COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.	SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT
COMMONWEALTH v. BERNARD F. BARAN, JR..	IND. Nos. 18042-18051; 18100; 18101

OPPOSITION TO THE COMMONWEALTH'S MOTION FOR SANCTIONS

I. INTRODUCTION

The District Attorney's Motion for Sanctions seeks, on its face, an entirely superfluous order -- and sanctions -- for defense counsel to comply with a rule with which defense counsel must comply and is already complying. Of course, what the District Attorney actually wants is to impermissibly silence speech that discusses the Order and Decision Granting a New Trial ("Decision") (Fecteau, J.) to Bernard Baran ("Baran"), a man, now deemed presumptively innocent, who has served the past twenty years in prison as the result of a constitutionally defective trial. In its Decision, the Court found Mr. Baran's trial to be riddled with error and criticized the prosecution's actions as well as those of trial defense counsel. Because the Court's Decision raises issues going directly to the heart of the fairness of our criminal justice system, this case has received, should receive, and will continue to receive, significant public attention. But no jury trial is even close to imminent, and there is no basis under Massachusetts Rule of Professional Conduct 3.6 ('Rule 3.6") to restrain or sanction speech on these issues. To the contrary, the District Attorney's appeal of Judge Fecteau's Decision is currently pending in the Appeals Court, it is fully briefed, and the issues, facts, and arguments are a matter of public

record. It is not only appropriate for Mr. Baran's defense counsel to comment on the appeal, and respond to the claims and arguments raised by the District Attorney, but, by any reasonable standard, counsel would be seriously deficient if they remained mute. Mr. Baran is, after all, attempting to restore his reputation and his life, taken away from him as a result of errors and omissions by the legal system.

Claiming a violation of Rule 3.6, the District Attorney seeks unspecified sanctions against Attorney Harvey Silverglate for co-authoring an article, critical of the judiciary, that appeared in *Massachusetts Lawyers Weekly*, a legal trade publication. The article, "Using A Ban On Pre-trial Publicity To Avoid Embarrassing Prosecutors, Judges," *Massachusetts Lawyers Weekly*, Nov. 5, 2007, argues that the Court's (Locke, J.) failure to issue a written ruling on a previous motion for a gag order -- for well over a year -- served as a *de facto* gag order impermissibly restricting speech -- and from which Attorney Silverglate could not appeal. Mr. Silverglate notes, accurately, that he in fact refrained from speaking out about the case while awaiting the written, formal gag order that never arrived.

The District Attorney's Motion for Sanctions should be denied and his request for an order to abide by the rules should be rejected. There has been no violation of Rule 3.6. Counsel's statements in *Massachusetts Lawyers Weekly* about judicial action and the pending appeal -- all matters of public record in a case of significant public concern -- have not been shown to have any effect, let alone "a substantial likelihood of materially prejudicing" a jury. (Emphasis added.) At this point, we do not know if a jury ever will be impaneled and likely cannot know for a substantial period of time -- perhaps years -- until the appeal finishes winding its way through the appellate courts, including possible post-conviction *habeas corpus* litigation in the federal system. The District Attorney can hardly suggest that a discussion of court action in a publication aimed at lawyers will prejudice a hypothetical jury pool in Pittsfield, Massachusetts months or years in the future. The article which, admittedly, is critical of the judiciary, is certainly entitled to significant First Amendment protection. Rule 3.6 was not, and constitutionally could not, be aimed at shielding judicial actions and inactions from discussion

and critique. In any event, such statements are allowed under the safe harbor provisions of Rule 3.6. And, of course, it goes without saying that it would be unseemly for this Court to enter an unnecessary, improper and unconstitutional gag order in a situation where it is the Court, in part, being criticized by the article in question.

II. BACKGROUND

A. The District Attorney's Previous Effort to Obtain a Gag Order.

On July 17, 2006, one month after Baran's Motion for a New Trial was granted, in part because the prosecution did not make crucial unexpurgated videotape evidence available to defense counsel, *see* Memorandum of Decision and Order on Defendant's Motion for a New Trial, Berkshire Superior Court Criminal Action Nos. 18042-51; 18100-1 (June 13, 2006), the District Attorney sought a blanket prohibition against defense counsel making any statement outside of the confines of the courthouse about any aspect of this case.

