

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT
IND. Nos. 18042-18051; 18100; 18101

COMMONWEALTH

V.

BERNARD F. BARAN, JR.

COMMONWEALTH'S MOTION FOR SANCTIONS

Now comes the Commonwealth and respectfully requests that this Court issue an order (see attached proposed Order) requiring counsel for the defendant to cease forthwith from making public extra-judicial oral and/or written statements concerning the above-captioned case. As reasons for its request, the Commonwealth states the following:

FACTS

1. This case has drawn widespread attention in local, national, and international print and television media, and media coverage is likely to continue as the case proceeds, pending the outcome of the Commonwealth's appeal for the allowance of the Motion For New Trial, to trial.
2. The Defendant, acting through Attorney John G. Swomley, filed a motion for new trial on June 18, 2004. Four months later, while the motion was pending before

the Superior Court, Fecteau, J., Attorney Swomley accepted the invitation to speak at a public forum sponsored by Williams College in Williamstown, Massachusetts. As reported by the *Berkshire Eagle* newspaper on October 25, 2004, Attorney Swomley stated that then-assistant district attorney Daniel A. Ford had "buried evidence intentionally" in the 1984-1985 prosecution of the Defendant. Attorney Swomley also accused the Berkshire District Attorney's Office of stymieing his efforts to discover records and materials that are relevant to his motion for new trial, and claimed that prior appellate counsel suffered a conflict of interest representing Baran on appeal. (See attached 10/25/2004 article from the *Berkshire Eagle*).

3. On November 4, 2004, Attorney Swomley wrote a letter to the Editor of the *Berkshire Eagle*, published on November 9, 2004, responding to an *Eagle* editorial that characterized his discussion at Williams College as "needlessly clouding the issue with Oliver Stone-style conspiracy theories." Attorney Swomley claimed that he never used the word "conspiracy," however he unequivocally stated in his letter that the Defendant is an "innocent man." (emphasis supplied). (See attached 11/09/2004 letter to the Editor of the *Berkshire Eagle*).

4. Attorney Swomley subsequently wrote a second letter to the Editor of the *Berkshire Eagle*, dated November 29, 2004, and published December 7, 2004, responding to a letter to the editor of the *Eagle* written by a group of Berkshire County attorneys commenting on the Defendant's allegation of prosecutorial misconduct and ineffective assistance of appellate counsel. Attorney Swomley argues that he violated no ethical rules by speaking at Williams College about the pending case. He further wrote: "Now the primary ethical reason lawyers should not comment about cases in the media is that

they may influence a potential jury that may try this case, not that they may embarrass a public official. **There is no risk of influencing a potential jury in this case – that was done 20 years ago.** (emphasis supplied). (See attached 12/07/2004 letter to the Editor of the *Berkshire Eagle*).

5. On June 16, 2006, the Superior Court, Fecteau, J., issued its memorandum of decision and order on the Defendant's motion for new trial. The Court allowed the motion and vacated the Defendant's convictions. The Defendant subsequently posted cash bail in the Berkshire Superior Court and was released from his G.L. c. 123A civil commitment to the Massachusetts Treatment Center.

6. On June 22, 2006, the Commonwealth filed its Notice of Appeal.

7. On July 4, 2006, Attorney Harvey A. Silverglate, co-counsel with Attorney Swomley for the Defendant, wrote a letter to the Editor of the *Berkshire Eagle*, published on July 12, 2006, in which he claimed that the child victims who had testified against the Defendant in 1985 had been subjected to **"ghastly brainwashing sessions that have long last been made part of the official court record of the case."** (emphasis supplied). Furthermore, Attorney Silverglate states that the Court's memorandum

has explained to any rational, reasonable person willing to listen with an open mind, precisely **how not only the jurors were fooled into believing that Mr. Baran abused these young children, but how the children themselves were brainwashed into believing this fantasy.** When the videotapes and other evidence showing how this false testimony was created are eventually made available to the public – which we hope will happen soon – **there should not be a fair and rational person left who has the slightest doubt in Baran's innocence.** (emphasis supplied).

(See attached 07/12/2006 letter to the Editor of the *Berkshire Eagle*).

8. On July 17, 2006, the Commonwealth filed its Motion For An Order Requiring Counsel To Cease Making Public Extra-Judicial Statements Concerning The Case with attachments. This Court took the matter under advisement after conducting a hearing on October 23, 2006, at which time the Court warned that it would entertain a motion for sanctions if either party failed to abide by the mandates of Mass. Rule of Professional Conduct 3.6.

9. The Commonwealth filed its brief in this matter in the Appeals Court on August 25, 2007.

10. On September 2, 2007, the Berkshire Eagle, in an article titled "DA Files Baran Appeal," reported that District Attorney Capeless declined to comment on the appeal because the Superior Court had issued a gag order. The article quoted Attorney Swomley, who stated that no gag order had been issued. He characterized the Commonwealth's brief as an attempt **"to make an unintelligible story into an argument that all the government's arguments are reasonable,"** and he specifically commented upon the content of the videotaped interviews of the child victims as **"offer[ing] evidence that could have cleared Baran entirely,"** including the children's allegations of abuse by third-parties and their purported denials of abuse by the Defendant. (emphasis supplied). (See attached 09/02/2007 article from the *Berkshire Eagle*).

11. On November 5, 2007, the Massachusetts Lawyers Weekly published in its Opinion section an article authored by Attorney Silverglate and paralegal James Fellows Tierney titled "Using A Ban On Pre-Trial Publicity To Avoid Embarrassing Prosecutors, Judges." Attorney Silverglate wrote that this Court **"imposed a patently**

unconstitutional de facto gag order.” Attorney Silverglate stated that Mass. Rule of Professional Conduct 3.6 was being “misapplied [by this Court] to protect the interest of public officials who have violated their duties.” He specifically named Superior Court Judge Daniel A. Ford and the late Berkshire District Attorney Gerard D. Downing as persons “being insulated from public inspection.” Attorney Silverglate opined that because the Commonwealth’s appeal has been docketed, this Court’s “enforced silence no longer deters.” (emphasis supplied).

