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

Massachusetts Lawyers Weekly, November 5, 2007
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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 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 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 Tennen, and Harvey 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 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 can sometimes 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, since 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 Capeless resumed the search, did the D.A.'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 were nonetheless shocked when they finally viewed them. The tapes show how accusations of child sexual abuse could 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 Judge Fecteau wrote, "[t]he 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) Fecteau's opinion's extensive quotations from the children's interviews seemed 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 SJC 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 trails 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 eleven 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), 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.

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