often prejudicial details.[1] In the articles cited in footnote one, defense counsel made statements to the press advancing theories about Jennifer Dulos' possible

[1] See Dana Shuster, Missing Mom Jennifer Dulos was "Afraid For Her Life": Friend, New York Post (last modified June 22, 2019) available at https://nypost.com/2019/06/22/lawyer-claims-troubled-jennifer-dulos-orchestrated-her-own-gone-girl-disappearance/ (last visited September 6, 2019); see also EJ Dickson, Lawyer of Husband Suspected in Missing Mom Case Suggests She Staged Disappearance Herself, Rolling Stone (last modified June 24, 2019) available at https://www.rollingstone.com/culture/culture-news/jennifer-dulos-fotis-dulos-disappearance-gone-girl-851888/ (last visited September 6, 2019); Neil Vigdor, "Revenge Suicide Hypothesis" Offered by Lawyer for Estranged Husband of Missing Woman, The New York Times (last modified July 2, 2019) available at https://www.nytimes.com/2019/07/02/nyregion/jennifer-dulos-missing-connecticut.html (last visited September 6, 2019); Matthew Campbell et al., Polygraph Expert Explains How Test Could Be Used in Dulos Case, Eyewitness News WFSB (last modified June 14, 2019) available at https://www.wfsb.com/news/polygraph-expert-explains-how-test-could-be-used-in-dulos/article_781f0a66-8ee2-11e9-9ec0-8337d6426b0f.html (last visited September 6, 2019).

motive for framing the defendant, and also made disparaging remarks about her mental health and personal life. The court is also concerned with leaks by investigating police agencies, and it takes judicial notice of press accounts replete with references to "law enforcement sources."[2] See *Staehr* v. *Hartford Financial Services Group, Inc.*, 547 F.3d 406, 424 (2d Cir. 2008) (affirming district court's decision to take judicial notice of media reports, not for the truth of any matters that may be asserted in such reports, but rather to establish that such matters had been publicly asserted); see also *Mahoney* v. *Lensink*, 213 Conn. 548, 562 n.20, 569 A.3d 518 (1990). Most recently, on September 9, 2019, the case was the subject of a nationally broadcast Dateline NBC story entitled *The Disappearance of Jennifer Dulos.* The show featured interviews with the defendant and his attorney, potential trial witnesses and certain members of law enforcement. The problem with pervasive information or misinformation in the social media age is that in a high-profile case, it carries the potential to overwhelm the vital, constitutionally guaranteed right to a fair trial. This is a particular danger here, where there is still an active criminal investigation and an ongoing process of fact-gathering into the disappearance and current whereabouts of this missing mother of five minor children.

Recently, another highly publicized criminal investigation was derailed by the death of the accused while in federal custody. The Wall Street Journal made note of the new, sometimes corrosive power of social media in its coverage of the suicide of financier Jeffrey Epstein, who was facing charges of sexually abusing minor girls. "The death of Jeffrey Epstein set off a wave

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[2]See Tara O'Neill, Jennifer Dulos Case Being Treated as a Homicide, Blood Found in New Canaan Home, Stamford Advocate (last modified May 30, 2019) available at https://www.stamfordadvocate.com/local/article/Sources-say-blood-found-in-New-Canaan-home-of-13908207.php (last visited September 6, 2019); see also Nancy Dillon, Fotis Dulos Arrested Again on New Tampering Charge in Case of Missing Connecticut Mom, New York Daily News (last modified September 4, 2019) available at http://www.nydailynews.com/news/crime/ny-fotis-dulos-arrested-again-new-tampering-charge-missing-wife-20190904-am4z5xekr5emxobkpgxxwphndu-story.html (last visited September 6, 2019).

of conspiracy theories online that ***demonstrate both how social media fuels misinformation and threatens to erode public acceptance of the results of any investigation . . . . [T]he slow process of fact-gathering isn't keeping pace with the rapid spread of theories***." (Emphasis added.) Alex Leary, Conspiracy Theories Fly Online Over Epstein Death, Wall Street Journal (last modified August 11, 2019) available at https://www.wsj.com/articles/conspiracy-theories-fly-online-in-wake-of-epstein-death-11565561364 (last visited September 10, 2019).

This court's order is narrowly tailored to accomplish its desired objective of ensuring a fair trial. In light of that important objective, the order extends beyond the lawyers–beyond counsel for the state, the accused and their respective staffs. The order also includes the defendant, Fotis Dulos himself, as well as all potential witnesses who may be subpoenaed to testify at trial by either the state or the defendant. Additionally, the order also extends to all of the various police agencies at the state and local level that have been actively investigating the disappearance of Jennifer Dulos.

To borrow an analogous concept from federal securities laws, in terms of the charges against Fotis Dulos, and the ongoing investigation into the disappearance of his estranged wife, the parties covered by the court's order in this case are considered to be "insiders." High ranking executives at publicly traded corporations are all considered insiders within the meaning of securities laws. Due to their senior management roles, such executives routinely become aware of material non-public information about their company's business. These insiders all share an affirmative duty to keep such information confidential, and the federal laws prohibiting insider trading have evolved to address the breaches of that duty whenever such insiders trade securities based upon material nonpublic information. See § 10 (b) of the Securities Exchange Act of 1934; see also Rule 10b-5 of the Securities and Exchange Commission. Trial counsel and the Connecticut law enforcement community in particular have obtained confidential information–material,

nonpublic information–about this case and the ongoing criminal investigation solely by reason of their respective positions of trust, either as officers of the court or as sworn public peace officers. It is these special relationships that give rise under the Rules of Professional Conduct to the duty to refrain from making any public statements, and the duty to avoid disclosures that pose a substantial likelihood of material prejudice to the trial of this case. See Rules of Professional Conduct 3.6 (a). As for potential civilian trial witnesses, by the terms of this order, such persons must now wait until the appropriate time to publicly reveal any other relevant information they may be in possession of. That time will come under oath in an evidentiary proceeding. This court is also cognizant of the fact, as the commentary to rule 3.6 of the Rules of Professional Conduct note, that the public has a legitimate interest in the conduct of these judicial proceedings. Therefore, while the public and the press, television networks and other entities or attorneys not covered by this order may obviously continue to publicly disseminate stories, articles or commentary about this case, or to engage in speculation or conjecture via social media or other outlets, those considered insiders are now bound by the terms of this order.