12. Attorney Silverglate grossly mischaracterized not only the record evidence, but also Judge Fecteau’s findings regarding the evidence. For example, he wrote that Judge Fecteau “**described the media-fueled frenzy that led more parents to join what became a witch hunt;**” that the children’s “**ultimate versions**” of the abuse “**coincided with the investigators’ stated suspicions;**” that the unedited videotapes “**show how accusations of child sexual abuse can be constructed virtually out of whole cloth;**” and that “[i]n [Judge] Fecteau’s opinion, **extensive quotations from the children’s interviews seem a public acknowledgment of the weakness of the Commonwealth’s case.**” (emphasis supplied). (See attached copy of opinion piece from the *Lawyer’s Weekly*, November 5, 2007.)

ARGUMENT

The Commonwealth contends that Attorney Silverglate has again violated the provisions of Rule 3.6 by misstating the record evidence and by embellishing its perceived weaknesses. This conduct is particularly egregious here because this Court has previously warned counsel that statements of this kind “cross the line” of the Rule and because, if the Commonwealth’s appeal is denied, this matter would stand for trial in the

Superior Court. Furthermore, the fact that the Appeals Court has docketed the Commonwealth's appeal does not negate the ethical mandates of the Rule.

Massachusetts Rule of Professional Conduct 3.6 (Trial Publicity) sets forth parameters for the types of information about a case that a lawyer may and may not disseminate to the public.¹ The Rule strikes a balance between free expression on the one hand, and a fair trial by an impartial jury on the other hand. The Rule contemplates some curtailment of information that may be disseminated about a party prior to trial, "particularly where trial by jury is involved." See Comment [1] to Rule 3.6.

In this case, Attorney Silvergate's statements fall squarely within the sort of material expressly proscribed by Rule 3.6. This is just the type of information that will create serious problems in selecting an impartial jury. *Commonwealth v. Lauria*, 359 Mass. 168, 171 (1971) (right to a fair trial by an impartial jury belongs to the Commonwealth as well as to the defendant). See Mass. R. Crim. P. 37(b)(1) (transfer of case for prejudice).

The fact that these sexual abuse indictments, if the Defendant prevails on appeal, would stand for trial wherein the victims' credibility and the investigation's effectiveness will be central targets of scrutiny by the defense warrants special consideration by this Court to assure a fair trial for both the Defendant and the Commonwealth. Of all proceedings, "[c]riminal jury trials [are] most sensitive to extrajudicial speech." Comment [6] to Rule 3.6. The nature and the circumstances of the crimes charged here,

¹ According to Mass. R. Prof. Conduct 3.6, "[a] lawyer who is participating . . . in the investigation or litigation of a matter shall not make an extrajudicial 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 adjudicative proceeding in the matter."

multiple counts of sexual assault upon pre-schoolers, further merits restriction upon extrajudicial comments. See *Commonwealth v. Blackburn*, 354 Mass. 200, 203-204 (1968) (discussing as a factor the "shocking" and "repellent" nature of the crime); *Commonwealth v. Bianco*, 388 Mass. 358, 367-368 (1983) (same). By every indication, the public has been "shocked" and "repelled" by the horrific circumstances of this crime. Cf. *Commonwealth v. James*, 424 Mass. 770, 776 & n.13 (1997) (differentiating between publicity that relates to the crime itself, compared to media coverage of the community's reaction in holding a prayer vigil).

Attorney Silvergate's published opinion that the child victims were somehow manipulated into making false accusations is especially likely to have a material, prejudicial effect on a criminal proceeding because it relates to "the character, credibility, reputation or criminal record of a . . . witness, or the expected testimony of a . . . witness." See Comment [5](1) to Rule 3.6. This is particularly pertinent to his claim that Judge Fecteau found that the investigation evolved into a "witch hunt" once the media reported the initial accusations of abuse. Although Judge Fecteau found reason to question the manner in which the police and social workers interviewed the children, in order to record their accusations for an upcoming grand jury proceeding but only after the children had made their initial disclosures of abuse, he did not make such an inflammatory finding that the media planted the seed of vengeance in the minds of caring parents.

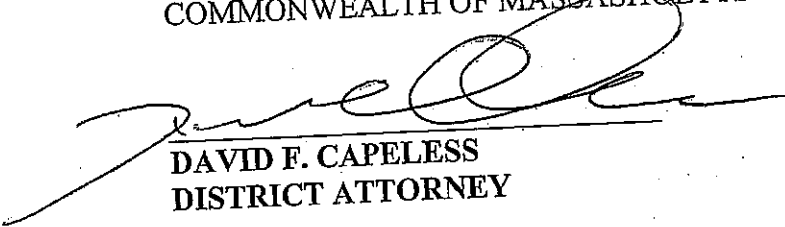
The media has covered every scheduled court date of this case, and such coverage is likely to intensify as the case nears trial. An order from this Court is imperative because repetitive publicity of these subjects will have substantial likelihood of

prejudicing the case and create significant problems in selecting an impartial jury. See Mass. R. Prof. Conduct 3.6G.L. c. 220, § 2 (court's general powers); *Commonwealth v. Scott*, 360 Mass. 695 (1971) (proximity of publicity to trial date).

