The Commonwealth of Massachusetts

BERKSHIRE DISTRICT ATTORNEY

DAVID F. CAPELESS
DISTRICT ATTORNEY

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July 17, 2006

John G. Swomley, Esquire
Swomley and Associates
227 Lewis Wharf
Boston, Massachusetts 02110

RE: *Commonwealth v. Bernard F. Baran, Jr.*

Dear Mr. Swomley:

Enclosed please find the Commonwealth's Motion for An Order Requiring Counsel to Cease Making Public Extra-Judicial Statements Concerning the Case with attachments and proposed Order for your files.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

David F. Capeless
District Attorney

DFC/jaf
(w/enclosures)

CERTIFICATE OF SERVICE

I, David F. Capeless, District Attorney for the Berkshire District, do hereby certify that I caused to be served, by prepaid postage, on Monday, July 17, 2006, upon John G. Swomley, Esquire, at Swomley and Associates, 227 Lewis Wharf, Boston, Massachusetts 02110, a copy of the Commonwealth's Motion For An Order Requiring Counsel to Cease Making Extra-Judicial Statements Regarding the Case.

Signed under the pains and penalties of perjury, this 17th day of July, 2006.

David F. Capeless
District Attorney

Date: 07/17/2006

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 AN ORDER REQUIRING COUNSEL TO CEASE MAKING PUBLIC EXTRA-JUDICIAL STATEMENTS CONCERNING THE CASE

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 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 an 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 argued 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. 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." Furthermore, Attorney Silverglate stated 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 07/12/2004 letter to the Editor of the *Berkshire Eagle*).

ARGUMENT

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. See Mass. R. Professional Conduct 3.6 (attached). 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.

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 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 adjudicative proceeding in the matter."

One factor in determining the prejudicial impact of pre-trial publicity is the nature of the proceeding involved. Of all proceedings, "[c]riminal jury trials [are] most sensitive to extra-judicial speech." Comment [6] to Rule 3.6. Another factor is the nature and the circumstances of the crime charged. 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).

Certain subjects are especially likely to have a material, prejudicial effect on a criminal proceeding. These subjects relate 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. Likewise, these subjects include "any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration." See Comment [5](4) to Rule 3.6. Another area of particular concern relates to "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." See Comment [5](5) to Rule 3.6. Compare *Commonwealth* v. *Burden*, 15 Mass. App. Ct. 666, 672 (1983) (media reported only information that parties anticipated would be admitted into evidence at trial).

In this case, counsel'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 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 request this Honorable Court allow this motion and issue the proposed, attached Order.

Respectfully submitted for the
COMMONWEALTH OF MASSASHUETTS

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Dated: July 17, 2006

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.

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.

By the Court,

_____
Bertha D. Josephson
Associate Justice, Superior Court

Dated: July _____, 2006

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, than 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.

[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