On October 23, 2006, the Superior Court (Locke, J.) held a hearing on the District Attorney's motion for a gag order. At that hearing, Judge Locke took the District Attorney's motion under advisement. He did not issue any ruling from the bench, but admonished counsel to abide by Rule 3.6, governing pretrial publicity, and suggested that if counsel exceeded the rule, he would expect a motion for sanctions to be filed. He also suggested that statements by Attorney Silverglate "crossed the line," an observation with which Attorney Silverglate vigorously disagrees and that is not supported by the law. Because Judge Locke did not enter any order, either granting or denying the District Attorney's gag order, Attorney Silverglate could not appeal any adverse ruling. (The District Attorney's public statements that Judge Locke issued a gag order are incorrect. *See* Motion for Sanctions, ¶ 10. No such order appears on the docket, and had any such order entered, it certainly would have been appealed and, we predict with all due respect, reversed.)

B. Counsel Refrains from Public Speaking until the District Attorney's Appeal Is Docketed.

Out of respect for the Court, Mr. Baran's attorneys decided to refrain from speaking about the case while the motion for a gag order was under advisement. Mr. Baran's attorneys waited for a decision on the motion for a gag order for eleven months. On July 18, 2007, the Appeals Court docketed the District Attorney's appeal of the Decision granting a new trial. *See* Appeals Court Docket, No. 2007-P-1096, attached hereto at Tab 1. The District Attorney filed his brief with the Appeals Court on August 25, 2007 (*see* Motion for Sanctions, ¶ 9), and Mr. Baran filed his brief and a supplemental appendix on October 31, 2007. The District Attorney did not file a reply brief. *See* Appeals Court Docket. The appellate briefs are a matter of public record -- none of the briefs nor the supplement appendix are under seal. *See id.* As a result, public interest was renewed and it is entirely appropriate for counsel to speak about their client's case, the appeal, and matters of public record. Moreover, after the appeal was docketed and briefs filed, it became clear that no trial was in any way imminent.

In his Motion for Sanctions, the District Attorney cites two extra-judicial statements, made after the appeal was docketed, by Mr. Baran's counsel. None violate Rule 3.6.

First, on September 2, 2007, immediately after the District Attorney filed his brief, but before Mr. Baran had filed his response, *The Berkshire Eagle* ran a story "DA Files Baran Appeal." *Berkshire Eagle,* Sept. 2, 2007, attached hereto at Tab 2. *See* Motion for Sanctions, ¶ 10. The article describes Judge Fecteau's decision to overturn Mr. Baran's convictions, and the arguments that the District Attorney makes in his appellate brief. The article quotes the District Attorney's brief, including criticisms of Judge Fecteau's findings of fact.

In the article, Mr. Baran's attorney, John Swomley, appropriately responds, "noting that the district attorney's brief left out several significant facts":

> "(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."

Id. There is nothing inappropriate in a defense attorney whose client has prevailed in a motion for new a trial, in response to statements made in the Commonwealth's public brief, on an issue central to the appeal, stating publicly that, in his view, there is evidence "that could have cleared Baran entirely." Motion for Sanctions, ¶ 10.

Second, the District Attorney complains about an article in *Massachusetts Lawyer's Weekly* co-authored by Attorney Silverglate that, as its title suggests, is a criticism of the judiciary, a *de facto* gag order, and the resulting impermissible prior restraint on speech. Motion for Sanctions ¶¶ 11-12. "Using A Ban On Pre-trial Publicity To Avoid Embarrassing Prosecutors, Judges," *Massachusetts Lawyers Weekly*, Nov. 5, 2007, attached hereto at Tab 3. The lede -- "Prior restraints of speech are among the most disfavored threats to constitutional rights, as they undermine the democratic ideal of a well-informed public" -- says it all. In the piece, Attorney Silverglate and his co-author James Tierney state the standard under Rule 3.6 and observe that "[p]rotecting 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." They note that "[t]hough [the Rule is] 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." The article criticizes Judge Locke for "impos[ing] a patently unconstitutional de facto gag order," which because no order issued, was not appealable.