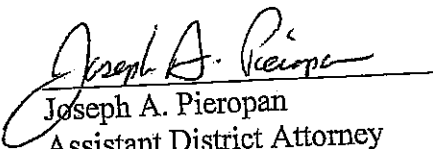
CONCLUSION

For the reasons stated above, the Commonwealth requests this Honorable Court sanction counsel for violating Massachusetts Rule of Professional Conduct 3.6.

Respectfully submitted for the
COMMONWEALTH OF MASSACHUSETTS



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Dated: November 13, 2007

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in S.J.C. Rule 3:09, the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Corresponding ABA Model Rule. Identical to Model Rule 3.5(a), (b) and (c); (d) added from DR 7-108 (D).

Corresponding Former Massachusetts Rule. DR 7-106, DR 7-108 (D), DR 7-110 (B), S.J.C. Rule 3:08, PF 1, DF 1.

RULE 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 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 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) 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 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; and

(7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the 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.

(c) 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.

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

(e) This rule does not preclude a lawyer from replying to charges of misconduct publicly made against him or her or from participating in the proceedings of a legislative, administrative, or other investigative body.

Comment

[1] 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 right to know about threats to its safety and measures aimed at assuring its security. It also 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.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that 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, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of

material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

[6] (1) 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;

[7] (2) 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;

[8] (3) 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;

[9] (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

[10] (5) 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

[11] (6) 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.

[12] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[13] Finally, extrajudicial 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.

Corresponding ABA Model Rule. Almost identical to Model Rule 3.6 except paragraph (e) is derived from DR 7-107 (I).

Corresponding Former Massachusetts Rule. DR 7-107.

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the

Berkshire Eagle

Baran's lawyer blasts county 'power brokers'

By D.R. Bahlman
Berkshire Eagle Staff

Monday, October 25, 2004 - WILLIAMSTOWN -- Bernard F. Baran's lawyer has fired a broadside at the "power brokers" of the county's legal establishment, contending that their determination to stonewall the retrial of child sex abuse charges against Baran has kept an innocent man in state prison.

The lawyer, John G. Swomley of Boston, discussed the Baran case last week at the invitation of several student groups at Williams College. Addressing some 60 people gathered in a lecture hall at the college, Swomley blasted the Berkshire County district attorney's office, the county's largest law firm and an ex-prosecutor who now sits as a Superior Court judge.

Swomley said that the judge, Daniel A. Ford of Pittsfield, the former assistant district attorney who prosecuted Baran at his 1985 trial, "buried evidence intentionally" to help assure a conviction in a case that Ford saw as a "high profile ticket to a judgeship."

According to Swomley, who said he recently reviewed portions of the prosecution's file in the Baran case, Ford saw to it that evidence that could have bolstered Baran's defense was not turned over to his lawyer.

Such disclosure of so-called "exculpatory evidence" is required under the U.S. Supreme Court's ruling in Brady v. Maryland, Swomley said.

Specifically, he said, Baran's trial attorney was not informed that the Department of Social Services had turned over to the district attorney's office numerous reports of sexual abuse involving one of Baran's alleged victims. The reports suggested that the abuse was committed by someone other than Baran, Swomley said.

The lawyer described the social atmosphere of the mid-1980s as being highly charged by the issue of child sex abuse and "recovered memory." The Baran case was tried amid the "hysteria" stirred by a series of high-profile child sex abuse cases that had just begun to unfold, Swomley said.

'Outrageous allegations'

Through a spokeswoman for the Massachusetts Trial Court, Ford denied Swomley's charges.

"The outrageous allegations made by Mr. Swomley at the Williams College forum are completely untrue," the judge said. "However, because Mr. Swomley has touched on a case pending before the court, I am constrained by the Judicial Conduct Code from commenting on that matter."

Earlier this year, Swomley filed a motion for a new trial for Baran. A hearing on the motion is scheduled for later this month before Superior Court Judge Francis Fecteau of Worcester.

Swomley contends that Baran was the victim of an injustice brought about by the use of unreliable evidence, the incompetence of the lawyer who defended him at trial, the use of investigative techniques that have since been discredited and prosecutorial misconduct.

Three of the six alleged victims recanted their stories after Baran's conviction, Swomley has said.

"Two told their therapists within a few months of [the convictions], and a third did so in front of a high school class," he wrote in a summary of his motion for a new trial.

Three life terms

Baran, who is now 37, is serving three consecutive life terms in state prison. His convictions were upheld by the state Appeals Court in 1986.

Last week, Swomley said that "no [new] issues" were raised on the appeal, which was handled by attorneys from Cain, Hibbard, Myers & Cook of Pittsfield, the county's largest law firm.

He said that among the materials he recently received from the Berkshire County district attorney's office is a 1985 letter from David Burbank, who was then practicing at Cain, Hibbard, to then assistant district attorney Ford.

Dated some five days after the verdict in the Baran case, the letter requests access to the prosecution's file, presumably to aid Burbank's preparation of a client's civil lawsuit against the Pittsfield day care center where Baran worked and where the sexual abuse allegedly occurred.

Whether Burbank's request was complied with is not clear, but Swomley noted last week that about eight months after the letter was sent, Baran's mother retained the firm to handle her son's appeal of the criminal case. Burbank was one of the lawyers who worked on the appeal, Swomley said.

'Conflict of interest'

"This is a conflict of interest. ... I went to law school and I remember a few things, and one of them is that this is a big no-no," Swomley said.

Burbank is no longer associated with Cain, Hibbard. C. Jeffrey Cook, a partner in the firm, said yesterday that he discussed Swomley's statement with Burbank and that Burbank denied writing such a letter.

"He says it didn't happen," Cook said.

Since taking the case some four years ago, Swomley said, he has been stymied in his efforts to documents and other records that he says could help him establish Baran's innocence.

Swomley has accused the district attorney's office of foot-dragging.

For more than two years, Swomley and the DA's office have been sparring in Fecteau's court over the evidence in the Baran case.

