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Plaintiff Estate's Motion for Sanctions Against Cuyahoga County Prosecutor William D. Mason

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CUYAHOGA COUNTY

CHARLES MURRAY, Administrator
of the Estate of
SAMUEL H. SHEPPARD

) Judge Ronald Suster

) Case No. 312322

vs.

STATE OF OHIO

Defendant

) PLAINTIFF ESTATE'S
) MOTION FOR SANCTIONS
) AGAINST CUYAHOGA
) COUNTY PROSECUTOR
) WILLIAM D. MASON
)

Now comes counsel for the Estate of Dr. Samuel H. Sheppard and moves that this Honorable Court impose appropriate sanctions upon the Cuyahoga County Prosecutor William D. Mason for violation of Disciplinary Rule 7-107. The Plaintiff's position is more fully stated in the attached Brief incorporated herein.

Respectfully submitted,



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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing has been hand-delivered, this 25 day of Feb,
2000, to William D. Mason, Esq., Cuyahoga County Prosecutor, at his office, Justice Center,
1200 Ontario Street, Cleveland, Ohio 44113.



TERRY H. GILBERT
GORDON S. FRIEDMAN
Attorneys for Plaintiff

BRIEF

It is the position of counsel for the Plaintiff that the Cuyahoga County Prosecutor, William D. Mason, engaged in prohibited conduct with respect to a press interview held on February 22, 2000. More specifically, wherein he revealed the terms of a written settlement proffer made to the State by Plaintiff's counsel at the request of the trial court. Such a revelation of a settlement proposal after a jury has been empaneled and risking the poisoning of the jury panel, is in clear violation of the Rules of Professional Practice, which provides:

A goal of our legal system is that each party shall have his case adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial. . . . And may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out of court statements regarding an anticipated or **pending trial** may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

E.C. 7-33; State v. Ross, 36 Ohio App.2d 185 at 193 (1973).

More particularly, Ohio Disciplinary Rule 7-107 deals with trial publicity and states in no uncertain terms that:

- (A) A lawyer who is participating . . . in . . . a matter shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicated proceeding in the matter.

Section (D) of 7-107 provides that such Disciplinary Rule is applicable to a "lawyer associated with any firm or emphasized government agency with a lawyer subject to Division (A) of this Rule shall make a statement prohibited by Division (A) of this Rule." DR 7-107.

Specifically, the appointed Cuyahoga County Prosecutor, William D. Mason, on February 22, 2000, conducted a press interview during the noon hour break from the trial in the within matter. (See Attachment A). During the course of that press conference, Mason revealed

what he claimed to be the terms of a settlement demand made by Plaintiff's counsel. However, that settlement demand as articulated by Mason was inaccurate and misleading.

As a result of this inappropriate statement, predicably, the following day the Cleveland Plain Dealer presented in the form of a banner headline, "Sheppard Sought \$3.25 Million, Mason Says." This obvious headline had a potentially damaging effect on the trial already in progress. As a direct result of Mason's statements, this Court was forced to conduct an individual voir dire of each of the eleven remaining jurors to determine whether or not they had been affected by Mason's statements. One juror did, in fact, see the banner, and saw the misleading quote of \$3.25 million. Fortunately, during the course of that venire, this particular juror reflected a misunderstanding of the \$3.25 million and indicated that he could put it out of his mind. Nevertheless, the purpose of DR 7-107 is exemplified in the fact that this juror did in fact see the results of Prosecutor Mason's unprofessional conduct. Further, Ethical Consideration 7-14 provides in pertinent part that:

A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

It is respectfully submitted that by virtue of the fact that Prosecutor Mason used his official position to reveal what he claimed to be the content of a settlement proposal was an abuse of power and discretion given to the sovereign through the Office of the Cuyahoga County Prosecutor. Likewise, said conduct by the Cuyahoga County Prosecutor is a violation of Ethical Consideration 7-33, out of court statements, which notes in pertinent part:

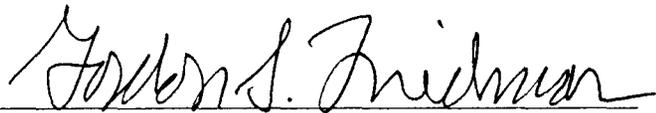
The release by a lawyer of out of court statements regarding an anticipated or pending trial may improperly affect impartiality of the tribunal.

The behavior of the Cuyahoga County Prosecutor in his press interview was, in fact, contemptuous of the Court's admonition to all parties not to make any comments regarding the

previous evening's statements regarding discussions of settlement. It is one thing for a prosecutor to have a press conference where he generically denies or confirms statements, but it is quite another for him to actually reveal the details of a settlement proposal (inaccurately) which by its very nature is inadmissible in a court of law as evidence and contemptuous of this Court's order that the details of settlement discussions not be revealed. It is noteworthy that Mr. Mason chose to make his inappropriate comments during the examination of Samuel Reese Sheppard, and during a line of questioning involving the existence of a financial motive for this lawsuit. Mason sought to do in the press interview what he could not do during cross-examination.