To explain exactly the type of speech that is being restrained by the *de facto* gag order, the article gives a brief chronology of the Mr. Baran's case, paraphrasing and directly quoting Judge Fecteau's 79-page Decision. For example, the article quotes Judge Fecteau: "The unedited versions [of the videotapes] 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 the article).

The article then argues that the *de facto* gag order is impermissible because "[q]uestions 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."

III. ARGUMENT

A. The District Attorney Has Not Even Attempted to Make a Showing of Any Substantial Likelihood That These Statements Will Materially Prejudice Any Jury.

Rule 3.6 governs "Trial Publicity" and limits only extrajudicial statements that a lawyer "reasonably" should know will "have a substantial likelihood of materially prejudicing" a potential jury.[1] (Emphasis added.) To be consistent with the First Amendment, Rule 3.6 demands that counsel's right to free expression be balanced against the right to an impartial jury. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75 (1991) ("[T]he 'substantial likelihood of material prejudice standard' constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."). Thus, the key question is whether comments of counsel would have a substantial likelihood of materially prejudicing the ability to impanel an impartial jury. *See id.* at 1075 (the standard imposes "only narrow and necessary limitations on lawyers' speech" and is "aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire."); *Clement v. Sheraton Boston Corp.*, 1993 WL 818763 (Mass. Super. Dec. 17, 1993) ("It is incumbent for [party seeking gag order] to demonstrate that the statements attributed to the attorneys . . . created 'a substantial likelihood of materially prejudicing an adjudicative proceeding.'") (*quoting Gentile*, 501 U.S. at 1074-75).[2]

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[1] Substantial likelihood of material prejudice is a high standard. Even comments that are reasonably likely to cause material prejudice are not proscribed by the Rule. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986) (reversing trial court for applying standard of "reasonable likelihood of substantial prejudice" to issue of whether pretrial proceeding should be closed to the public and holding that correct standard was a showing of a "substantial probability" of prejudice to fair trial rights).

[2] Although there is little Massachusetts case law directly addressing gag orders such as

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See Rule 3.6, Comment 1 ("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.").

Here, no jury trial is imminent -- indeed no trial may ever happen. The case is on appeal precisely because the District Attorney wants to prevent a trial by jury. Should the District Attorney lose its appeal and decide to re-prosecute Mr. Baran, any jury trial would likely be well more than a year away.

One of the key indicators of whether pretrial publicity is likely to impact the ability to obtain a fair trial or impanel a jury is the proximity of the publicity to the time of the trial. *See, e.g., Gentile*, 501 U.S. at 1044 (Kennedy, J., concurring) ("[E]xposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date."); *United States v. Kelly*, 722 F.2d 873, 879 (1st Cir. 1983) (to be prejudicial pretrial publicity, "the publicity must be proximate in time to the trial"); *United States v. Pfingst*, 477 F.2d 177, 186 (2d Cir. 1973) (where press conference occurred "some six months before the jury in the bankruptcy trial was drawn," no prejudicial pretrial publicity because "the memory of the public for such news is short"); *Oryang v. State*, 642 So.2d 989, 993 (Ala. Crim. App. 1994) (where approximately one year and four months elapsed from the time of articles to trial, "[t]he passage of so much time clearly weighs against any prejudicial impact that the articles may have had").

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the one requested, the Supreme Judicial Court's decisions in other areas indicate that it imposes a stringent burden on a party that contends that publicity will result in prejudice. *See Commonwealth v. Clark*, 432 Mass. 1, 8 (2000) (explaining that before a trial may be closed to the public, "[1] the party seeking closure must advance on overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] [the judge] must consider reasonable alternatives to closing the proceeding, and [4] [the judge] must make findings adequate to support the closure.") (*quoting Commonwealth v. Martin*, 417 Mass. 187, 194 (1994)). *Cf. Commonwealth v. Colon-Cruz*, 408 Mass. 533, 551 (1990) (trial judge should exercise power to change venue because of pretrial publicity with "great caution" only after "solid foundation in fact has been first established", noting that "[a] defendant's right to a fair and impartial jury does not require that jury members have no prior knowledge of the crime").