Unedited tapes sought

The matter has been stalled over such issues as preservation of the confidentiality of some of the material, but Fecteau ordered in 2003 that Swomley be provided with all the evidence that the DA's office supplied to Baran's previous lawyers, and Swomley in 2003 signed a "protective order" that guards the confidentiality of some of the evidence.

Among the items sought by Swomley are unedited videotapes of the grand jury that indicted Baran and unedited videos of interviews with the children whom Baran was convicted of molesting.

Last week, Swomley said that the unedited tapes would show the extent of the "coaching" that the children were put through. He said that the preparation of the young witnesses apparently included the promise of "prizes."

On a videotape that he received from the DA's office -- which Swomley said had assured him that the tape had only recently "been found in a box of old DWI videos or something" -- a child is heard demanding to know when he will get his prize.

In a document that runs to more than 350 pages, Swomley alleges that four of the six children who testified at the jury trial held before then Superior Court Judge William W. Simons were not competent witnesses,

primarily because they exhibited no understanding of the difference between the truth and a lie.

"The error was compounded by the fact that none of the children were properly placed under oath to tell the truth," reads a summary of Swomley's brief. "Each child was asked only to 'promise to tell what happened.' "

Swomley said that he has abandoned all hope of resolving outside of court the dispute over evidence.

Last week, he said that his latest attempts to do so were rebuffed by District Attorney David F. Capeless.

"I was under the impression that we were having private discussions," Capeless said last week. "Mr. Swomley evidently feels no compunction in making public statements about them. We will deal with this in court, the proper way. ... If the positions were reversed, I can only imagine Mr. Swomley's outrage. ... This is a 20-year-old case, it's very difficult to put it together, but we are trying to do that."

Swomley said last week that his patience is exhausted and that he is "done trying to work this out quietly."

"I'm fighting to the end now," he said.

D.R. Bahlman can be reached at dbahlman@berkshireeagle.com or at (413) 496-6243.

Berkshire Eagle

Shining a light on Baran case

Tuesday, November 09, 2004 - To the Editor of THE EAGLE:-

I would like to respond to the Eagle editorial of Oct. 26 which characterizes the talk I gave about the Baran case at Williams College as "needlessly clouding the issue with Oliver Stone-style conspiracy theories."

First, I do not believe I ever mentioned the word conspiracy in my talk. Second, whether or not "the 'power brokers' of the Berkshire legal establishment have conspired to prevent Mr. Baran from receiving a retrial," are merely engaged in a little friendly neighborhood back scratching, or are acting alone with no motive beyond laziness, ignorance or a desire to protect their own good names is of no consequence to the end result: an innocent man remains in prison.

My job is to see to it that this innocent man is freed. I might add that I think that is District Attorney Capeless' job too. I appreciate that it appears the editorial board of The Berkshire Eagle at least shares the view that justice was not done at the first trial and that Mr. Baran deserves a new trial. That is really all that the system owes Mr. Baran: due process and a fair trial.

As to the allegations made in my talk at Williams College which you suggest a "power broker" conspiracy, I stand by the allegations themselves. You write "the three assertions are backed by precious little evidence, and the last is simply conjecture." I will address them individually.

- The Berkshire County district attorney's office, specifically District Attorney David F. Capeless has dragged his/her feet in releasing relevant evidence.

I first moved for discovery of the original videotapes of the child victims in the year 2000 from then D.A. Gerard Downing. After claiming to be actively looking for them for the better part of four years, they were discovered in a box of OUI videos just this year. D.A. Downing claimed that staffing shortages precluded him from looking for them faster.

Lest there be any doubt about the foot dragging of D.A. Capeless himself, one look at the pleadings in that case will show that he refused to discharge his duties as a public official properly served with a freedom of information act request. Only when I sought an order to force him to comply with his obligations as a public servant did he back down and make the file available to me.

- The Pittsfield law firm of Cain, Hibbard, Myers & Cook had a conflict of interest related to the appeal process.

In looking at the file in the D.A.'s office, I noticed a letter written by David O. Burbank, then an attorney at the law office of Cain Hibbard. Mr. Burbank was Mr. Baran's appellate attorney and, in our new trial motion filed this last June, we argue that he was ineffective in that appeal. Cain Hibbard obtained Mr. Baran's file from trial counsel in May 1985. The D.A.'s file contains a letter written by Mr. Burbank to then Assistant D.A. Dan Ford, on Feb. 4, 1985, five days after the verdict and less than four months before he began representing Mr. Baran. The letter claimed that he was representing one of the child victims for damages allegedly suffered at the hands of Mr. Baran. Appended to that letter was a release signed by the mother of this child victim authorizing Assistant D.A. Ford to provide confidential documents to Mr. Burbank to facilitate such a suit.

I have inquired of Mr. Baran and his mother, who hired Cain Hibbard, whether they were apprised by Mr. Burbank that he had previously represented one of the child victims and they have unequivocally responded "no." You may consider the letter to be precious little evidence of a conflict. I will say, at this point that we are still seeking more information; nonetheless, I find the letter fascinating.

- Daniel A. Ford, now a Superior Court Judge, buried evidence to secure a high-profile conviction.

There is no secret that in the new trial motion, I averred that Mr. Ford engaged in prosecutorial misconduct. To begin with, at the trial, Assistant D.A. Ford introduced evidence that the initial disclosing child tested positive for gonorrhea of the throat. And despite the fact that Mr. Baran tested negative for gonorrhea, Assistant D.A. Ford spent considerable time at trial convincing the jury that homosexuals like Mr. Baran are more likely carriers of the disease and that it is easy to cure with a little penicillin.