DISCUSSION

I

The Rules of Professional Conduct and Official Commentary to the Rules

A

Rule 3.6: Trial Publicity

The rule in Connecticut is that an attorney is prohibited from making public comments that carry a substantial likelihood of materially prejudicing a pending case. This directive is codified in rule 3.6 (a) of the Rules of Professional Conduct:

> (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.

The next section, rule 3.6 (b), provides an exception to this prohibition. It allows a "reasonable lawyer" to make a public statement about a pending case, but only under the following limited circumstance:

(b) Notwithstanding paragraph (a), 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. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Paragraph 7 of the official commentary to rule 3.6 of the Rules of Professional Conduct elaborates upon this exception, noting that:

[E]xtrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

The final section of rule 3.6 (c) of the Rules of Professional Conduct, makes it clear that the prohibition also extends beyond trial counsel to their associates, including where applicable, other lawyers working in the same law firm or the same government agency:

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Paragraph 3 of the official commentary makes it clear that the trial publicity rule is limited to those attorneys involved in the investigation or litigation of a case, and their respective associates, because "the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small . . . ." In terms of those attorneys that do fall within the ambit of the rule, however, paragraph

6 of the commentary also highlights that a "relevant factor in determining prejudice is the nature of the proceeding involved. *Criminal jury trials will be most sensitive to extrajudicial speech.*" (Emphasis added.)

Paragraph 1 of the official commentary also recognizes the inherent tension between the freedom of expression and the right to a fair trial in a particular case:

> It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, 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. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No doubt in part because of the need to better define the parameters of what constitutes acceptable and unacceptable disclosures, paragraph 4 of the official commentary outlines certain subjects that "would not ordinarily be considered to present a substantial likelihood of material prejudice" to a pending case. In relevant part, those subjects include the following:

> (a) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
> (b) information contained in a public record;
> (c) that an investigation of the matter is in progress;
> (d) the scheduling or result of any step in litigation;
> (e) a request for assistance in obtaining evidence and information necessary thereto; . . .
> (g) in a criminal case: in addition to subparagraphs (a) through [e]:
>
> (i) identity, residence, occupation and family status of the accused;
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
> (iii) the fact, time and place of arrest; and
> (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Paragraph 5 of the official commentary also recognizes, on the other hand, "certain subjects which more likely than not to have material prejudicial effect on a proceeding, particularly when they refer to . . . a criminal matter, or any other proceeding that could result in incarceration." These potentially prejudicial subjects relate to:

> (a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
> (b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
> (c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
> (d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
> (e) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
> (f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Note that the commentary to Rule 3.6 is intended to provide guidance to its proper interpretation and application. However, as the introduction to the Rules of Professional Conduct also makes clear "the text of each Rule is authoritative."

B

Rule 3.8: Special Responsibilities of a Prosecutor

Because of their unique public positions, prosecutors are subject to additional rules of professional responsibility. These affirmative duties may be found in rule 3.8 of the Rules of Professional Conduct, which incorporate and expand upon the trial publicity rules for all attorneys codified under rule 3.6, above. This particular rule extends beyond the state's attorney's office to include investigating police officers, and provides in relevant part:

The prosecutor in a criminal case shall:

> "(5) Exercise reasonable care to prevent ***investigators, law enforcement personnel,*** employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6." (Emphasis added.)

II

Practice Book § 42-48: Cautioning Parties and Witnesses

In addition to the Rules of Professional Conduct, the terms of Practice Book § 42-48 provide both an independent ground and further support for the court's order. It authorizes the court in notorious cases to prohibit extrajudicial public statements by counsel, law enforcement agencies and potential witnesses:

> Whenever appropriate in the light of the issues in the case or its notoriety, the judicial authority may direct the parties, their counsel and the witnesses not to make extrajudicial statements relating to the case or the issues in the case for dissemination by any means of public communication.

III

The Constitutional Right to a Fair Trial

Article first, § 19, of the Connecticut constitution "reflects the abiding belief of our citizenry that an impartial and fairly chosen jury is the cornerstone of our criminal justice system." (Internal quotation marks omitted.) *State* v. *Day*, 233 Conn. 813, 845, 661 A.2d 539 (1995). "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." (Internal quotation marks omitted.) Id., 843, citing *Irvin* v. *Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *State* v. *Tucker*, 226 Conn. 618, 630, 629 A.2d 1067 (1993); *State* v. *Cubano*, 203 Conn. 81, 88, 523 A.2d 495 (1987); *State* v. *Ziel*, 197 Conn. 60, 64, 495 A.2d 1050 (1985).

While cognizant of the public's interest in this case, the trial court is also mindful of the need to ultimately empanel a jury dedicated to objectivity, and to following the court's instructions. See *State* v. *Crafts*, 226 Conn. 237, 258-59, 627 A.2d 877 (1993); see also *Beck* v. *Washington*, 369 U.S. 541, 555-57, 82 S. Ct. 955, 8 L. Ed. 2d 98, reh. denied, 370 U.S. 965, 82 S. Ct. 1575, 8 L. Ed. 2d 834 (1962). As the commentary to rule 3.6 of the Rules of Professional Conduct notes, because of the nature of the proceeding involved "[c]riminal jury trials will be most sensitive to extrajudicial speech." In a similar vein, Justice Oliver Wendell Holmes Jr. observed, "[t]he theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879 (1907). This court's ultimate goal is to ensure that these jury trial proceedings will be conducted in an atmosphere that is *not* "utterly corrupted by press coverage."[3] *State* v. *Kelly*, 256 Conn. 23, 34-35, 770 A.2d 908 (2001), quoting *State* v. *Crafts*, 226 Conn. 237, 257-58, 627 A.2d 877 (1993).

IV

Restrictions on Extrajudicial Statements

Intense publicity surrounding a criminal proceeding was once otherwise referred to (in the pre-internet era) as "trial by newspaper." Despite the many advances in information technology, it continues to pose significant and well-known dangers to a fair trial. If anything, the court believes that the current instantaneous transmission of information, true or false, across global platforms magnifies the potential for trial prejudice. "Trial by newspaper, like all catch phrases, may be

[3] For example, see the relevant portion of the voir dire instruction found in § 1.1-5 of the Connecticut Criminal Jury Instructions on juror's duties and responsibilities: "The parties have a right to have the case decided only on evidence they know about and that has been introduced here in court. Information you may find outside the courtroom has not been tested by the oath to tell the truth and by cross-examination and may be unreliable. "Connecticut Criminal Jury Instructions (4th Ed. 2008) § 1.1-5, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 10, 2009).

loosely used but it summarizes an evil influence upon the administration of criminal justice in this country. . . . Of course trials must be public and the public have a deep interest in trials. The public's legitimate interest, however, precludes distortion of what goes on inside the courtroom, dissemination of matters that do not come before the court, or other trafficking with truth intended to influence proceedings or inevitably calculated to disturb the course of justice. The atmosphere in a courtroom may be subtly influenced from without. . . . Cases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *Pennekamp* v. *Florida*, 328 U.S. 331, 359-62, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946) (*Frankfurter*, *J.*, concurring); see also *Bridges* v. *California*, 314 U.S. 252, 271, 62 S. Ct. 190, 86 L. Ed. 192 (1941) ("[l]egal trials are not like elections to be won through the use of the meeting-hall, the radio, and the newspaper"). Accordingly, the Supreme Court has held that "a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 378, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

This court is very cognizant of the fact that a prior restraint on speech, also known as a "gag order" is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). With the specter of an "immediate and irreversible sanction," a prior restraint not only "chills speech," it "freezes it at least for the time." (Internal quotation marks omitted.) Id. Thus, "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity." (Internal quotation marks omitted.) *New York Times Co.* v. *United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971). However, the First Amendment is itself not sacrosanct,

particularly when viewed in the context of other constitutional guarantees. See *United States* v. *Carmichael*, 326 F. Supp. 2d 1267, 1291 (M.D. Ala. 2004) ("[t]he exercise of First Amendment rights, however, can sometimes imperil the administration of fair criminal trials"). Thus, the imposition of such an order demands that the court balance two competing constitutional rights, specifically, a trial participant's right to free speech under the first amendment, and a criminal defendant's right to a fair trial under the sixth amendment. See *Estes* v. *Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). In his concurrence in *Pennekamp* v. *Florida*, supra, 328 U.S. 365, Justice Felix Frankfurter noted that "[t]he administration of law, particularly that of the criminal law, normally operates in an environment that is not universal or even general but individual. The distinctive circumstances of a particular case determine whether law is fairly administered in that case, through a disinterested judgment on the basis of what has been formally presented inside the courtroom on explicit considerations, instead of being subjected to extrancous factors psychologically calculated to disturb the exercise of an impartial and equitable judgment. . . . In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote."

Thus, in certain circumstances such as the case at bar, the court is compelled to issue a limited order imposing restrictions on the speech of trial participants in order to protect the fairness of a judicial proceeding from prejudicial media coverage. The need for such an order is more compelling in highly publicized cases, because "the circus-like environment that surrounds highly publicized trials threatens the integrity of the judicial system." See *Levine* v. *United States District Court*, 764 F.2d 590, 598 (9th Cir. 1985), cert. denied, 476 U.S. 1158, 106 S. Ct. 2276; 90 L. Ed. 2d 719 (1986). Indeed, the Supreme Court has suggested that a narrowly-drawn order may be the

preferred response in those cases where lawyers appear likely to divulge "inaccurate information, rumors, and accusations." *Sheppard* v. *Maxwell*, 384 U.S. 333, 361, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); see also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991) ("[b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding")

V

Appropriate Legal Standard

The Supreme Court has provided guidance on the act of balancing competing rights in the First Amendment context. Much of the modern discussion on this balance finds its genesis in *Sheppard* v. *Maxwell*, supra, 384 U.S. 334. In that case, the Supreme Court overturned the criminal conviction of Dr. Sam Sheppard for the murder of his wife following a jury trial that was the subject of extensive and prolonged nationwide media coverage. The court determined that the "carnival atmosphere" surrounding Sheppard's trial had made due process impossible, and faulted the trial court's inaction. The court observed that "bedlam" reigned at the courthouse, due to the failure of the trial court to supervise the environment or alleviate the issue of prejudicial trial publicity "by imposing control over the statements made to the news media by counsel, witnesses, and especially the coroner and police officers." Id., 360. The court also noted that inadmissible and often inaccurate information had been leaked to the public, fueling the flames of publicity engulfing the case. See id. 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., 362. The court emphasized the threat that pretrial

publicity posed to the constitutional right to a fair trial, and stressed the indispensable role of the trial court in protecting that right. See id., 361

While acknowledging the importance of a free and responsible press, the court concluded that a properly drafted order imposed on trial participants "might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment." *Sheppard* v. *Maxwell*, supra, 384 U.S. 361. So prejudicial was the publicity in *Sheppard* that the Supreme Court was moved to comment on the importance of taking preventive measures "[trial] courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences," using their powers to regulate "prosecutors, counsel for defense, the accused, witnesses, court staff... [and] enforcement officers coming under the jurisdiction of the court." Id., 362.

Ten years after its *Sheppard* decision, the Supreme Court established an enduring standard for regulating the press. In *Nebraska Press Assn.* v. *Stuart*, supra, 427 U.S. 539, the court vacated on prior restraint grounds an order prohibiting the press from reporting on a murder trial taking place in a small, rural community. See id., 570. Courts have read *Nebraska Press* as establishing that a court may enter such an order against trial participants when three conditions are satisfied. "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest; (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available." *Levine* v. *United States District Court*, supra, 764 F.2d 598; see also *United States* v. *Brown*, 218 F.3d 415, 427 (5th Cir. 2000), cert. denied, 531 U.S. 1111, 121 S. Ct. 854, 148 L. Ed. 2d 769 (2001). In addition, the court endorsed the proposal in *Sheppard* that trial courts look to employ methods short of prior restraints on the press itself, including the

prohibition of extrajudicial comments by trial participants, in order to mitigate the potentially prejudicial effects of pretrial publicity. See *Nebraska Press Assn.* v. *Stuart*, supra, 554-55.

In *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1033, the Supreme Court considered a challenge to a Nevada Supreme Court rule prohibiting an attorney from making extrajudicial comments to the media that the attorney knew or should have known would "have a substantial likelihood of materially prejudicing an adjudicative proceeding." (Internal quotation marks omitted.) Observing that in its earlier opinions the court had contemplated limitations on the speech of trial participants, the majority stated that *Sheppard* and other cases "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 *Nebraska Press* . . . and the cases which preceded it." Id., 1074. While the court approved Nevada's "substantial likelihood" standard in the context of speech restrictions imposed on attorneys, it did not mandate such a standard as a constitutional minimum necessary to justify such an order. See id.

Connecticut's appellate courts have not yet had occasion to articulate the standard for such orders in the wake of the Supreme Court's decision in *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1064. However, a majority of the federal circuit courts of appeal have clarified that a "clear and present danger" is *not* a condition precedent to the entry of an order on trial participants. A line of cases have held that the somewhat lower showing of a substantial likelihood of material prejudice, which is found in rule 3.6 of the Rules of Professional Conduct, or the even more relaxed standard of a reasonable likelihood of material prejudice is all that is necessary. See *In re Morrissey*, 168 F.3d 134, 138-40 (4th Cir.) (reasonable likelihood), cert. denied, 527 U.S. 1036, 119 S. Ct., 144 L. Ed. 2d 794 (1999); see also *In re Application of Dow Jones & Co.*, 842 F.2d 603, 610 (2d Cir.) (same), cert. denied, 488 U.S. 946, 109 S. Ct. 377, 102 L. Ed. 2d 365 (1988);

United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.) (same), cert. denied, 396 U.S. 990, 90 S. Ct. 478, 24 L. Ed. 2d 452 (1969); but see *United States v. Scarfo*, supra, 263 F.3d 93 (substantial likelihood); see also *United States* v. *Brown*, supra, 218 F.3d 428 (same); *United States* v. *Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996) (same). Rule 3.6 (a) of the Rules of Professional Conduct contains the "substantial likelihood of material prejudice" standard. As such, the court is required under *Nebraska Press* and *Gentile* to make clearly articulated findings of fact addressing the three prerequisites for issuing an order discussed above. See *United States* v. *Brown*, supra, 428.

The order in the present case concerns the speech of all trial participants, as well as investigating law enforcement agencies. The question of what test to apply to a prior restraint on non-attorneys involved in a case was not decided in *Gentile*, which premised its approval of the "substantial likelihood" standard on the unique role of trial counsel. See *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1071. The Fifth Circuit Court of Appeals in *United States* v. *Brown*, supra, 410, however, faced a similar circumstance to that presented in this case. In *Brown*, the court considered the constitutionality of a lower court's order that essentially prohibited the attorneys, parties, and trial witnesses from discussing the case with the media. See id., 418-19. *Brown* involved the prosecution of a group of high ranking Louisiana state officials implicated an alleged "sham" settlement of a threatened lawsuit against the president of a failed insurance company. See id., 418. At issue in that case was the district court's *sua sponte* order, based on pretrial publicity, stating that parties, lawyers, and potential witnesses could not make "any extrajudicial statement or interview" about the trial, other than matters of public record, that "could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice." Id. The order also provided that "[s]tatements or information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a party." Id.

However, the order exempted those statements that dealt generally with the nature of allegations in the case or matters of public record, provided that such statements were made "without elaboration or any kind of characterization." Id., 419.

The *Brown* court observed that "this case . . . concerns a judicially crafted restriction on the extrajudicial speech of all trial participants . . . [and] not a general rule of professional conduct. An attorney's ethical obligations to refrain from making prejudicial comments about a pending trial will exist whether a gag order is in place or not. In this case, the driving interest of the district court was to preserve the fair trial interests of the parties . . . . As the district court pointed out, trial participants, like attorneys, are privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties. The mischief that might have been visited upon the three related trials—primarily, jury tainting—would have been the same whether prejudicial comments had been uttered by the parties or their lawyers. In other words, the problem the district court sought to avoid depended in no way on the identity of the speaker as either a lawyer or a party: the interests of the lawyers and the parties in 'trying the case in the media' were (and continue to be) the same. In light of these considerations, there appears to be no reason, at least where lawyers and parties have each demonstrated a 'substantial likelihood' of making prejudicial comments outside the courtroom, to distinguish between the two groups for the purpose of evaluating a gag order directed at them both." (Internal quotation marks omitted.) *United States* v. *Brown*, supra, 218 F.3d 428. In addition to *Brown*, a number of other courts have upheld restrictions on the speech of non-attorney trial participants. See *Doe* v. *Rose*, United States District Court, Docket No. CR-15-07503 (MWF) (C.D. Cal. September 30, 2016); see also *United States* v. *Bulger*, United States District Court, Docket No. 99-10371 (DJC) (D. Mass. June 1, 2013); *United States* v. *Rodriguez*, United States District Court, Docket No. 2:04-cr-55 (RRE) (D. N.D.

June 29, 2006); *United States* v. *Scrushy*, United States District Court, Docket No. CR-03-BE-0530-S (KOB) (N.D. Ala. April 12, 2004); *United States* v. *Koubriti*, 307 F. Supp. 2d 891 (E.D. Mich. 2004); *United States* v. *Davis*, 904 F. Supp. 564 (E.D. La. 1995).

A

Substantial Likelihood of Material Prejudice

Courts look to a number of factors to determine whether a substantial likelihood of material prejudice exists. In the context of a trial by jury, the limitations on extrajudicial speech "are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991). Both of these concerns were adequately addressed by the order issued in *United States* v. *Brown*, supra, 218 F.3d 418. Under the first prong, the *Brown* court found that the district court had met its burden, because by the time of its order, the case and related cases had attracted "intense and extensive media attention" that was sufficient to raise a legitimate concern about a "carnival atmosphere." The trial court also had an "entirely appropriate concern" that the jury pool would be tainted by the extrajudicial comments; and finally, the parties had demonstrated a desire to "manipulate media coverage to gain favorable attention." Id. 428-29.

The three factors identified in *Brown*, (1) pretrial publicity; (2) prejudice of the jury; and (3) the manipulation of media coverage, have been reiterated in many other cases upholding such orders. Perhaps the two most important factors, the extent of pretrial publicity and the prevention of a "carnival atmosphere" highlighted in *Sheppard*, have been found in other jurisdictions to be a

legitimate reason to order restrictions on the speech of trial participants. See *United States* v. *Scarfo*, supra, 263 F.3d 94; see also *In Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 611 (2d Cir.) ("[b]ased on the sensational public nature of the case and the leaks of grand jury information, the . . . failure to restrain the trial participants would add fuel to an already voracious fire of publicity and create a real and substantial likelihood that some, if not all, defendants might be deprived of a fair trial" [internal quotation marks omitted]), cert. denied, 488 U.S. 946, 109 S. Ct. 377, 102 L. Ed. 2d 365 (1988); see also *Doe* v. *Rose*, supra, United States District Court, Docket No. CR-15-07503 (MWF) (noting that pretrial publicity is the most important factor, and highlighting that the parties' attempts to "woo" the press with salacious details and outlandish claims had only served to increase publicity); *United States* v. *Rodriguez*, supra, United States District Court, Docket No. 2:04-cr-55 (RRE) ("[a] court may consider as relevant to its substantial likelihood determination whether the unrestricted statements of the participants to the case would increase the volume of extensive publicity" [internal quotation marks omitted]); *United States* v. *Hernandez*, United States District Court, Docket No. 98-0721-CR (JAL) (S.D. Fla. February 20, 2001) ("local and national media coverage of this case has been significant since the Government's filing of the original indictment . . . and that this coverage has only intensified"). In Connecticut, precedent may also be found in the order entered in *State* v. *Grant*, Superior Court, judicial district of New Haven, Docket No. CR-6481390-T (September 15, 1999, *Fasano, J.*) (25 Conn. L. Rptr. 433, 434) (the court, citing *Sheppard*, concluded that based upon the newspaper articles submitted at the hearing on the state's motion, that continued coverage of a similar nature was likely to impair the rights of the parties).[4]

[4] The trial court's order in *State* v. *Grant*, supra, 434, did not utilize the "substantial likelihood" standard of Rule 3.6, but rather, the presumably more lenient "reasonable likelihood" standard. Judge Fasano addressed this difference in another decision concerning such an order, *State* v. *Komisarjevsky*, Superior Court, judicial district of New Haven, Docket No. CR-07-241860-T (July 1, 2011, *Fasano, J.*).

As highlighted in *Brown,* courts should also examine whether pretrial publicity has become so extensive that potential or empaneled jurors will have difficulty avoiding press coverage of the trial. See *United States* v. *McGregor*, 838 F. Supp. 2d 1256, 1265 (M.D. Ala. 2012) (concluding that because defense counsel frequently opined on the credibility of witnesses and also speculated as to the government's trial strategy, it was likely that the jury would become aware of extrajudicial comments). The strongest cases in favor of such orders are those in which trial counsel have previously made publicized statements that dealt with matters likely to sway prospective or selected jurors. See *Levine* v. *United States District Court*, supra, 764 F.2d 590; see also *United States* v. *Bulger*, supra, United States District Court, Docket No. 99-10371 (DJC) (in connection with the trial of Boston mobster "Whitey" Bulger, the court found that "[r]egardless of the presumption that the jurors are heeding the Court's instructions to bypass any media coverage of this case, the media coverage of this trial is so pervasive that there is a danger that jurors might inadvertently come upon a news report of this case on television, the Internet or in print"); *State* v. *Hernandez*, supra, United States District Court, Docket No. 98-0721-CR (JAL) ("the [c]ourt finds that the publication of extrajudicial statements and actions by the trial participants may very well taint the sequestered jury in this case").

The so-called "Cheshire home invasion" case had also attracted a great deal of media interest, and the court prohibited extrajudicial statements "that raise a reasonable likelihood of material, prejudicial impact upon any subsequent trial of the case." Citing *Nebraska Press,* Judge Fasano ordered that "[t]he language, although not identical to Rule 3.6 of the Professional Rules of Professional Conduct, is consistent with case law impacting orders of this nature and First Amendment rights and privileges . . . . Additionally, in the view of this court, the current language constitutes a more definitive legal standard." (Citations omitted.) Id. The court also noted that its order did not include a "safe harbor provision analogous" to Rule 3.6 (b), and ordered that "to the extent that the court's order is more demanding than the Rules of Professional Conduct, it is the court's order that controls." Id. The court, however, noted that it would entertain motions by the defendant to allow an appropriate response to adverse publicity that might fall within the parameters of Rule 3.6 (b). See id.

In addition to *Brown's* emphasis on the manipulation of media coverage, courts have shown a particular concern that the parties may attempt to use the media to improperly introduce evidence in the press that would otherwise be inadmissible at trial. See *Levine* v. *United States District Court*, supra, 794 F.2d 597 (citing *Patterson* for the proposition that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." [internal quotation marks omitted]); see also *Doe* v. *Rose*, supra, United States District Court, Docket No. CR-15-07503 (MWF) ("the parties have already attempted to use the press as a way to air evidence that is either flatly inadmissible, or the admissibility of which is still in question").

The three concerns outlined in *Brown* are particularly pronounced in the present case. The court finds that the local and national news media coverage of this case has been intense and extensive since Jennifer Dulos first disappeared, and it shows no sign of abating. See *United States* v. *Brown*, supra, 218 F.3d 428. In addition, it is apparent that both defense counsel and law enforcement have already attempted to use the press to influence public opinion in support of their respective positions. Among the most egregious examples are the public claims cited in footnote one that Jennifer Dulos is psychologically unstable, addicted to drugs, and that she consorted romantically with drug dealers. Other public claims include the apparent disclosure of the details of recovered evidence, or descriptions of unrecovered items of potential evidence. The potential taint that such remarks could pose to the jury pool is obvious. The press coverage of this case has spanned all platforms, from traditional media outlets, including local and national newspapers and news broadcasts, to less traditional forms like blog posts and various types of social media. The pervasive nature of this coverage poses a substantial likelihood that if an order is not issued, and

extrajudicial comments of this type were to continue, they are substantially likely to materially prejudice these proceedings. See *In Application of Dow Jones & Co., Inc.*, supra, 842 F.2d 611.

B

Narrow Tailoring

Under the second prong, such trial court orders must be no broader than necessary in order to preserve the right to a trial by an impartial jury. Thus, an order that bars comment on anything to do with a trial will invariably fail. See, e.g., *United States* v. *Salameh*, 992 F.2d 445, 447 (2d Cir. 1993); see also *State* v. *Carruthers*, 35 S.W.3d 516, 564 (Tenn.) (order found to be overbroad where it contained "no exceptions," apparently prohibiting "any comments to the press about the case" [emphasis omitted]), cert. denied, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757 (2000).

In *United States* v. *Brown*, supra, 429-30, the court found that the order was sufficiently narrow to eliminate only that speech having a "meaningful likelihood of materially impairing the court's ability to conduct a fair trial." The *Brown* order did not impose a "no comment rule," but rather, it allowed the parties to comment on assertions of innocence, general statements about the nature of an allegation or defense, and statements of matters of public record. Further, the order specifically prohibited "[s]tatements or information intended to influence public opinion regarding the merits of th[e] case," and thus it was not unconstitutionally vague or overbroad. Id., 430. Such orders are most likely to be sustained on appeal if they conform to the terms of Rule 3.6 of the Model Rules of Professional Conduct. For example in *Levine* v. *United States District Court*, supra, 764 F.2d 599, the Ninth Circuit found that the district court's order was overbroad as issued, and referenced Rule 3.6 as the possible template for an appropriately drafted order.

The trial court in *State* v. *Grant*, supra, 25 Conn. L. Rptr. 434, concluded that its original order as drafted, which specifically tracked the language of Practice Book § 42-48, mentioned earlier, did not adequately comply with constitutional safeguards. Therefore, the court concluded that in order to "minimize the restrictive effect of any such order by proscribing only those communications the danger sought to be avoided . . . . [T]he order should prohibit only those statements that raise a reasonable likelihood of prejudicial impact." (Citation omitted; internal quotation marks omitted.) Id. However, some orders that are actually broader in scope than 3.6 (a) of the Rules of Professional Conduct have been upheld by other jurisdictions. See e.g. *United States* v. *Tijerina*, supra, 412 F.2d 661 (prohibited statements for dissemination "[r]egarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the court"); see also *United States* v. *Brown*, supra, 218 F.3d 415.

The order in the present case as drafted comports with both the Practice Book and the Rules of Professional Conduct. It is *not* a "no comment" rule. The defendant's attorney also retains the right to "make a statement that a reasonable lawyer would believe is required to protect a client from substantial undue prejudicial effect of recent publicity not initiated by the defendant's counsel or the defendant" as long as the "statement made pursuant to this subsection shall be limited to such information as is necessary to mitigate the recent adverse publicity." See Rules of Professional Conduct 3.6 (b). The lawyers involved in this case are already subject to these ethical restraints imposed by the Rules of Professional Conduct, and thus, the court is simply ordering the lawyers to do what they are already obligated to do. The closeness with which the order tracks Rule 3.6 illustrates the narrowness of its scope. See *Levine* v. *United States District Court*, supra, 764 F.2d 599. The argument by the defendant's attorney at the hearing on this matter, that such an

order is somehow superfluous or a waste of judicial resources, because counsel is already aware of his professional responsibilities, is without merit. This order permits the court to act promptly when faced with a possible violation by any of the trial participants subject to its terms,

C

Least Restrictive Means

In an effort to protect the first amendment rights of the trial participants, the court is responsible for ensuring that such an order is the least restrictive means of eliminating potential prejudice. In reviewing such orders, courts distinguish between the press and trial participants themselves. They are therefore much more willing to find inadequate other alternatives to orders imposed upon counsel and trial participants, as opposed to orders that impose similar restrictions upon the press. See *Levine* v. *United States District Court*, supra, 764 F.2d 590. In *United States v. Brown*, supra, 218 F.3d 431, although the district court did not expressly discuss alternatives on the record, the Fifth Circuit Court of Appeals concluded that "[w]hile it is undoubtedly good judicial practice for district courts to explicitly set forth on the record their consideration of such matters, we do not believe that this shortcoming requires us to vacate the present order." This conclusion was the result of the court's review of *Sheppard* and *Nebraska Press,* wherein the Supreme Court concluded that an order on trial participants was an appropriate alternative to an order gagging the press. See id., 430-31. The court, however, concluded that "[t]he record sufficiently supports the district court's clearly implied conclusion that the other measures suggested by *Sheppard* and *Nebraska Press* would be inappropriate or insufficient to adequately address the possible deleterious effects of enormous pretrial publicity on this case . . . ." Id., 431.

Addressing the alternatives, the *Brown* court further concluded that "[a]s the Supreme Court noted in *Gentile,* even '[e]xtensive 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. . . . 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 and would not have prevented, in any meaningful way, the infection of jurors in the two related trials. For example, even if the district court had sequestered the jury in this case, the comments by the parties would still threaten to prejudice the jurors in the other trials. In short, all of these options carry with them significant costs without addressing the root cause of the district court's concern. . . . The *Sheppard* Court observed that when considering how to 'cure' the effects of pretrial publicity, a trial court's overriding object must be to institute 'those remedial measures that will prevent the prejudice at its inception' . . . . In light of the parties' and attorneys' demonstrated enthusiasm for using the press to their utmost advantage, the district court made a reasoned and reasonable decision to focus its prophylactic attempt to avoid prejudicing the three related trials on the trial participants." (Citations omitted; internal quotation marks omitted.) *United States* v. *Brown*, supra, 318 F.3d 431.

In *State* v. *Grant*, supra, 25 Conn. L. Rptr. 434, the court addressed the petitioner's argument, made in reliance upon *Nebraska Press*, that the court should consider less restrictive alternatives before entering such an order. The trial court emphasized that it was not its intention to regulate the press, but rather, only the extrajudicial comments of the active trial participants. The court cited *Gentile* for the proposition that "[s]uch regulation warrants a less demanding standard than regulation of the press." Id. The court, however, did address the potential alternatives such as a change of venue, more searching voir dire, emphatic jury instructions, trial

postponement, and jury sequestration. Id. As to a change of venue, the court concluded that doing so would "burden . . . another jurisdiction with this high profile case; removing the matter from the community most interested and most effected by the case; inconvenienc[e] parties, witnesses, and the public; and risk . . . the effects of prejudicial comment extending statewide, given the notoriety of this case." Id. As to a more searching voir dire and emphatic jury instructions, the court concluded that, given the massive amount of publicity and its prejudicial effect as suggested by the articles of record, such remedial steps alone would prove inadequate. See id. Lastly, the court concluded that trial postponement and sequestration of jurors were hardly more reasonable alternatives to a timely and properly tailored order by the court. See id.

More recently, the federal judge overseeing the criminal trial of Paul Manafort, the former 2016 campaign chairman for President Trump, entered an order similar to that in the present case. That order limited comments to the media and the public by lawyers, defendants, and witnesses. See *United States* v. *Manafort*, United States District Court, Docket No. 17-0201 (ABJ) (D. D.C. November 8, 2017). The *Manafort* court acted pursuant to Local Criminal Rule 57.7 (c) of the Rules of the United States District Court for the District of Columbia and the Supreme Court's decision in *Gentile.* The court ordered that "in order to safeguard defendants' rights to a fair trial, and to ensure that the Court has the ability to seat a jury that has not been tainted by pretrial publicity, all interested participants in the matter, including the parties, any potential witnesses, and counsel for the parties and the witnesses, are hereby ordered to refrain from making statements to the media or in public settings that pose a substantial likelihood of material prejudice to this case." (Emphasis omitted.) Id.

In the present case, the national news media attention that this case has received will only be amplified if trial participant's public statements are left unchecked. It would in all likelihood

render a change of venue anywhere within the 169 towns composing the state of Connecticut highly problematic. While the court anticipates a rigorous voir dire as well as emphatic jury instructions, the prophylactic measure of an order restraining extrajudicial comments is the type of "remedial measure that will prevent the prejudice at its inception," and play an essential role in guaranteeing that the "carnival atmosphere" highlighted in *Sheppard* never occurs in the present case. *Sheppard* v. *Maxwell*, supra, 384 U.S. 363. The court also believes that given the massive amount of publicity and its prejudicial effect, as in *Grant*, allowing additional voir dire and more detailed jury instructions alone are insufficient. See id., 434. The court also shares the opinion of Judge Fasano in *Grant* that trial postponement and the sequestration of jurors is hardly a reasonable alternative as compared to a timely, properly tailored order by the court. See id.

VI

Extending the Order to Law Enforcement

Besides the New Canaan police department, this investigation has called upon the resources of a number of municipal law enforcement agencies in different parts of the state, as well as the Connecticut State Police. Without in any way denigrating the many hours of police work devoted to the search for Jennifer Dulos, as the court previously noted, there are apparently one or more members of an unknown police department who have been sharing non-public information about their ongoing investigation with the press. Those law enforcement leaks threaten the fairness of these proceedings, and must stop. The Supreme Court in *Sheppard* was particularly concerned with leaks coming from law enforcement sources, and their prejudicial effect. See *Sheppard* v. *Maxwell*, supra, 384 U.S. 360. The police "like attorneys, are privy to a wealth of information that,

if disclosed to the public, could readily jeopardize the fair trial rights of all parties." *United States* v. *Brown*, supra, 218 F.3d 428.

After the assassination of President John F. Kennedy in Dallas, Texas in 1963, the Chief Justice of the United States, Earl Warren, chaired a commission that examined the circumstances of his death. See Chief Justice Earl Warren, Chairmen, Report of the President's Commission on the Assassination of President John F. Kennedy, 227 (1964). The Warren Commission was highly critical of the actions of the Dallas police department. It faulted the lapses in professional judgment characterized by the inappropriate public dissemination of information that led to the murder of suspect Lee Harvey Oswald while in police custody. See id. 242. "[N]either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald. Undoubtedly the public was interested in these disclosures, but its curiosity should not have been satisfied at the expense of the accused's right to a trial by an impartial jury." Id., 260. "The Commission believes that the news media as well as the police authorities, who failed to impose conditions more in keeping with the orderly process of justice, must share responsibility for the failure of law enforcement which occurred in connection with the death of Oswald." Id., 242. While the court is not suggesting that the recent actions of any members of the Connecticut law enforcement community rise to the level seen in 1963 Dallas, such disclosures to the press still pose a substantial likelihood of materially prejudicing these proceedings.

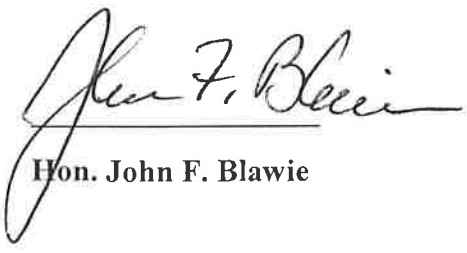
Cognizant of the need to balance the right of an accused to a fair trial and the right of free expression, the Supreme Court has stated that in high profile criminal cases, trial courts "must take strong measures to ensure that the balance is never weighed against the accused." *Sheppard* v. *Maxwell*, supra, 384 U.S. 362. "[W]here there is a reasonable likelihood that prejudicial news prior

to trial will prevent a fair trial," the trial courts should "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences," with appropriate orders to regulate "prosecutors, counsel for defense, the accused, witnesses, court staff . . . [and] enforcement officers coming under the jurisdiction of the court . . . ." Id., 363. The *Sheppard* court stated that "[c]ollaboration 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." Id.

CONCLUSION

The law does not always keep pace with technology. While the essential parameters of the right to a fair trial have remained fairly static, having been established at the time of the Founding Fathers, information technology in particular has experienced a dynamic and exponential growth in the 21st Century. However, the constitutional guarantee of a fair trial is *not* outmoded or outdated; it has the vindication of centuries behind it, and this order ensures its continued viability in this case. Therefore, this is not a "choice" between two constitutional rights: fair trial v. freedom of speech. Nor does this court's order somehow demand that counsel must choose between representing a client, and observing the canons of professional ethics. Those are false choices, because if the right to a fair trial is not maintained, if the canons of ethics and professional conduct are cast aside in a freewheeling, 24/7 news cycle social media world, freedom of speech itself is in jeopardy. Without safeguarding and ensuring the security of a fair trial in all cases, not merely *State* v. *Dulos*, that very freedom might easily become its first victim.

BY THE COURT,



Hon. John F. Blawie

FST-CR19–0148554-T	:	**SUPERIOR COURT**
STATE OF CONNECTICUT	:	**JUDICIAL DISTRICT**
V.	:	**OF STAMFORD/NORWALK**
FOTIS DULOS	:	**SEPTEMBER 12, 2019**

ORDER

For the reasons stated in the accompanying memorandum of decision, the court finds that a substantial likelihood exists that the continued public dissemination of extrajudicial comments by the parties identified in this order carries a substantial likelihood of materially prejudicing a fair trial in this case. The court also finds that entering a narrowly-tailored order is the least restrictive means of ensuring and safeguarding the right to a fair trial for the benefit of the defendant, the state, and the public. Therefore, this order is binding upon the following persons and entities (collectively, the "Parties"):

1. Attorneys for the state and the defendant, as well as their respective associates.
2. The defendant, Fotis Dulos, including his immediate family and associates.
3. Any and all fact witnesses or expert witnesses whom either the state or the defendant reasonably believes they intend to call to testify at a trial or other evidentiary proceeding in this matter. Counsel shall be responsible for notifying such witnesses of the terms of this order.
4. The members of any law enforcement agency, whether sworn or unsworn, and the members of any other state, local or municipal agency, private citizens or business entities that have been or will become involved in the investigation into these allegations or the disappearance of Jennifer Dulos, or the testing or production of any records or other

evidence. Counsel shall be responsible for notifying such agencies, persons and entities of the terms of this order.

The court hereby orders:

(1) That until the final verdict is rendered and the jury has been discharged, the Parties shall henceforth refrain from making or authorizing extrajudicial comments and disseminating or authorizing the dissemination of information to the media and the public concerning the following:

a. the character, credibility, reputation or criminal record of a party, victim, or witness, or the identify of a witness, or the expected testimony of a party or witness;

b. the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

c. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

d. information that the Parties know or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

e. with the exception of the defendant, Fotis Dulos, any opinion as to the guilt or innocence of the defendant.

(2) Nothing contained in this order shall prohibit any of the Parties from stating the following, without elaboration or characterization:

a. the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

b. identity, residence, occupation and family status of the defendant;

c. if any suspects involved in the disappearance of Jennifer Dulos have not been apprehended, any information necessary to aid in the apprehension of those persons;

d. the fact, time and place of arrest;

e. the identity of investigating and arresting officers or agencies and the length of the investigation.

f. information contained in a public record;

g. that an investigation of the matter is in progress;

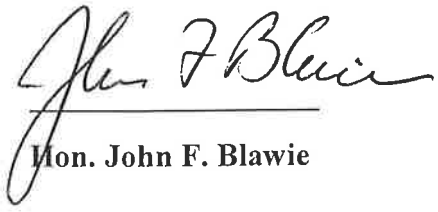
h. the scheduling or result of any step in litigation;

i. a request for assistance in obtaining evidence and information necessary thereto; and

j. 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;

(3) Counsel for the defendant may make a statement that a reasonable lawyer would believe is required to protect his client from the substantial undue prejudicial effect of recent publicity *not* initiated by the defendant's counsel or the defendant, his family or associates. Any statements made by counsel pursuant to this exception shall be limited to only such information as is necessary to mitigate the recent adverse publicity.

IT IS SO ORDERED,



Hon. John F. Blawie