Because no trial is imminent, counsel's statements do not violate Rule 3.6. *See Gentile*, 501 U.S. at 1037 (Kennedy, J., concurring) (standard "requires an assessment of proximity and degree of harm"). *See also Commonwealth v. Carter*, 537 Pa. 233, 250, 643 A.2d 61, 69 (1994) (where "there was a fifteen month 'cooling off' period between the prejudicial articles and the jury selection," no error in not issuing a gag order). Sanctions certainly are not warranted where any harm to the jury process is entirely speculative. Indeed, "limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993).

Even if the likelihood of a trial anytime in the foreseeable future was not hopelessly speculative, the statements identified by the District Attorney in Attorney Silverglate's article or elsewhere do not have a substantial likelihood of materially prejudicing a jury pool. An article published in the professional publication, *Massachusetts Lawyers Weekly*, criticizing the court for letting over a year pass without issuing a judicial decision on a motion for a gag order cannot seriously be seen to taint a jury pool in Pittsfield, Massachusetts, or anywhere else. Certainly, the District Attorney cannot be seeking to sanction Attorney Silverglate because appellate judges might read his *Massachusetts Lawyers Weekly* article. *Cf. Bridges*, 314 U.S. 252, 273 (1941) ("To regard [newspaper articles], therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise.").

In any event, regardless of any statements by counsel, the appeal will receive media coverage. The initial investigation and conviction received a great deal of media coverage, as did the Court's vacating the conviction twenty years later. The pending appeal is a matter of public record, as are the briefs and the facts and arguments presented in them. As the public record reveals, this appeal concerns, among other things, whether a nineteen year old man was wrongly convicted and served over twenty years in prison based on questionable investigatory tactics involving the statements of three year olds; whether exculpatory evidence was withheld from the defense for years; and, as stated in the Statement of Issues in the Commonwealth's

Brief (p.1),

> whether the Motion Judge . . . abused his discretion by finding that trial counsel provided ineffective assistance of counsel by failing to publish videotapes of the child victims' pre-trial interviews and to consult with an expert on child psychology to impress upon the jury the inconsistent statements of the children and the alleged defects in the interviewing techniques employed by the Commonwealth . . . .

The genie is out of the bottle: the relevant information resides in the public record, and restraining or sanctioning counsel's speech will not change the fact that this case and the issues in the public record will be reported on. *See generally Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Division of the District Court*, 403 Mass. 628, 639 (1988) (Wilkins, J., concurring) ("The adverse consequences of the disclosure of the contents of the affidavit would seem likely to have paled in comparison with the consequences of the disclosure, already made, that the criminal defendant had been charged with murder in the first degree."). As in *Bridges v. California*, "[i]f there was electricity in the atmosphere, it was generated by the facts; the charge added by [counsel] can be dismissed as negligible." 314 U.S. at 278. *See generally Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 110 (1979) (Rehnquist, J., concurring) (absent a showing of effectiveness at serving its intended purpose, restriction on First Amendment rights, even if intended to serve a compelling state interest, is unconstitutional). Any statements by counsel now cannot undo the fact that there has already been media coverage in the case. *See ABA Annotated Model Rules of Professional Conduct* 243 (1984) (extent to which information already circulated is a significant factor in determining likelihood of prejudice), *cited in Gentile*, 501 U.S. at 1046 (Kennedy, J., concurring). *See also Commonwealth v. James*, 424 Mass. 770, 777 (1997) ("A defendant's right to a fair and impartial jury does not require that jury members have no prior knowledge of the crime."); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) ("[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically ... to an unfair trial."); *Gentile*, 501 U.S. at 1054-1055 (Kennedy, J., concurring) (citations omitted) ("Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity,

they are able to disregard it and base their verdict upon the evidence presented in court."). Rather, it is enough that prospective jurors will decide the case on the evidence, laying aside whatever preconceived notions of guilt or innocence they may have. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).[3]

B. The Strong Constitutional Rights at Stake Outweigh any Speculative Impact on a Possible Jury.

The Court must balance counsel's First Amendment rights, as well as Mr. Baran's Sixth Amendment right to effective assistance of counsel, against the very speculative and remote possibility that members of the jury pool might hear of and be tainted by counsel's statements in *Massachusetts Lawyer's Weekly* or elsewhere. *See Gentile*, 501 U.S. at 1074-75. The balance weighs in favor of allowing speech, not sanctioning it.

The countervailing First Amendment rights are compelling. In a democratic society, the public interest in the judiciary is perhaps at its zenith in criminal proceedings "to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Frankfurter, J.). "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Gentile*, 501 U.S. at 1035-36 (*quoting Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)). As implicitly recognized in Rule 3.6, counsel are often the most informed voice regarding the conduct of judicial proceedings, and the most accurate source of information. *See* Rule 3.6, Comment 1 ("[T]here are vital social interests served by the free dissemination of information about events having

[3] In cases where there has been widespread pretrial publicity, the traditional remedy is to delay the trial for some period of time, perhaps six months. Here, any trial would be more than a year away. *Cf. Commonwealth. v. Burden*, 15 Mass. App. Ct. 666, 672 (1983) (denying motion to continue trial because of pre-trial publicity where moving party "presented no evidence that there had been any unusual media coverage during the six months preceding the trial"). If the District Attorney should eventually decide to retry the case, and there is prejudicial pre-trial publicity at that time, he may then request continuance for a "quiet period" or even a change of venue. *See Commonwealth v. James*, 424 Mass. 770, 776 (1997).

legal consequences and about legal proceedings themselves. . . . [The public] has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern.") and Comment 7 (extrajudicial statements are permissible "where a reasonable lawyer would believe that public response is required in order avoid prejudice to the lawyer's client").

Further, the District Attorney specifically seeks to sanction speech critical of a judge for letting more than a year pass without ruling on a motion for a gag order, as promised in an open court hearing, and effectively silencing comment on a case of great public concern. And, of course, since the Court did not issue a written gag order, as it suggested it might, counsel chose to remain silent, unaware of what limits the Court might impose on their speech. A sanction for such critical speech flies in the face of a tradition that vigorous debate and unfettered criticism of the judiciary is necessary for a healthy judiciary.

As noted by Chief Justice Margaret H. Marshall, in the Commonwealth "forceful criticism of the judiciary has a long history." Margaret H. Marshall, *Address, Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence, and the Rule of Law*, 24 Sydney L. Rev. 455, 460 (2002). No doubt that history of criticism and scrutiny is due in part to the demanding standards to which the Commonwealth's judges are held, enshrined in Article 29 of the Declaration of Rights of the Massachusetts Constitution, which provides:

> It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. (Declaration of Rights, Article XXIX)

The public has an undeniable interest in informing itself as to whether the conduct of judges satisfies these stringent standards, and counsel has an undeniable right to speak about the conduct of judges. *Thomajanian v. Odabashian*, 272 Mass. 19, 23 (1930) ("constant observance of the principle embodied in Article 29 … can never be relaxed"). Criticism of the judiciary therefore is critical to our constitutional system. *See* Marshall, *Dangerous Talk*, *supra*, at 459 ("[M]ost American judges … have come to understand that their own judicial autonomy is integrally bound up with the public's virtually unfettered freedom to critici[z]e them.") (citation omitted). "The assumption that respect for the judiciary can be won by shielding judges from

published criticism wrongly appraises the character of American public opinion." *Bridges v. California*, 314 U.S. at 270-71. "And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Id.*

Criticism of the Court's implicit restraint of free speech goes to the heart and soul of the First Amendment's free speech protections, as do statements about the errors in Mr. Baran's conviction, including criticism of the prosecution. Further, Mr. Silverglate's article also suggests criticism of the trial prosecutor of Mr. Baran, who went on to become (and remains) a sitting Superior Court judge. *See Gentile*, 501 U.S. at 1035-36 ("Public awareness and criticism have even greater importance where, as here, . . . the criticism questions the judgment of an elected public prosecutor."). In a case such as this one, which has generated understandable and justifiable public interest, the delicate balance that Rule 3.6 attempts to strike between the First Amendment and the interests of a fair trial should not be used by any party as a tactical weapon to silence its opponents. Andrew Hamilton, arguing in defense of John Peter Zenger, stated:

> It is a privilege, I will go farther, it is a right which all free men claim, that they are entitled to complain when they are hurt; they have a right publicly to remonstrate the abuses of power ... Were this to be denied, then the next step may make them slaves. For what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions without the liberty of complaining....

Andrew Hamilton, argument to the jury, *The Trial of John Peter Zenger*, W. Lewis, 46 ABA J 27, 110 (1960). Here, the speech that the Commonwealth effectively seeks to silence is at the core of the First Amendment: criticism of the governmental police power. Nothing about this case indicates an order sanctioning speech is necessary or warranted to safeguard the defendant's right to a fair trial or, even, the public's interest in the administration of justice. To the contrary, in this case, sanctioning counsel's speech would be a disservice to those very goals.

C. Counsel's Statements Are Protected by the Safe Harbor Provisions of Rule 3.6.

In any event, the statements noted in the District Attorney's brief fall squarely within the safe harbor provisions of Rule 3.6 and are permissible even if there is a substantial likelihood of materially prejudicing a jury. *See* Rule 3.6(b), (c), and (e).

As the District Attorney notes (Motion for Sanctions, p. 5), at the hearing Judge Locke suggested that some of Attorney Silverglate's statements had "crossed the line" of the Rules. Instead of issuing an order to that effect, which Attorney Silverglate could appeal, Judge Locke did not issue any decision at all. Rule 3.6(e) expressly "does not preclude a lawyer from replying to charges of misconduct publicly made against him," exactly what Attorney Silverglate did in his article.

Further, a lawyer is allowed to make statements 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." Rule 3.6(c). Here, the publicity surrounding Mr. Baran's release, the scathing account of his mistreatment chronicled in Judge Fecteau's Decision, and the fact of the District Attorney's appeal, cannot be placed on Mr. Baran. Mr. Baran has had multiple convictions vacated. He has every right to claim through his counsel his innocence (and he is deemed presumptively innocent under the law) and attempt to restore his reputation within the community. If counsel remained mute -- by abiding a *de facto* and unappealable gag order -- until entering the courthouse, particularly in a very public case such as this, they would be deficient. As the Supreme Court recognizes "[a]n attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client." *Gentile*, 501 U.S. at 1043 (Kennedy, J., concurring). *See also Craig v. Harney*, 331 U.S. 367, 377 (1947) ("If the point had been made in a petition for a rehearing, and reduced to lawyer's language, it would be of trifling consequence. The fact that it was put in layman's language, colorfully phrased for popular consumption, and printed in a newspaper does not seem to us to elevate it to the criminal level.").

Moreover, Rule 3.6 expressly allows an attorney to comment on claims and defenses and information in the public record, such as statements about the grounds for a new trial, and arguments and facts made in support of Mr. Baran's position in the appeal. The statements about the Commonwealth's conduct and the course of the trial reflect no more than what the voluminous public record in the case already reveals -- indeed, they are the core issues at dispute in the District Attorney's appeal. Rule 3.6(b)(2) provides that, "[n]otwithstanding paragraph (a) [of Rule 3.6], a lawyer may state: (1) the claim, offense or defense involved, and ... (2) the information contained in a public record ...." *See also Gentile*, 501 U.S. at 1055 (Kennedy, J., concurring) (noting there was "not a single example where a defense attorney has managed by public statement to prejudice the prosecution of the State's case").

CONCLUSION

For all of the foregoing reasons, the Commonwealth's Motion For Sanctions should be denied.

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Dated: November 28, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the following attorney of record by overnight mail on November 28, 2007:

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