There is also no dispute that this initial disclosing child, at a point before the close of the trial of Mr. Baran, disclosed to the Department of Social Services that his mother's boyfriend put his penis in the child's mouth and ejaculated. This incident occurred chronologically at a point in time prior to the allegations leveled against Mr. Baran. This evidence was *never* turned over to the defense.

Never means not when the trial was going on (DSS had custody of the child and brought the child to Dan Ford's office for weeks of mock trial preparation, brought the child to court for a competency evaluation and brought the child to court for the trial). Never means not in the days after the trial when formal written notice of the abuse was sent to DSS to then Assistant D.A. Downing (Downing was actively involved in the prosecution of Mr. Baran along with Assistant D.A. Ford). Never means not any time before, during or after the appeal filed by Cain Hibbard. Never means not even with Assistant D.A. Ford left the D.A.'s office and went to work for Cain Hibbard. Never means not even when I moved for discovery in 2001 from then D.A. Downing of any allegations that another person besides Mr. Baran abused these child victims.

The only reason I came to know of these serious allegations was because of the diligence of a civil associate in an insurance defense firm who encountered them while defending the day care center against civil lawsuits brought by the families of these child victims. The only reason this evidence ever saw the light of day is because that civil associate became convinced of Mr. Baran's innocence and saw to it that this evidence did not remain buried. Do I know that Dan Ford buried this evidence to secure the conviction? No. Do I know that he buried it to make sure that the conviction did not get overturned on appeal? No. Do I know that he buried it to make sure that the conviction did not get overturned on appeal? Well, I guess to say I know *why* Mr. Ford did what he did would be conjecture. To say, however, I know *what* Dan Ford did is not. Dan Ford *never* disclosed this evidence to the defense and D.A. Downing *never* disclosed this evidence to the defense. All the while Mr. Baran spent the last 20 years in prison.

You decide why these public officials kept that information secret all those years.

JOHN SWOMLEY

Boston, Nov. 4, 2004

The writer is Bernard Baran's lawyer.

Berkshire Eagle

Berkshire lawyers circle the wagons

Tuesday, December 07, 2004 - To the Editor of THE EAGLE:--

I'm responding to a group of Berkshire County lawyers who have written a letter titled "Good lawyers wrongly smeared" in The Eagle of Nov. 24.

That they won't say anything bad about each other may be part of the problem.

I have been working on Bernard Baran's case going on five years now (almost entirely unpaid) and as I have tried to pry it up off the floor of Berkshire County jurisprudence where it has been firmly nailed and walked over these last 20 years by the fine members of the Berkshire County Bar, I am struck by how little interest any of them have had in correcting an injustice committed in their own back yard.

Where I come from lawyers are not infallible. I was a public defender in Brooklyn, N.Y., for almost five years and have been taking court-appointed cases in the Boston area ever since. You can screw up at trial or on appeal and when you do, even when it is a close call, if it helps your client you fall on your sword. And when you are doing an appeal or a new trial motion you must have no qualms about leveling those claims either. With the district attorney's office it is an even brighter line: If you see that justice was not done, whether by you, your subordinate, your predecessor, a witness or even the other side, you have an obligation to do justice. It's that simple.

I've filed a new trial motion which claims among many other things: that trial counsel was ineffective, that appellate counsel was ineffective for not arguing that trial counsel was ineffective and that there was prosecutorial misconduct. What about that shocks any of their consciences?

Have I dared to defend myself in the media? This exchange began with a response by me to an editorial accusing me of accusing others of being conspiratorial in a talk I gave at Williams College. It can't be that. It must be that I have dared say anything public at all. Is Williams College not a fit place to hold discussions about justice in Berkshire County? Why should I not say publicly what I had no difficulty writing in a brief filed publicly in open court? I'm of the strong conviction, as a lawyer and a private citizen, that the public has a right to know about the public acts of public officials. Sunlight is the best disinfectant.

They accuse me of being "grotesquely unfair" to Dan Ford for bringing up what has been covered in The Berkshire Eagle. Somehow this violated "rules that lawyers are supposed to follow -- let facts come out in the courtroom where they belong." They must be forgetting that the trial has already happened in this case, and the central problem with the trial is that the facts did not come out in the courtroom. Now the primary ethical reason lawyers should not comment about cases in the media is that they may influence a potential jury that may try the case, not that they may embarrass a public official. There is no risk of influencing a potential jury in this case -- that was done 20 years ago.

What is most infuriating about the letter is that the lawyers care more about reputations -- both justly and unjustly earned -- than they do in even finding out about whether an injustice occurred. That they "Hold no collective opinion about the merits of the Baran conviction" likely means that they have not bothered to learn about it. How dare they impugn me for speaking up?

I have been trying for four years to get evidence to prove Baran's innocence from the DA's office, not quietly, I might add. What have they done to raise a cry that justice shouldn't be done this way in your county? Any one of them has the knowledge and training to read the transcripts, which are publicly available, and decide for themselves whether Bernard Baran received a fair trial. I challenge them to do that and bet there won't be a lawyer among them who will say "Justice was done."

Except maybe Lee Fluornoy, who really shouldn't be a signatory to your letter. The letter looks to the casual

reader as if it is written by concerned but disinterested lawyers, and Ms. Fluornoy, at that time, was an assistant district attorney who along with Dan Ford and Gerard Downing were members of the team that prosecuted Mr. Baran. She is anything but a disinterested lawyer.

JOHN G. SWOMLEY

Boston, Nov. 29, 2004

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Victims, but not of Baran

Letters
Berkshire Eagle

Wednesday, July 12
To the Editor of THE EAGLE:-

There is little to say at this point in response to those claimed "victims" of childhood sexual assault in the Bernard Baran case who continue to believe, even into their adulthood, the tales of abuse that were driven into their young, impressionable minds decades ago in the ghastly brainwashing sessions that at long last have been made part of the official court record of the case. ("Accuser resolute Baran is guilty," Eagle, July 4) Mr. Baran was granted a new trial after the videotapes, having remained hidden while Mr. Baran spent two decades in prison for a crime that never even took place, were finally located and presented to the court.