For these reasons, it is respectfully submitted that this Honorable Court forthwith fashion a remedy as a sanction that will underline publicly the seriousness of the County Prosecutor's breach of professional conduct so as to make clear to other lawyers, whether public or private, that such conduct during the pendency of a trial is forbidden and which will hopefully serve as a deterrent effect on any future such conduct by any lawyers during the course of litigation.

Respectfully submitted,



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Sheppard sought \$3.25 million, Mason says

By JOHN F. HAGAN
and JAMES EWINGER
PLAIN DEALER REPORTERS

Against the backdrop of Sam Reese Sheppard's testimony about his mother's murder yesterday, Cuyahoga County Prosecutor William D. Mason told reporters Sheppard was willing to settle his father's wrongful-imprisonment claim for \$3.25 million.

The revelation came before prosecutors spent the afternoon cross-examining

Sheppard, striving to portray him and his supporters as profiteers who want to make money on the lawsuit, the sale of books and movie rights. His answer to that charge was, "I own a bicycle and two guitars."

The estate of his father, Dr. Sam H. Sheppard, is seeking damages for the doctor's 10 years in Ohio prisons before his acquittal at a 1966 retrial and eventual death in 1970.

Mason said outside the courtroom that

the negotiations began around Christmas and that the Sheppard legal team floated the settlement figure before trial began nearly a month ago. In a fleeting interview before Common Pleas Judge Ronald Suster imposed silence on the lawyers, Mason termed the proposal "outrageous and unacceptable." He also said the Sheppards were willing to accept "something short of a declaration of innocence."

SEE SHEPPARD/6-A

THE PLAIN DEALER • INTERNATIONAL/NATIONAL • WEDNESDAY, FEBRUARY 23, 2000

Mason says estate sought \$3.25 million

SHEPPARD FROM 1-A

Terry Gilbert, lead lawyer for the Sheppard estate, complained to Suster that Mason was making the negotiations public. He said outside court that Mason's disclosure was "disgraceful," and that the dollar figure was based on legal guidelines allowing for the lost wages of a doctor, for 10 years of wrongful imprisonment, and attorneys fees and expenses.

"I feel he disingenuously goaded me to open up dialogue and never had any intention of settling," Gilbert said.

Mason characterized the sheer size of the proposal as a sign of Gilbert's bad faith. Gilbert countered by saying the negotiation was at the judge's urging and that Mason's public disclosure could prejudice the jury.

Suster agreed and upbraided Mason in the courtroom, saying it was improper that he disclosed the demand figure to the news media.

Mason said he announced the figure only in response to statements by Gilbert that the prosecutor had rejected their efforts to settle the case. Mason said he had resisted settling because he believes Sheppard was the killer, despite the 1966 acquittal.

Sheppard originally was convicted in December 1954, nearly six months after his wife, Marilyn, was found beaten to death in their Bay Village home.

Assistant County Prosecutor Steve Dever expressed sympathy to Sam Reese Sheppard yesterday for the slaying of his mother, and noted that today would have been the 55th wedding anniversary of Sam and Marilyn Sheppard.

Throughout the morning and most of the afternoon, the younger Sheppard, now 52, testified about his recollections of the day his mother died, the remainder of his father's life and the impact it had on him.

The evident feature of Sheppard's testimony was that his fa-



LARRY HAMEL-LAMBERT / PLAIN DEALER PHOTOGRAPHER

Terry Gilbert, an attorney for Dr. Sam Sheppard's estate, hands Sheppard's son, Sam Reese Sheppard, a photo showing Sheppard and his parents when he was a boy. Sheppard testified yesterday about recollections of the day his mother died and of the rest of his father's life.

ther's innocence is an article of faith.

That was apparent in his numerous asides about the case, referring casually to the 1954 case where his father was convicted as "the unfair trial," and the 1966 proceeding where he was acquitted as "the fair trial."

And it was glaringly obvious when Dever asked him if he always believed his father was innocent and if he ever asked him about it. Sheppard said he never

asked because there was no need.

"It is not a belief. It is a knowledge that I know through and through," Sheppard said. Later, he told Dever the basis of his belief: "It was a father-son communication that needed no words."

Sheppard acknowledged that he made about \$150,000 on book and movie rights after taxes, but that he is not rich, and that his family received no compensation from "The Fugitive" TV series or

movie, or from a documentary.

Sheppard also conceded the inaccuracy of a crucial detail that his legal team and supporters promoted to renew interest in the 1954 slaying: That there was undisclosed evidence of a break-in at the Sheppard home.

A retired Cleveland detective testified last week that a door on which scratch marks were found led to a crawl space and not to an outside door that could have been used by an intruder.

The Sheppard team contends that Marilyn Sheppard was killed by Richard Eberling, a onetime handyman at the Sheppard home who died in prison in 1998 while serving life for a 1984 murder. A health care worker to whom he allegedly confessed the Sheppard murder is expected to testify today.

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