Superior Court Judge Francis Fecteau, who viewed the videotapes, heard several days of live testimony, reviewed many volumes of trial evidence and testimony, and spent an entire year studying this trial and writing an exhaustive 79-page opinion, has explained to any rational, reasonable person willing to listen with an open mind, precisely how not only the jurors were fooled into believing that Mr. Baran abused these young children, but how the children themselves were brainwashed into believing this fantasy. When the videotapes and other evidence showing how this false testimony was created are eventually made available to the public — which we hope will happen soon — there should not be a fair and rational person left who has the slightest doubt in Baran's innocence.

Hopefully the victims, too, will recognize that they were indeed victimized — but not by Mr. Baran. Many lives were wrecked by the now-discredited investigatory and prosecutorial techniques used in this and similar cases nationwide that marked the era of the 1980s sex panic so eloquently described in Judge Fecteau's opinion.

HARVEY A. SILVERGLATE

Cambridge, July 4, 2006

The writer is co-counsel with John G. Swomley for Bernard Baran.



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Berkshire Eagle, The (Pittsfield, MA)

September 2, 2007

Section: Headlines

Article ID: 6784287

DA files Baran appeal

Jack Dew, Berkshire Eagle Staff

Sunday, September 02 PITTSFIELD — Seeking to return Bernard J. Baran to prison, the Berkshire County district attorney's office has filed an appeal arguing that a judge wrongly freed the former day-care worker who had served 21 years of a life sentence for allegedly molesting five children at the Early Childhood Development Center in Pittsfield. Baran, now 42, was convicted in January 1985 and sentenced to five concurrent life prison sentences.

His initial appeal was denied a year later, but his case was resurrected by a growing number of supporters who believed that Baran, a gay man, was a victim of hysteria surrounding day care centers and child molestation allegations during the 1980s.

Superior Court Judge Francis R. Fecteau overturned Baran's convictions in June 2006, concluding that his original defense attorney, Leonard Conway, was incompetent, and that Baran had therefore not received a fair trial. Baran posted a \$50,000 bond and has been free since, although he continues to be monitored with an electronic bracelet and must adhere to strict rules governing his movements.

Berkshire District Attorney David F. Capeless and Assistant District Attorney Joseph A. Pieropan argue in their brief — filed last week in the state Appeals Court — that Fecteau's conclusions were flawed, and that the judge overstretched his judicial authority when he granted Baran a new trial.

Fecteau's findings "are based in significant part upon surmise and facts arguably absent from the record evidence," they wrote, including his conclusion that Baran's original attorney committed a fatal error when he failed to demand unedited copies of videotaped interviews of the alleged victims.

The Appeals Court must now decide whether Baran's defense team was able to meet the high threshold needed to overturn a conviction based on ineffective counsel and whether Fecteau properly interpreted the law.

If the Appeals Court upholds Fecteau's findings — barring intervention by the Supreme Judicial Court — Capeless would have to decide whether to prosecute Baran a second time, a difficult prospect given that the alleged victims would be testifying on events that occurred when they were 2 or 3 years old; some have already told The Eagle that they do not remember the alleged abuse.

If the Appeals Court strikes down Fecteau's ruling, Baran could be returned to prison to serve the remainder of his sentence. His defense team could pursue other appeals — including the possibility of prosecutorial misconduct for failing to turn over the videotapes — and also could seek relief from the Supreme Judicial Court.

Capeless declined to comment on the appeal, saying that a Superior Court judge had issued a gag order barring attorneys from discussing the case.

Baran's lead attorney, John **Swomley**, who said there is no gag order in the case, noted that the district attorney's brief left out several significant facts.

Of prime importance, **Swomley** said, is the significance of the videotaped interviews with the alleged victims, some of whom said they had been molested by someone other than Baran, while others at times denied ever having been molested at all. At the least, the videos show the children being led and prompted, **Swomley** said; at most, they offer evidence that could have cleared Baran entirely.

"(The district attorney's brief) doesn't really tell the story of what happened (to Baran) in any meaningful way," **Swomley** said. "It jumps in and tries to make an unintelligible story into an argument that all the government's arguments are reasonable. They seem reasonable if you don't learn what happened, but we will be sure ... that the appellate judges get the whole picture."

Much of Fecteau's ruling hinged on the videotaped interviews of the alleged victims, which the district attorney's office had said were lost until shortly before a 2004 hearing on Baran's appeal

Had Conway — Baran's original attorney — demanded to see the tapes before the first trial, Fecteau concluded, he would have been able to mount a much more effective defense.

In their brief, Capeless and Pieropan argue that Fecteau "placed too much weight upon the relevance of the videotapes."

The tapes were made after the children had told parents or authorities of the alleged abuse and were prepared solely for the grand jury that eventually indicted Baran, they wrote. Far from being the sole evidence upon which the case was built, the tapes were simply a way to save the children from the pain of testifying.

Even if the videotapes could have helped the defense, they argue, the children's testimony during the trial displayed many of the same supposed flaws captured on tape: The children were reluctant to testify and needed to be guided by leading questions. One even denied that she had ever been abused.

"The prolonged trial testimony of the children abundantly demonstrated their hesitancy to identify (Baran) as their abuser," they wrote.

The brief offers similar critiques of Fecteau's other rulings. It asserts that Baran's original attorney appropriately used evidence that one of the alleged victims had gonorrhea — for which Baran tested negative — to argue that Baran could not possibly have molested him.

And while Fecteau found that Conway should have hired an expert witness to help analyze the children's statements, the district attorney's brief asserts that the failure to hire an expert is not sufficient evidence of ineffective counsel to merit overturning a conviction.

Swomley said the district attorney's argument that Conway was an effective attorney is flat wrong, based on an incomplete picture of the trial and the atmosphere surrounding it.

"This was a poor high school dropout, no education, no means, and he went to trial in less than six months with counsel who did no investigation, consulted no experts, called no experts, was bereft of thoughts of how to address a case of this complexity because he had never done a case of this complexity," **Swomley** said.

Swomley's office will file a response to Capeless' brief in the coming weeks, and then the matter will be scheduled for a hearing before a three-judge panel in Boston.

To reach Jack Dew: jdew@berkshireeagle.com (413) 496-6241

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Opinion

Using a ban on pre-trial publicity to avoid embarrassing prosecutors, judges

By Harvey A. Silverglate and James Fallows Tierney

Prior restraints of speech are among the most disfavored threats to constitutional rights, as they undermine the democratic ideal of a well-informed public.

This principle was recently illustrated when an Appeals Court judge quickly dissolved an order preventing television station WHDH from broadcasting a story about two Boston firefighters. There, no privacy or other compelling interest outweighed the public's interest in learning about drug use among public safety officers.

On the other hand, when certain urgent values are at stake — such as the right to a fair trial — we tolerate some modest limitations on speech.

Massachusetts Rule of Professional Conduct 3.6 limits lawyers' pretrial public statements if they would "have a substantial likelihood of materially prejudicing an adjudicative proceeding."

Protecting the integrity of the trial process — by preventing jurors from being influenced by lawyers' extrajudicial speech — is deemed a justifiable ground to limit counsel's First Amendment rights.

Though intended to protect the accused, this principle can sometimes be misapplied to protect the interests of public officials who have violated their duties. One case in which we are involved illustrates the importance of limiting a judge's power to gag lawyers seeking to inform the public on matters of overwhelming public concern.

In 1985, Bernard Baran, a gay 19-year-old, was convicted of child molestation and rape at the height of the now widely discredited "day care center child sexual abuse" hysteria famously resulting in the Amirault family prosecutions.

Baran served 21 years of his life sentence until June 13, 2006, when Superior Court Judge Francis R. Fecteau granted Baran's motion for a new trial, largely on grounds of ineffective assistance of counsel. (See *Commonwealth v. Baran*, 2006 Mass. Super. LEXIS 393.)

Fecteau's 79-page opinion detailed how Baran's trial counsel failed to counter the prosecution's tactics, which ranged from suggestive questioning of child witnesses to playing into witnesses' and jurors' homophobia.

Although Fecteau had been designated to hear the motion, his colleague on the Superior Court, Jeffrey A. Locke, was assigned to the case for all other purposes. Before the commonwealth docketed its appeal, Locke imposed a patently unconstitutional de facto gag order. It prevented Baran's post-conviction counsel — John G. Swomley, Eric B. Tennen and Harvey A. Silverglate — from commenting on a case that throws light on the fairness of our criminal justice system in cases involving sensational accusations of child sex abuse, as well as the extent to which exculpatory evidence might too readily be lost or even hidden.

Those insulated from public examination included the trial prosecutor (now sitting Superior Court Judge Daniel A. Ford) as well as a post-conviction (now deceased) district attorney who claimed for years that he could not find exculpatory material that was located rather quickly by his successor in office.

Locke's gag order, remarkably, was constructed in a way that effectively precluded appellate review. The lesson is that when courts wish to deter constitutionally protected discussion in public forums, they sometimes can figure out more than one way to skin the First-Amendment cat.

However, as the case has now been docketed for appeal, counsel are free to exercise their First Amendment rights and bring the case to the attention of the bar and the public.

'What happened'

When charges were brought against Baran in 1984, he was working at a day care center in Pittsfield. One set of parents, spurred by seemingly homophobic concerns, alleged that Baran molested their son. A second mother heard about the investigation and raised further allegations.

In his decision, Fecteau described the media-fueled frenzy that led more parents to join what became a witch hunt. Additionally, in order to identify potential "victims," "[t]he DSS held a 'good touch, bad touch' puppet show ... [which] was attended by ... some of the children who testified against Mr. Baran."

In all, six children designated as victims were subjected to hours of suggestive questioning — videotaped to provide evidence to the grand jury — in which investigators and parents used promises of prizes and food, anatomically correct dolls, and various conditioning techniques and admonitions to tell "what happened."

Unsurprisingly, the children's ultimate versions coincided with the investigators' stated suspicions. (Like the puppet show, these questioning techniques have since been largely discredited, as they may lead impressionable children to provide testimony about things that never occurred.)

The children ultimately adopted the scenarios suggested by the interrogators' questions, and the brief film clips from the taped interviews when the children finally accused Baran of molestation were strung together and shown to the grand jury, which indicted.

Neither the grand jury nor the trial jury saw the process by which those accusations were crafted. When Baran's post-conviction counsel took the case, they had not seen the unedited tapes. However, they reasoned that the inculpatory snippets shown to the grand jurors must have come from longer tapes of the interviews.

As Judge Fecteau noted, over a period of 43 months Baran's new attorneys repeatedly sought to force then-District Attorney Gerard Downing to find and turn over the tapes. Downing insisted that, despite his best efforts, he could not locate them. Only after Downing suffered a fatal heart attack in December 2003, when his successor David F. Capeless resumed the search, did the DA's Office locate the "missing" tapes and turn them over at a September 2004 discovery hearing.

Baran's post-conviction counsel long had their suspicions of what the unedited videotapes would show, but nonetheless were shocked when they finally viewed them.

The tapes show how accusations of child sexual abuse can be constructed virtually out of whole cloth. Indeed, they are replete not only with investigators' improper and suggestive interviewing techniques, but also with the children's repeated *negative* answers to questions about whether Baran had raped or molested them.

As Fecteau wrote: "The unedited versions contain statements in which *the children deny that Mr. Baran had done anything to them and statements in which they accuse other persons of abuse.*" (emphasis added)

In Fecteau's opinion, extensive quotations from the children's interviews seem a public acknowledgment of the weakness of the commonwealth's case; indeed, the unedited tapes unraveled the prosecution.

Fecteau did not rule on whether the trial prosecutors — including Ford — had turned over the unedited tapes to Baran's trial counsel who failed to use them at trial, or whether disclosure was limited to the seemingly inculpatory, heavily edited snippets the grand jurors saw.

If the former were true, Baran was deprived of effective assistance of counsel. If the latter suppression occurred, the prosecutors committed a serious due process violation by withholding powerfully exculpatory evidence.

Fecteau seemingly found it unnecessary to resolve this uncomfortable question, involving the actions or inactions of one prosecutor who is now on the bench and another who passed away, since Baran would have been deprived of an essential constitutional right under either scenario.

Enforced silence

Baran's case raises profound institutional questions of fairness in our criminal justice system, especially in child sexual abuse cases. How can juries be assured of getting full evidence in cases involving testimony by very young children? How might a court control the use of unduly suggestive questioning protocols? How can courts assure that exculpatory evidence is not being withheld?

These questions and others are worth raising, and Baran's post-conviction counsel have been and remain in a good position to raise them. In fact, they raised them often, until Locke's October 2006 gag order.

At a speech at Williams College, and later in the Berkshire Eagle, Swomley questioned whether Ford had "buried evidence intentionally" by failing to disclose the unedited tapes to trial counsel.

Similarly, Silverglate described the videotapes' contents in a letter to the Eagle, explaining that "[w]hen the videotapes ... are eventually made available to the public ... there should not be a fair and rational person left who has the slightest doubt in Baran's innocence."

Swomley and Silverglate were not alone in discussing the case. As he campaigned for election to the office he inherited from Downing, Capeless opined on the case when questioned, proclaiming his personal belief in Baran's guilt. He promised to appeal and noted that "[i]f I'm successful [in the appeal], there will be no trial, and he will go back to jail." (During this time, the case remained in a legal limbo, awaiting docketing in the Appeals Court.)

While seeking election, Capeless filed a motion to gag defense counsel, claiming that their speech triggered Supreme Judicial Court Rule 3.6, even though a re-trial in the near future was a near-impossibility.

In front of Locke, Capeless argued in October 2006, one month before he was elected to office, that "the commonwealth's concern for the future" forced him to seek the gag order.

Locke, ignoring the constitutional arguments proffered by Massachusetts ACLU counsel representing Swomley and Silverglate, found, remarkably, that Swomley and Silverglate's speech "crosses the line of Rule 3.6," which is intended to protect jurors from being unduly influenced by lawyers' extrajudicial speech.

Of course, the case was headed to the Appeals Court; retrial in front of a jury likely would be years away, if ever, given the lengthy appellate and habeas corpus trials typical of cases like Baran's.

Capeless requested an order against future breaches of Rule 3.6. Locke, having already expressed his view that Baran's counsel had violated the rule, instead took the matter under advisement. From the bench, Locke said that the court "will issue a ruling." In the meantime, "counsel are under an obligation to abide by the rules of professional conduct," which "I expect that they will. I would expect, given this motion, that I would see a request for sanctions if either side did not" abide by Rule 3.6.

Locke never did issue his formal gag order. Instead, he hung this veritable Sword of Damocles over counsel's head, failing — or refusing — to issue an order that would be appealable. For 11 months, until the commonwealth docketed its appeal of the new trial order, the threat of sanctions served the purpose of unconstitutionally gagging counsel. It was a very long prior restraint.

As the commonwealth has finally docketed the appeal, Judge Locke's enforced silence no longer deters. We raise these urgent public policy questions to the Massachusetts bar, wholly aside from the case's more technical legal issues being raised in formal appellate proceedings.

Questions about the fairness of the criminal justice system and the mechanisms for discovering and punishing prosecutorial misconduct constitute urgent core political speech protected by our state and federal constitutions.

In a landmark opinion on pre-trial publicity, *Gentile v. State Bar of Nevada* (1991), U.S. Supreme Court Justice Anthony Kennedy questioned whether there was "any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted. ... Public awareness and criticism have even greater importance where, as here, ... the criticism questions the judgment of an elected public prosecutor."

Surely inquiry and criticism are warranted when the questions involve the conduct of a trial prosecutor who is now a sitting judge, as well as that of a district attorney who, for years until his death, claimed not to have found exculpatory material readily located by his successor.

And there is also a public interest in ensuring that the improper techniques used to indict and convict Bernard Baran never again destroy the life of any citizen.

Harvey A. Silverglate is of counsel to the Boston firm of Good & Cormier and co-counsel, with John G. Swomley and Eric B. Tennen of Boston's Swomley & Associates, for Bernard Baran. James Fallows Tierney is Silverglate's research assistant and paralegal and plans to attend law school next year.

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT
INDICTMENT NOS. 18042-18051; 18100-18101

COMMONWEALTH OF MASSACHUSETTS

v.

BERNARD F. BARAN, JR.

ORDER

The Court hereby Orders that all counsel for the Defendant, and any persons working on their behalf, forthwith cease from making public extra-judicial oral and/or written statements concerning the above-captioned case that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”, in violation of the Massachusetts Rules of Professional Conduct, including, but not limited to, Rule 3.6: Trial Publicity.

By the Court,

Jeffrey A. Locke
Associate Justice, Superior Court

Dated: