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COMMONWEALTH OF MASSACHUSETTS

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CLERK OF THE COURTS

NORFOLK, SS: FOLK COUNTY

SUPERIOR COURT DEPARTMENT
NORFOLK SUPERIOR COURT
DOCKET NO. 2282CR0117

COMMONWEALTH

v.

KAREN READ

**COMMONWEALTH'S MOTION TO PROHIBIT PREJUDICIAL
EXTRAJUDICIAL STATEMENTS OF COUNSEL IN COMPLIANCE WITH
MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT 3.6 (a)**

Now comes the Commonwealth and respectfully moves this Honorable Court issue an order prohibiting all counsels of record: Attorney David Yannetti; Attorney Ian Henchy; Attorney Alan Jackson; and Attorney Elizabeth Little from making extrajudicial statements to the media that could be seen as prejudicial to the criminal proceedings. The Commonwealth and its law enforcement witnesses agree to be bound by the same order, guided by Massachusetts Rules of Professional Conduct 3.6 (a) as well as Massachusetts Rules of Professional Conduct Rule 3.8 (special responsibility of prosecutor).

The conduct of attorneys in Massachusetts is governed by the Massachusetts Rules of Professional Conduct found in Supreme Judicial Court Rule 3:07. Under Massachusetts Rules of Professional Conduct 3.6 (a), “[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of

materially prejudicing an adjudicative proceeding in the matter.” (Emphasis added) (Exhibit A).¹

Under Rule 3.6 (a), extrajudicial statements regarding “the character, credibility, reputation, or . . . identity of a witness”; “opinion[s] as to the guilt or innocence of a defendant”; the performance or results of forensic testing; and “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” are subjects likely to have a material and prejudicial effect on a criminal proceeding. See Comment 5 of Editor’s Notes to Rules of Professional Conduct 3.6; Comment 6 of Editor’s Notes to Rules of Professional Conduct 3.6 (“Criminal jury trials will be most sensitive to extrajudicial speech.”); see also Rules of Professional Conduct 8.4 (d) (engaging in conduct that is prejudicial to the administration of justice).

As stated by the United States Supreme Court, “[l]awyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.” Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074-1075 (1991) (attorneys are subject to ethical restrictions on speech that an ordinary citizen would not be; proof of a “substantial likelihood of material prejudice” satisfies the First Amendment.) Restraints on extrajudicial statements are warranted to protect the integrity and fairness of the judicial system and to insure that the outcome of a criminal trial be

¹ “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline.” Massachusetts Rules of Professional Conduct Preamble and Scope: A Lawyer’s Responsibilities at p. 14.

decided by impartial jurors, based solely on the evidence admitted at trial. See In re Cobb, 445 Mass. 452, 472–473 (2005).

It has long been recognized that adverse publicity has the potential to endanger a defendant's ability to receive a fair trial. Gannet Co. v. DePasquale, 443 U.S. 368, 378 (1979). A trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity in order to safeguard the due process rights of the accused and the integrity of the judicial system as a whole. Id.; Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966). Our criminal justice system is premised on the principle that the outcome of a criminal trial must be decided by impartial jurors based only on evidence that is admitted at trial. An outcome affected by extrajudicial statements would violate and eviscerate that basic tenet. Gentile, 501 U.S. at 1070; United States v. Flemmi, 233 F. Supp. 2d 75, 79 (D. Mass. 2000) (improper disclosures by law enforcement or attorneys threaten the integrity of judicial proceedings). Thus, restraints on extrajudicial statements by counsel may be warranted in a particular case to protect the integrity and fairness of the judicial system. Gentile, 501 U.S. at 1075; Sheppard, 384 U.S. at 361.

Notably, “[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.” Bridges v. California, 314 U.S. 252, 257 (1941). For the judicial system to operate fairly and impartially, attorneys must conduct themselves in conformity with their legal and ethical requirements. In re Cobb, 445 Mass. at 472–473. Defense counsel may “represent their client zealously within the bounds of the law” but they are “to treat all persons involved in the legal process with consideration, and to uphold the integrity and honor of the legal profession.” See Commonwealth v. Michel, 381 Mass. 447, 456 (1980) (internal citations omitted); see also Gentile, 501 U.S.

at 1075 (because attorneys have special access to information through discovery, their statements are especially authoritative and likely to be considered knowledgeable, reliable, and true by the general public).

As part of their “trial by media” strategy, the defendant has sought to target the witnesses’ credibility and character through the use of the media and has encouraged the unwarranted invasion of witnesses’ personal privacy. Contrary with their obligations under Massachusetts Rule of Criminal Procedure 32(f), which necessitates the protection of personal identifying information in publicly accessible court documents, and Supreme Judicial Court Rule 1:24, defense counsel failed to redact personal identifying information in their filings and strategically filed motions containing various witnesses’ personal identifying information: names, dates of birth, social security information, addresses, and phone numbers. The statutory purpose of Massachusetts Rule 32(f) and Supreme Judicial Court Rule 1:24 is to “prevent the unnecessary inclusion of certain personal identifying information ... in order to reduce the possibility of using such documents for identity theft, the unwarranted invasion of privacy, or other improper purposes.” See S. J. C. Rule 1:24, § 1.

Additionally, defense counsel filed records that identified a juvenile by name and published numerous post-mortem photographs of the victim to the media.

Commonwealth v. Bastarache, 382 Mass. 86, 106 (1980) (admissibility of autopsy photographs is left to discretion of trial judge); see also Globe Newspaper Co. v. Chief Med. Examiner, 404 Mass. 132, 136 (1989) (autopsy reports are “medical files or information” exempt from public disclosure).

Defense counsel has failed to sustain their burden of proving their noncompliance with S. J. C. Rule 1:24 and Massachusetts Rule of Criminal Procedure 32(f) was inadvertent. Rather, from the courthouse stairs, following this court's corrective ruling to impound the witness's identifying information, defense counsel directly encouraged media outlets to continue to contact witnesses and ask them inflammatory questions, in step with the defendant's theory of the case. See "Karen Read Post-Court Press Conference at Norfolk County Superior Court 5.3.2023" available at <https://youtu.be/rOGm4devM0U?t=446> (beginning at 7:25). In response to defense counsels' call to action, witnesses have suffered unwarranted invasion of privacy as they have been receiving repeated and harassing phone calls, family members of witnesses have been contacted and harassed, and the victim's family has suffered emotional harm due to the public dissemination of said photographs. See S. J. C. Rule 1:24, §1. As such, this court may consider imposing an order to ensure future compliance with S. J. C. Rule 1:24 and Massachusetts Rule of Criminal Procedure 32(f). See Massachusetts Rules of Criminal Procedure 48 (this court may subject counsel to "such sanctions as the Court may deem appropriate, including citation for contempt or the imposition of costs or fine.")

Following a court hearing on May 24, 2023, again declared from the courthouse stairs, defense counsel took the opportunity to create a substantial likelihood of materially prejudicing the proceedings by attacking both the Commonwealth and several witnesses. Defense counsel's inflammatory and prejudicial extrajudicial statements alleged that the Commonwealth was "incompetent" and "complicit" in the defendant's self-serving and unfounded proclamation that there is a cover-up of evidence and went as far as describing

the Commonwealth as hiding evidence and “constantly trying to have their foot on Karen Read’s throat”. See <https://www.youtube.com/watch?v=2NwB4BUZrLI>.

The Commonwealth has provided the defendant with a substantial amount of discovery. This evidence establishes that the defendant, while intoxicated, in a snowstorm, operated her motor vehicle in reverse for a period of time, before striking the victim at a high rate of speed. Contrary to this compelling and corroborated evidence, the defense strategy has been to identify witnesses and criticize their character, credibility, and reputation in the media, by arguing that all witnesses are involved in an alleged “cover-up” of evidence. Defense counsel Alan Jackson stated: “certainly the Massachusetts State Police is involved. There are people that were in that house that are involved. Brian Albert is involved. Jennifer McCabe is involved. The rest of the folks that were in that house, there's some level of involvement by every one of them. Every single one of them.” See “Karen Read denies killing Boston police officer John O’Keefe, says ‘we know who did it’” (May 24, 2023) (Exhibit B); video available at: <https://www.cbsnews.com/boston/news/karen-read-case-john-okeefe-boston-police-officer-canton-murder/>; Boston Globe, “Karen Read speaks publicly for first time; judge rejects bid by her lawyers to question two witnesses in death of police officer” (May 24, 2023) (Exhibit C).

Counsel’s prejudicial extrajudicial statements were widely reported on local and national media outlets. These statements go further than zealous representation; they are unsubstantiated proclamations, supported only by self-serving speculation and conjecture, likely not to be admissible at trial and done with the intent of materially prejudicing the criminal proceedings by risking the impartiality of potential jurors. Such

action and intent is expressly prohibited by the Massachusetts Rules of Professional Conduct. See Rules of Professional Conduct 3.6(a), 8.4 (d). The defendant is entitled to raise a third-party culprit defense; however, counsel is prohibited from making repeated extrajudicial statements that they know, or reasonably should know, have a substantial likelihood of materially prejudicing potential trial jurors or witnesses.

Furthermore, during the May 3, 2023 hearing, defense counsel first reported, in open court, during a live television broadcast, that: “federal authorities have now gotten involved in the circumstances surrounding this case and have impaneled a grand jury, a federal grand jury, to investigate some of these circumstances.” See Karen Read, accused of killing boyfriend in Canton, in court for hearing” available at: <https://www.youtube.com/watch?v=OQFsYsPocdk> (beginning at 25:08); see also “Karen Read defense: Problematic investigation into John O’Keefe’s death grabs federal attention” Boston Herald, May 4, 2023 (Exhibit D). As found by the Honorable E. Susan Garsh (Ret.) under similar circumstances in Bristol Superior Court: “given the historical importance of grand jury secrecy, the possible release of extrajudicial statements concerning what might be an ongoing grand jury investigation warrants action by this Court [through an order prohibiting counsel from making extrajudicial statements] to protect not only the fairness of the trial process but also the integrity of the grand jury process.” See Commonwealth v. Aaron Hernandez, “Memorandum of Decision and Order on Defendant’s Renewed Motion for Order Prohibiting Prejudicial Extrajudicial Statements of Their Counsel and Their Agents” (E. Susan Garsh, J.) (February 10, 2014) (Exhibit E), affirmed by Commonwealth v. Aaron Hernandez, SJ-2014-0095 (Exhibit F); see also United States v. Bulger, 2013 WL 3338749 at *4-7 (D. Mass.) (Casper, J.) (Unprecedented public interest

and media coverage warranted court order requiring counsel to comply with order restricting extrajudicial statements).

This case has received national attention, including coverage on traditional news media as well as on blogs, tik-tok, and other social media platforms. The majority of the coverage is directly indorsed by the defendant. See “Karen Read Post-Court Press Conference at Norfolk County Superior Court 5.3.2023” available at <https://youtu.be/rOGm4devM0U?t=446> (beginning at 7:20 Attorney Jackson encourages media blogger to continue attacking witnesses).

A trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity in order to safeguard the due process rights of the accused and the integrity of the judicial system as a whole. See Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979). Notably, the danger of publicity concerning pretrial hearings is “particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial” and unrestrained extrajudicial statements “could influence public opinion and inform potential jurors of information that is factually incorrect or wholly inadmissible at trial.” Id.

CONCLUSION

Whereas a failure to restrain prejudicial extrajudicial statements will have a substantial likelihood of materially prejudicing the criminal proceedings, the Commonwealth respectfully moves for a narrowly drawn, restriction on counsels' extrajudicial statements in conformity with their professional and ethical obligations under Massachusetts Rules of Professional Conduct 3.6 (a).

The Commonwealth and its law enforcement witnesses agree to be bound by the same restrictions as well as those imposed by the Rules of Professional Conduct Rule 3.8, special responsibility of prosecutor.² Notably, the Commonwealth's request for this order applies only to the Commonwealth, its attorneys and law enforcement witnesses, and defense counsels.

Undoubtedly, "free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." Nebraska Press Ass'n v. Stuart, 427 U.S.A. 539, 559-60 (1976). Therefore, the Commonwealth's proposed order does not impinge upon free and robust reporting; as it does not seek to restrain the media or public access to any courtroom proceeding or publicly available document. See Commonwealth v. Aaron Hernandez, SJ-2014-0095 at p. 8 (Exhibit F) (order prohibiting

² Under Massachusetts Rules of Professional Conduct 3.8 (f) (1)-(2) the Commonwealth agrees to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6" and to "take reasonable steps to prevent investigators and law enforcement personnel" from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

prejudicial extrajudicial statements by counsel does not impinge on free and robust reporting).

The Commonwealth does not seek restraint against Ms. Karen Read herself; potential non-law enforcement trial witnesses; nor does it seek attorney discipline for violations of the rules of professional conduct. The Commonwealth's proposed order seeks only mutual attorney compliance with the Massachusetts Rules of Professional Conduct.

In support of its motion, the Commonwealth proposes the following order:

- 1) No attorney appearing in this case or any person with supervisory authority over them shall release or authorize the release of information about this proceeding that a reasonable person would expect to be disseminated by any means of public communication if the attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing potential trial jurors or witnesses or will have a substantial likelihood of heightening public condemnation of the accused or law enforcement.
- 2) No attorney appearing in this case shall make or release or authorize the release of any extrajudicial statement that a reasonable person would expect to be disseminated by any means of public communication concerning any of the following subject matters related to this case:
 - a. the testimony or the expected testimony of a party or prospective witness;

- b. the existence or contents of any statements made by the defendant to any law enforcement personnel or the refusal or failure of the defendant to make a statement;
 - c. the results of any forensic testing;
 - d. the substance of any evidence a party anticipates seeking to introduce at trial;
 - e. information that an attorney knows or reasonably should know is likely to be inadmissible as evidence in a trial and that if disclosed would create a substantial risk of prejudicing an impartial trial;
 - f. the existence and subject matter of any ongoing grand jury or other criminal investigation of the defendant or of any prospective witnesses.
- 3) This Order shall not be construed to prevent any of the attorneys appearing in this case from:
- a. Arguing forcefully, impassioned, or zealously during courtroom proceedings nor a restraint on the defendant's Constitutional rights to defend herself and present a third-party culprit defense.
 - b. Quoting or referring without further comment to public court filings;
 - c. Announcing the scheduling or result of any step in the judicial process;
 - d. Stating an expectation or hope, without further explanation or elaboration about the ultimate outcome of the proceedings.
- 4) The duty to refrain from prejudicial disclosures requires all attorneys in this case to prevent the release of any photographs, reports, or documents that are not in the public record and all attorneys shall take diligent efforts to insure compliance with

Massachusetts Rule of Criminal Procedure 32(f) and Supreme Judicial Court Rule 1:24 to prevent the unnecessary inclusion of certain personal identifying information in publically accessible court documents.

- 5) If either the Commonwealth or defendant has a claim that this order was violated, they shall first file notice with the Norfolk Superior Court and this court may conduct a hearing. Failure to abide by the Rules of Professional Conduct may subject counsel to disciplinary actions, ranging from admonition or disbarment and if egregious, this court may consider disqualifying counsel or revoking pro hac vice admission to the Massachusetts bar. See S.J.C. Rule 4:01, § 4; PCG Trading, LLC v. Seyfarth Shaw, LLP, 460 Mass. 265, 269 & n. 6 (2011) .

Respectfully Submitted
For the Commonwealth,

MICHAEL W. MORRISSEY
DISTRICT ATTORNEY

Date: June 8, 2023

By: _____

Adam C. Lally
Assistant District Attorney

/s/ Laura A. McLaughlin
Laura A. McLaughlin
Assistant District Attorney

CLERK OF THE COURTS
NORFOLK COUNTY

EXHIBIT A

Massachusetts General Laws Annotated
Rules of the Supreme Judicial Court (Refs & Annos)
Chapter Three. Ethical Requirements and Rules Concerning the Practice of Law
Rule 3:07. Massachusetts Rules of Professional Conduct and Comments (Refs & Annos)
Advocate

Massachusetts Rules of Professional Conduct (Mass.R.Prof.C.), Rule 3.6

Rule 3.6. Trial Publicity

Currentness

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and 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.

Credits

Adopted June 9, 1997, effective January 1, 1998. Amended March 26, 2015, effective July 1, 2015.

<Adopted June 9, 1997, effective January 1, 1998.>

Editors' Notes

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 that 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:

- (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;
- (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;
- (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;
- (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;
- (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
- (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.

[6] 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.

[7] 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.

[7A] In making the statements permitted by paragraph (e), a lawyer must safeguard confidential information relating to the representation of a client as required by Rule 1.6.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Notes of Decisions (2)

S.J.C. Rule 3:07, Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.), Rule 3.6, MA R S CT RULE 3:07 RPC Rule 3.6

Current with amendments received through May 1, 2023. Some rules may be more current; see credits for details.

EXHIBIT B

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Live TV

LOCAL-NEWS

Karen Read denies killing Boston police officer John O'Keefe, says 'we know who did it'



BY WBZ-NEWS STAFF

UPDATED ON: MAY 24, 2023 / 5:10 PM / CBS BOSTON



Watch CBS News

DEDHAM - Karen Read, charged with killing her boyfriend, Boston Police Officer John O'Keefe, spoke out about the case for the first time Wednesday and alleged a coverup by state and local police.

Read and her attorneys were back in Dedham District Court for another hearing in the case before she surprised reporters and spoke outside afterwards.

Prosecutors allege that Read hit O'Keefe with her vehicle and killed him during a snowstorm back in January 2022. O'Keefe's body was discovered in a pile of snow outside the Canton home of Brian Albert, a fellow officer who hosted a gathering there that night.

Defense attorneys have argued that O'Keefe was actually beaten inside the home and his body was later dumped outside. In previous hearings, they focused on wounds to O'Keefe's arms, which they said showed he was attacked by Albert's dog during the fight.

"We know who did it. We know. And we know who spearheaded this coverup. You all know," Read said on the courthouse steps Wednesday. "I tried to save his life. I tried to save his life at 6 in the morning, I was covered in his blood. I was the only one trying to save his life."



Karen Read, in Norfolk Superior Court in Dedham on May 24, 2023.



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man," Read's attorney Alan Jackson added.

arguments on whether Jennifer McCabe and Albert should be Albert's sister-in-law who also attended the party the night

The judge later agreed to quash subpoenas for both and denied access to their phones.
Watch CBS News

Attorneys for McCabe and Albert argued that both are not involved in O'Keefe's death and should not be forced to turn over cell phone records.

Jackson told the judge that no one has questioned McCabe on why she searched "Ho[w] long to die in cold" around the time O'Keefe died.

Speaking to reporters on Wednesday, Jackson alleged that there has been a coverup that involves state and local police. He claims Albert and McCabe are among those involved.



Boston Police Officer John O'Keefe. (Photo credit: Boston Police)

"Certainly the Massachusetts State Police is involved. There are people that were in that house that are involved," Jackson said. "Brian Albert is involved. Jennifer McCabe is involved. The rest of the folks that were in that house, there's some level of involvement by every one of them. Every single one of them. We're not going to rest until we get to the bottom of exactly who's behind this cover up. Not only Karen Read deserves this. John O'Keefe deserves this, and has deserved this from moment one. And that's why they're not going to rest."

Read's comments outside court on Wednesday were her first public remarks since she was charged.



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of what happened to John O'Keefe," Read told reporters. "And we have marshalled every resources to get to the truth. It just

EXHIBIT C

Karen Read speaks publicly for first time; judge rejects bid by her lawyers to question two witnesses in death of police officer

By Travis Andersen Globe Staff, Updated May 24, 2023, 5:46 p.m.



Karen Read appeared in Norfolk County Superior Court for a pre-trial hearing earlier this month. JOHN TLUMACKI/GLOBE STAFF

Lawyers for Karen Read, the Mansfield woman charged with murder for allegedly hitting her boyfriend, Boston police Officer John J. O’Keefe, with her SUV and leaving him for dead in Canton last year, suffered a setback in court Wednesday as a judge denied their request to hold a pretrial hearing to question two key witnesses.

Norfolk Superior Court Judge Beverly J. Cannone quashed defense subpoenas to witnesses Brian Albert and Albert’s sister-in-law, Jennifer McCabe, and took under advisement a third defense request to examine Albert’s phone and McCabe’s phone records. Cannone didn’t indicate when she may rule on that motion.

Alan Jackson, a lawyer for Read, said his client must have access to the phone data to mount her defense.

“She’s constitutionally entitled to defend herself and she’s constitutionally entitled to this information,” Jackson said.

But Assistant District Attorney Adam C. Lally said the defense is conducting a fishing expedition.

“This isn’t a situation where the Commonwealth is afraid of evidence being produced,” Lally said. “It’s simply that counsel and the defendant need to comply with the rules and need to actually state actual facts and actual evidence, as opposed to the fanciful facts section that’s been submitted to the court.”

Read, 43, has pleaded not guilty to charges of second-degree murder, motor vehicle manslaughter while driving impaired, and leaving the scene of an accident causing personal injury and death. She remains free on \$100,000 bail. A trial date hasn’t been set.

Outside court Wednesday, Read spoke publicly for the first time, according to video footage posted by WBZ-TV.

“It feels we’re the only ones fighting for the truth of what happened to John O’Keefe,” Read told reporters. “And me and my family and my attorneys and my team have marshalled every resource to get to the truth. It just feels like no one else wants it.”

Asked if she was asserting she didn’t commit the crime, Read said, “We know who did it.”

“We know. And we know who spearheaded this coverup. You all know,” she said. “I was the only one trying to save his life.”

Around 6 a.m. on Jan. 29, 2022, Read discovered O’Keefe’s unconscious body in a snowbank amid whiteout conditions and freezing temperatures outside Albert’s Canton home on Fairview Road, prosecutors said. O’Keefe was later pronounced dead at Good Samaritan Medical Center in Brockton.

Shortly after midnight, Read had driven O’Keefe to the home of Albert, a fellow Boston police officer, to attend an after-party, court records show.

The group had been out drinking earlier that night and evidence, including video footage, showed Read had consumed several drinks and likely had a blood alcohol level well above the legal driving limit when she dropped off O’Keefe, prosecutors have said in court papers.

According to prosecutors, Read made a three-point turn to reverse direction and rammed into O’Keefe in the road outside the house before driving back to his home, where she often stayed. She returned to the Canton residence around 6 a.m. with McCabe and another woman and found O’Keefe’s body outside in the snow. She later said “I hit him, I hit him, I hit him” in the presence of a paramedic, prosecutors have alleged.

Read’s lawyers have said evidence suggests O’Keefe was beaten to death and attacked by a dog inside Albert’s home during the after-party, and that the assailants covered up the crime and framed Read. Prosecutors have dismissed the assertion as baseless.

In a filing this week, Read’s lawyers reiterated that McCabe “had searched [on her phone] ‘how long to die in cold’ at 2:27 a.m. — more than three hours before Officer John O’Keefe’s body was found.”

During Wednesday’s hearing, Lally said the time stamp on the Google search wasn’t accurate. Prosecutors have said McCabe actually made that search shortly after 6 a.m. at Read’s request when they discovered O’Keefe’s body.

At 2:27 a.m., McCabe conducted a Google search on her phone for her daughter’s basketball team, Lally said. She used the same open tab to search for information about hypothermia a few hours later, he said.

“That subsequent Google search that you’re doing ... is going to reflect in the phone as being done when the website was first visited, when Google was first visited” hours earlier, he said. “That is what happened in this particular case.”

Jackson rejected that explanation.

“More than one web page can be ... open on a cell phone at any given time,” he said. “The court knows this. Everyone who owns a cell phone knows this. ... The 2:27 ‘how long to die in cold’ search was nanoseconds, milliseconds before” the basketball search came up.

The page that came up after the dying in the cold search was deleted on McCabe’s phone, and “as soon as that page was deleted, the other [basketball] page behind it ... was immediately populating [the screen],” he said. “And when I say immediately, not the same time; nanoseconds behind.”

Seeking to bolster their request for more phone records, Read’s lawyers have also highlighted data showing McCabe deleted material on her phone on the morning O’Keefe’s body was found.

On Wednesday, Lally said forensic experts have indicated that “these deletions are not something that is actively done by the user.”

“It’s something that happens as data is stored,” he said.

Jackson scoffed at that suggestion.

“Everybody that has an iPhone, every 4-year-old that has an iPhone, knows that stuff doesn’t just delete itself,” Jackson said. “Those deletions weren’t coincidental. They were done by her.”

Earlier in the hearing, Cannone heard from McCabe’s lawyer, Kevin J. Reddington, who argued successfully that his client shouldn’t have to testify at a pretrial hearing.

“She has been cooperating with the government every step of the way,” Reddington said.

The next hearing in the case is scheduled for July 25.

EXHIBIT D

NEWS > CRIME & PUBLIC SAFETY

Karen Read defense: Problematic investigation into John O'Keefe's death grabs federal attention



Nancy Lane/Boston Herald

Karen Read, charged with the murder of her boyfriend Boston Police Officer John O'Keefe, talks with her attorneys Alan Jackson and David Yannetti as she attends a hearing in Norfolk Superior Court on Wednesday. (Nancy Lane/Boston Herald)

Among the many fireworks at the most recent hearing in the case of Karen Read, charged with killing her boyfriend John O'Keefe last year, is the defense's claim that the investigation is so troubled that the federal government has opened up a case to look into it.

"It's been reported that federal authorities have now gotten involved in the circumstances surrounding this case and have impaneled a grand jury, federal grand jury, to investigate some of these circumstances," defense attorney Alan Jackson said in Norfolk Superior Court Wednesday afternoon.

The case has brought about significant public attention — from both sides — which filled the second-floor courtroom in Dedham to standing room only.

The first set are those who believe Read has been made a “scapegoat,” in the words of defense attorney David Yannetti, by a prosecutor who “has hid evidence, manipulated evidence, stalled, delayed, obfuscated.” Many of these people yelled out their support on the courthouse steps as Read walked down with her lawyers and family members at her side.

The other side are those who, as prosecutor Adam Lally argues, believe the entire defense theory is a “fanciful” conspiracy and that their discovery requests are “the epitome of a fishing expedition” and that Read is guilty. Many of these sported Boston Police Department-branded clothing and “Justice for JJ” — JJ being O’Keefe’s initials — pins.

Following the hearing, the Herald reported largely on evidence the defense is requesting regarding O’Keefe’s wounds — which the defense has long argued could not have been caused by Read backing into him with her SUV during a 3-point.

In particular, they wanted animal control records for Chloe, the German Shepherd owned by Boston Police Sgt. Det. Brian Albert, who owned the home at 34 Fairview Road where O’Keefe was killed, as well as trace evidence that could put the dog as a member of the attack they say killed O’Keefe.

But that’s not all they wanted. The defense painted a picture of a discovery process they say has been anything but helpful or transparent, with Yannetti calling the commonwealth’s discovery work “outrageous” in comments to media following the hearing.

“For 15 months, this has been a quest for the truth conducted by one party, in this case, the defense,” he said. “We have made substantial progress in this case to the point where anybody familiar with this case knows that Karen Reed is innocent.”

That evidence is needed, they say, to prove their version of events: which is that O’Keefe was beaten to death in the home — they say Apple Health data indicates he was walking around in the house — and then his body was dragged to the front yard where by the next morning local responders found it “cold to the touch,” according to prosecutor filings.

But they also are requesting evidence to damage the prosecution’s version of events. The prosecution contends that the couple were out drinking in downtown Canton, where O’Keefe lives, when they met up with acquaintances at Waterfall Bar and Grill and were then invited to Albert’s house.

The prosecution contends that nobody at the gathering saw O’Keefe come in and that Read struck O’Keefe with her vehicle, leaving him to die in the cold and snow, and that a busted passenger-side tail light — and possibly a hair matter sample from the passenger rear door that had not been tested by the Wednesday hearing — points to this version of events.

But the defense argues that Read’s tail light was not busted when she dropped O’Keefe off — she didn’t stay, they say, because she has many health issues and was not feeling well — and that if they had unedited footage from the Canton Public Library security cameras they would be able to prove this.

Yannetti said that the footage they received from the library has a crucial two-minute gap from 12:37 to 12:39 a.m., a time when they say their client would have been driving past on her way back to O’Keefe’s home on Meadows Avenue.

Prosecutor Lally said “I would have a large issue with that” on the defense’s contention that all the evidence points to Read’s innocence. As for the defense not receiving evidence, he said that he has personally reached out to expedite testing and release and that the video they received from the library is the same video he received.

But defense attorneys are not just targeting Lally’s prosecution, but police investigators and in particular State police Trooper Michael Proctor, who they repeatedly characterize as “conflicted” and say has familial connections with those present in the home. More specifically, connections with homeowner Brian Albert and Jennifer McCabe, Albert’s sister-in-law, who they say searched for “ho[w] long to die in cold” hours before O’Keefe’s body was found.

The president of State Police Association of Massachusetts, the union for troopers, came out to throw his support behind Proctor and the investigation.

“This case is actively going on. Our homicide detectives here in Massachusetts are arguably the best in the country. Our solve rate is indicative of that,” SPAM President Patrick McNamara said outside the courthouse Wednesday. “The association supports our members across the commonwealth and the facts of this case will speak for itself.”

EXHIBIT E

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-00983

COMMONWEALTH

BRISTOL, SS SUPERIOR COURT
FILED

vs.

FEB 13 2014

AARON HERNANDEZ

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S RENEWED MOTION FOR ORDER PROHIBITING
PREJUDICIAL EXTRAJUDICIAL STATEMENTS OF COUNSEL AND
THEIR AGENTS AND REQUEST FOR AN EVIDENTIARY HEARING**

For the second time since the commencement of this case, defendant Aaron Hernandez ("Hernandez") seeks an order prohibiting prejudicial extrajudicial statements by the Commonwealth and its agents. For the reasons discussed below, this Court will enter an order dealing with extrajudicial statements (the "Order").

BACKGROUND

Hernandez has been indicted for murder and multiple related firearms charges. He was arraigned in Attleboro District Court on June 26, 2013. Since the arraignment, the case has generated extraordinary media attention, which the District Court judge described as "at least locally, unprecedented press coverage." On July 8, 2013, without objection from the Commonwealth, the District Court judge orally imposed an order prohibiting counsel for both sides from making prejudicial extrajudicial statements.

On September 6, 2013, Hernandez moved in this Court for an order prohibiting counsel and their agents from making prejudicial extrajudicial statements. The motion was accompanied by an affidavit of counsel attaching copies of several articles from newspapers and various internet

websites, which contain statements attributed to unnamed law enforcement sources. According to defense counsel, these articles represented only a "tiny fraction" of the media articles published following the arraignment. Counsel represented that a "Google" search using the terms "Aaron Hernandez" and "murder" generated 21,100,000 results prior to September 6, 2013, a number which undoubtedly is significantly greater today.

The parties stipulated that they would abide by the Massachusetts Rules of Professional Conduct, particularly Rule 3.6 and Rule 3.8, which prohibit prejudicial extrajudicial statements. Given that stipulation, the Commonwealth opposed entry of an order requiring such compliance. Mindful that it is preferable to rely on the professionalism and integrity of the lawyers, this Court declined to issue an order that would be enforceable by contempt. Rather, in a Memorandum of Decision and Order dated October 10, 2013, this Court strongly admonished all counsel to take steps to ensure that all attorneys working on the case refrain from making extrajudicial statements with a substantial likelihood of materially prejudicing an adjudicative matter in the case. In addition, given the "Special Responsibilities of a Prosecutor" articulated in Rule 3.8, the Court also strongly admonished the prosecutor to exercise reasonable care to prevent investigators, law enforcement personnel, and other employees assisting or associated with the prosecutor from making extrajudicial statements with a substantial likelihood of materially prejudicing an adjudicative matter in the case or that have a substantial likelihood of heightening public condemnation of the accused.

Thereafter, on November 15, 2013, Hernandez filed this Renewed Motion For Order Prohibiting Prejudicial Extrajudicial Statements of Counsel And Their Agents And Request For An Evidentiary Hearing. The motion is accompanied by an affidavit of counsel attaching media articles from the *Sports Illustrated* website, the Cable News Network website, the *Boston Globe* website,

HuffingtonPost.com and the *Miami Herald* website, as well as the transcript from an October 28, 2013 ESPN television broadcast. The articles refer to the serving of a grand jury subpoena on Miami Dolphins player Mike Pouncey and attribute statements that police, prosecutors, or a grand jury are investigating Hernandez's possible involvement in interstate gun trafficking to an unnamed source "with knowledge of the matter," a source "with knowledge of the investigation," a "separate law enforcement source," or a "law enforcement official who was not authorized to speak publicly about the case." Counsel's affidavit states that, on November 7, 2013, he conducted a web search for news stories by entering the words "Hernandez Pouncey gun" into the Google search engine. That query generated approximately 107,000 responsive documents.

The defendant's renewed motion was also accompanied by a proposed order.¹ Paragraphs one

¹ The order proposed by the defendant contained the following paragraphs:

1. None of the lawyers appearing in this case or any persons associated with them, including any person with supervisory authority over them or any person supervised by them, may release or authorize the release of information about this proceeding which a reasonable person would expect to be disseminated by any means of public communication if there is a substantial likelihood that such disclosure will materially prejudice potential trial jurors or witnesses or will have a substantial likelihood of heightening public condemnation of the accused.
2. This duty to refrain from prejudicial disclosures requires all counsel to take reasonable precautions to prevent all persons who have been or will be participants in or associated with the investigations conducted by the prosecution and defense from making statements or releasing any documents that are not in the public record and that are reasonably expected to be publicly disseminated which would have a substantial likelihood of materially prejudicing any potential trial juror or witness or have a substantial likelihood of heightening public condemnation of the accused.
3. Specifically, none of the lawyers appearing in this case or any of their agents shall release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by any means of public communication concerning any of following matters related to this case:
 - a. The prior criminal record or the character, background, reputation, or prior bad acts of the defendant or any co-defendant.
 - b. The existence or contents of any statements made by the defendant or any co-defendant to any law enforcement personnel or the refusal or failure of the defendant or any co-defendant to make any statements to law enforcement personnel.
 - c. The results of any forensic testing.
 - d. The prior statements or credibility of any prospective witness.
 - e. The substance of any evidence any party anticipates seeking to introduce at trial.
4. The foregoing shall not be construed to prevent any of the lawyers appearing in this case or any of their agents from quoting or referring without further comment to public court filings, announcing

through five of the proposed order asked the Court to impose equal obligations upon defense counsel and prosecutors in order to prevent prejudicial disclosures. Paragraph six asked the Court to order an evidentiary hearing regarding the circumstances surrounding the dissemination of information regarding an alleged ongoing grand jury proceeding into alleged criminal activities by the defendant.

The Commonwealth filed a written Opposition to the renewed motion in which it stated that it never has knowingly violated the letter or spirit of the Rules of Professional Conduct, denied that any member of the prosecution team or any other person under the control of the Bristol County District Attorney's Office had engaged in any such misconduct, and stated that it was not aware of any person connected with any law enforcement agency that had engaged in such misconduct. Nevertheless, during the argument at the hearing held on December 23, 2013 on the defendant's motion, the Commonwealth unequivocally withdrew its opposition to the entry of an order and unequivocally agreed to paragraphs one through five of the order proposed by the defendant.

the scheduling or result of any step in the judicial process, requesting assistance in obtaining evidence, or stating an expectation or hope, without further explanation or elaboration, about the ultimate outcome of the proceedings.

5. Counsel remain subject to the relevant provisions of the Massachusetts Rules of Professional Conduct, including Rules 3.6 and 3.8.
6. Counsel shall appear at an evidentiary hearing to be held on [Month][Day], [Year], at which hearing counsel for the Commonwealth shall be prepared to discuss the facts and circumstances surrounding the dissemination of prejudicial, extrajudicial statements like those highlighted in the exhibits to the Affidavit of Michael K. Fee. Without limitation, the Commonwealth shall be prepared to discuss:
 - a. The measures that the Commonwealth took to implement and comply with the Court's order entered on October 15, 2013.
 - b. The measures the Commonwealth has taken and plans to take to guard against the dissemination of extrajudicial statements that could prejudice defendant's right to a fair trial.
 - c. The events and extrajudicial statements described in the Affidavit of Michael K. Fee and accompanying exhibits, and the identities of the individuals who made the extrajudicial statements highlighted in the Affidavit of Michael K. Fee and accompanying exhibits.

Because the Commonwealth now asserts that, while it “certainly assented to the general content of paragraphs 1-5 at [the hearing on December 23, 2013], the Commonwealth by no means agreed to the precise wording of those sections” and because the Commonwealth now states that it “wishes to renew its strenuous objection to the entry of any order in this case regarding pre-trial publicity,” it is necessary to review what transpired at the hearing. During the argument on the defendant’s motion, the Commonwealth’s lead counsel in this case stated that the Commonwealth had agreed to an order. The Court noted that what the Commonwealth had agreed to in the past was that it would follow the Rules of Professional Conduct and inquired: “Do you agree that the rules at this point could be turned into an order of the Court?” The prosecutor responded, “Absolutely, your Honor.” The Court addressed with the prosecutor the precise language that had been proposed by the defendant and inquired, “Proposed order 1, 2, 3, 4, 5, so 1 through 5, there’s no opposition?” Asked if that was “the Commonwealth’s position at this time,” the prosecutor, after requesting and being allowed time to review the proposed order, stated: “Yes, your Honor, we agree to that.” Towards the end of the Commonwealth’s argument, the Court asked the prosecutor: “So, to the extent you’re now agreeing to paragraphs 1 through 5 of the order, I assume you’re withdrawing your argument that, by this order, the defendant has sought to enlarge the Commonwealth’s responsibilities beyond those currently recognized by applicable law?” The prosecutor responded, “That’s right, your Honor.”

The Court indicated that, in addition to the language to which there was no longer any objection, it wished to include specificity in the order as to what are “reasonable steps.” Counsel for the defendant stated that the defendant was “content with the Commonwealth’s agreement for paragraphs 1 through 5 with the understanding that the Court may add some specificity on reasonable

care.” The Court then invited both parties to submit proposed language that would detail the precise steps all counsel should be required to undertake in order to comply with their responsibility under Rule 3.6 and also the precise steps the Commonwealth should be required to undertake in order to comply with the “Special Responsibilities of a Prosecutor” set out in Rule 3.8. As the Court indicated, it was the Court’s hope that defining “reasonable steps” in the context of this case would eliminate later disputes as to what the more general agreed upon paragraphs of the defendant’s proposed order required of counsel. The Court reiterated, “You’ve both agreed to paragraphs 1 through 5,” which uses words such as “reasonable steps,” and thus what the Court wished to receive from counsel was a proposed paragraph six. An Assistant District Attorney other than the prosecutor who had argued on behalf of the Commonwealth inquired whether the Commonwealth’s filing should address the range of persons towards whom the Commonwealth had responsibilities. The Court responded that the range of persons towards whom the Commonwealth must exercise reasonable care is defined by the Rules of Professional Conduct and is not limited to persons solely under the prosecutors’ control and that the Court intended neither to expand nor contract that range.

After the hearing, both the defendant and the Commonwealth submitted proposed orders. They were followed by the Defendant’s Response and Opposition to the Commonwealth’s Modification of Proposed Order and by the Commonwealth’s Response to Defendant’s Opposition to the Commonwealth’s Modification of Proposed Order Regarding Pre-Trial Publicity.

DISCUSSION

It has long been recognized that adverse publicity has the potential to endanger a defendant’s ability to receive a fair trial. Gannet Co. v. DePasquale, 443 U.S. 368, 378 (1979). A trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity in order to

safeguard the due process rights of the accused. Id.; Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966). Our criminal justice system is premised on the principle that the outcome of a criminal trial must be decided by impartial jurors based only on material admitted into evidence at trial. An outcome affected by extrajudicial statements would violate that basic tenet. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1070 (1991). See also United States v. Flemmi, 233 F. Supp.2d 75, 79 (D. Mass. 2000) (noting that improper disclosures by law enforcement officers or attorneys for the government threaten integrity of judicial proceedings). Thus, restraints on extrajudicial statements by counsel may be warranted in a particular case to protect the integrity and fairness of the judicial system. Gentile v. State Bar of Nevada, 501 U.S. at 1075. See also Sheppard v. Maxwell, 384 U.S. at 361.² “[L]awyers in pending cases [are] subject to ethical restrictions on speech to which an

² Orders restricting pretrial publicity, including those which track the Rules of Professional Conduct with respect to prejudicial extrajudicial statements, are not uncommon. See, e.g., United States v. Wecht, 484 F.3d 194, 198-199 (3d Cir. 2007) (entering, with parties’ consent, pretrial order incorporating local rule restricting extrajudicial statements); United States v. Brown, 218 F.3d 415, 428-429 (5th Cir. 2000), cert. den., 531 U.S. 1111 (2001) (imposing post-indictment order to supplement ethical rules where substantial likelihood of prejudice existed); The News-Journal Corp. v. Foxman, 939 F.2d 1499, 1504-1505 (11th Cir. 1991) (imposing broad order prohibiting extrajudicial statements by attorneys and others until jury empaneled); Application of Dow Jones & Co., Inc., 842 F.2d 603, 605-606 (2d Cir.), cert. den., 488 U.S. 946 (1988) (imposing pretrial gag order restraining extrajudicial statements following publication of secret grand jury information); In re Russell, 726 F.2d 1007, 1010-1011 (4th Cir. 1984) (entering broad order prohibiting extrajudicial statements); United States v. Bulger, 2013 WL 3338749 at *1 (D. Mass.) (Casper, J.) (entering order prohibiting attorneys from violating local rule regarding extrajudicial statements); United States v. Kouri-Perez, 985 F. Supp. 25, 29 (D.P.R. 1997) (noting entry of pretrial order that restricted extrajudicial statements to confines of ABA Model Rules of Professional Conduct); State v. Grossberg, 705 A.2d 608, 610, 614 (Del. Super. 1997) (entering order precluding attorneys from public comment except in accordance with Professional Conduct Rule 3.6 and prohibiting persons assisting or associated with counsel for the State from making extrajudicial statements that the State would be prohibited from making under Rule 3.6, and later extending order to defendants and all persons assisting or associated with defense counsel). See also In re Special Proceedings, 291 F. Supp.2d 44, 48 (D. R. I. 2003) (court entered protective order mirroring provisions of Professional Conduct Rule 3.6, which prohibited counsel from discussing video tape that was evidence in grand jury investigation and potential trial evidence). Cf. United States v. Cutler, 58 F.3d 825, 835 (2d Cir. 1995) (upholding attorney’s contempt conviction for violating gag order that incorporated local rule prohibiting extrajudicial statements). Such orders flow logically from the language in Sheppard v. Maxwell, 384 U.S. at 362, to the effect that the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of the defendant to submit to interrogation or take any lie detector tests; any statement made by the defendant to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.

ordinary citizen would not be.” Gentile, 501 U.S. at 1071.

This Court need not and indeed does not find or suggest that the Commonwealth has violated any ethical rule. Past violations of ethical principles need not be established to warrant entry of an order prohibiting prejudicial extrajudicial statements. United States v. McVeigh, 931 F. Supp. 756, 760 (D. Colo. 1996). Accordingly, an evidentiary hearing to determine the source of past extrajudicial statements is unnecessary.³ This is not an action for contempt. Id. at 759 (order tracking Rules of Professional Responsibility issued without evidentiary hearing as to past public disclosures).

An order is issued at the present time because the Commonwealth expressly agreed at the hearing to the entry of paragraphs one through five of the order requested by the defendant. The Court deems the Commonwealth’s post-hearing objection to entry of any order to have been waived.

Independent of the Commonwealth’s assent, an order regarding pre-trial publicity is warranted at this time. Even though the articles are not close in time to the expected trial, the nature and quantity of the articles that have been published or broadcast give rise to a substantial likelihood that comments that might be made in the future by persons associated with or assisting counsel might well taint the jury pool. Further, the Order is the least restrictive corrective measure available, and it is narrowly drawn.

The articles presented to the Court contain information that implicate the character, reputation, and alleged prior bad acts of Hernandez in a way that would likely heighten public condemnation of the accused, and they are susceptible to an interpretation that the reported

³ The defendant’s request for an evidentiary hearing in his original proposed order is moot. Given the Commonwealth’s assent at the hearing to the entry of the defendant’s requested order, the defendant’s post-hearing proposed order deletes the request for an evidentiary hearing.

information was furnished by a law enforcement officer. Cf. United States v. Flemmi, 233 F. Supp.2d at 81 (moving party's burden of establishing a prima facie case of violation of a relevant rule, regulation, or order relating to pretrial publicity is relatively light and may be based solely on assessment of news article). The nature of the information disclosed may suggest a government source, particularly where it involves a grand jury investigation. Id. at 81-84.

Here, the extrajudicial statements referenced in the defendant's motion concern a purported grand jury investigation into Hernandez's role in gun trafficking. The requirement that grand jury proceedings remain secret is deeply rooted in the common law of the Commonwealth in order to protect the process from extraneous influences, protect individuals from notoriety and disgrace, protect witnesses from intimidation and subornation, and encourage the free and full disclosure of information concerning commission of a crime. WBZ-TV4 v. District Atty. for the Suffolk Dist., 408 Mass. 595, 599-600 (1990). Rule 5 of the Massachusetts Rules of Criminal Procedure prohibits anyone performing an official function in relation to the grand jury from disclosing "matters occurring before the grand jury" except in the performance of official duties or pursuant to a court order. See Mass. R. Crim. P. 5(d). "Matters occurring before the grand jury" include not only what has occurred and is occurring but also what is likely to occur, including the identities of witnesses, the substance of testimony, and the strategy or direction of the investigation. United States v. Flemmi, 233 F. Supp.2d at 79.

Since the inception of this case, the volume of media reports, digital and otherwise, has been great. In addition, given the historical importance of grand jury secrecy, the possible release of extrajudicial statements concerning what might be an ongoing grand jury investigation warrants action by this Court to protect not only the fairness of the trial process but also the integrity of the

grand jury process. See United States v. Bulger, 2013 WL 3338749 at *4-7 (D. Mass.) (Casper, J.) (unprecedented public interest and media coverage warranted continuation, post-impementment, of court order requiring counsel to comply with local rule concerning extrajudicial statements); United States v. Flemmi, 233 F. Supp.2d at 86 n.7 (prima facie showing of improper statements by government warrants entry of order enjoining prosecutor, agents, and employees from making extrajudicial statements).

Paragraphs One through Four and Paragraph Eight of the Order entered by the Court adopt much of the language to which all parties agreed at the hearing.⁴ These paragraphs apply across the board both to prosecutors and to defense counsel. They broadly impose on counsel the requirements

⁴ In addition to changing the numbering of some of the paragraphs, the Court made the following changes, among others:

1. The Court declines to issue, at this time, a direct command, as the defendant has sought, against persons other than counsel in this case and any person with supervisory authority over them. Such an order would go beyond the Rules of Professional Conduct that this Order is intended to enforce.
2. The Court rejects both the defendant's request that there be no reference to "knowing" action and the Commonwealth's post-hearing request that Paragraph One of the Order be limited to a "knowing release" and, instead, has incorporated the "if the lawyer knows or reasonably should know" language from Rule 3.6(a) of the Rules of Professional Responsibility.
3. With respect to the types of statements specifically prohibited by Paragraph Two of the Order, the Court declines the Commonwealth's post-hearing request to exempt from the prohibition statements regarding the "character" or "reputation" of the defendant. Such statements are deemed by the Commentary to Rule 3.6 to be ones that are more likely than not to have a material prejudicial effect on a proceeding. See Mass. R. Prof. C. 3.6, comment 5(1). Moreover, in its most recent filing, the Commonwealth stated that it did not oppose the inclusion of specific examples of proscribed categories of disclosures that might lead to "heightened public condemnation of the accused" if the defendant wished to have them included.
4. The Court considers it appropriate, as the defendant has requested and as the Commonwealth agreed at the hearing, to prohibit statements about the co-defendants that counsel cannot make about the defendant. Such statements may very well have a prejudicial effect on the defendant. Cf. *id.* (statements about the character, credibility, reputation or criminal record of a witness as well as 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 are subjects that are more likely than not to have a material prejudicial effect on a proceeding).
5. Given the nature of the articles that prompted the renewed motion, the Court has added language specifically prohibiting release of statements concerning grand jury proceedings and any other criminal investigation of the defendant or any co-defendant.

of Rules 3.6, 3.8, 5.1 and 5.3 of the Massachusetts Rules of Professional Conduct.

Notwithstanding the Commonwealth's representation to the Court at the hearing that it was withdrawing its argument that the defendant's proposed order would enlarge the Commonwealth's responsibilities beyond those currently recognized by applicable law, the Commonwealth now urges the Court not to impose any obligations with respect to persons who may be assisting or associated with counsel unless such persons are under the "supervisory control" of counsel or "under their control." The Court deems this argument to have been waived. Even if it were not, the Commonwealth's proposed narrowing of responsibilities does not comport with the language, commentary, or purpose of the Massachusetts Rules of Professional Conduct.

The responsibility of all attorneys with respect to non-lawyer assistants is set forth in Rule 5.3 of the Massachusetts Rules of Professional Conduct. This Rule controls the behavior both of the defense counsel and the prosecutors in this case. It provides, in relevant part, that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer . . ." Mass. R. Prof. C. 5.3(b). The "non-lawyer" object of the reasonable care obligation includes secretaries, investigators, law student interns, and paraprofessionals, "whether employees or independent contractors." Mass. R. Prof. C. 5.3, comment 1.

Rule 3.8(e) of the Massachusetts Rules of Professional Conduct reinforces the prosecutor's obligations as set forth in Rule 5.3 and expands on them.⁵ That rule, as its title states, creates "Special Responsibilities of a Prosecutor." It provides, in relevant part, that a prosecutor shall "exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other

⁵ Mass. R. Prof. C. 3.8(e) rule is based on ABA Model Rule 3.8(f).

persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.”⁶ Mass. R. Prof. C. 3.8(e).

Notably, the reasonable care obligation imposed by the language of Rule 3.8 does not contain the “direct supervisory authority” limiting language found in Rule 5.3. While Rule 3.8 obviously encompasses such people as secretaries, investigators, law student interns, and paraprofessionals who may be employees or independent contractors over whom the prosecutor has direct supervisory authority, it also includes such persons as law enforcement personnel who may be assisting or associated with the prosecutor. A prosecutor very well may have no direct supervisory authority over law enforcement officers who perform a vital role in criminal investigations. Accordingly, the duty of reasonable care under Rule 3.8(e) applies “even when such persons are not under the direct supervision of the prosecutor.” ABA Model Rules of Prof. Conduct, Rule 3.8(f), comment 6, pp. 113-114 (2013 ed.). See State v. Siple, 1995 Del. Super. LEXIS 156 at *4-11 (entering broad protective order mirroring provisions of Rule 3.8).

Inexplicably, the Commonwealth maintains that it is relying on the language of Rules 3.8 and 5.3 – which do not use parallel language – and upon the language of the Commentary. The Commonwealth argues that “[t]he Commentary to Rule 3.8 expressly adverts to Rule 5.3 in defining the range of persons for whom a prosecutor may be held accountable in the event of improper extrajudicial disclosures.” There is no “advert” to Rule 5.3 in the comments to Massachusetts Rule 3.8. Comment 6 to the equivalent section of the ABA Model Rules of Prof. Conduct, Rule 3.8(f),

⁶ Rule 3.6 prohibits an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding and that is expected to be disseminated by means of public communication.

does indeed “advert” to Rule 5.3, but not in a fashion that lends support to the Commonwealth’s position. Rather, after advertng to Rule 5.3, Comment 6 to ABA Model Rule 3.8(f) points out, as follows, that a prosecutor’s responsibilities go beyond Rule 5.3:

Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office. Paragraph (f) reminds the prosecutor of the importance of those obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

ABA Model Rules of Prof. Conduct, Rule 3.8(f), comment 6, pp. 113-114 (2013 ed.) (emphasis added).

Rather than aligning the “vague, open-ended standards suggested by the defendant with the specific requirements of the Rules of Professional Conduct (specifically, rules 3.8 and 5.3),” as the Commonwealth posits it has done in its proposed order, the Commonwealth’s suggested order deviates from Rule 3.8. In effect, it treats Rules 3.8 and 5.3 as articulating one standard as if there were no “Special Responsibilities of a Prosecutor.” See Devine v. Robinson, 131 F. Supp.2d 961, 970-971 (N.D. Ill. 2001) (rejecting argument that Rule 3.8 is vague and over broad, and opining that it should rarely pose a problem for prosecutors to identify the people “assisting or associated with” them for purposes of rule).

Requiring a prosecutor to take reasonable steps to prevent those assisting or associated with the prosecutor from making prejudicial extrajudicial statements is a natural corollary of the prosecutor’s unique role in criminal cases. “A prosecutor has the responsibility of a minister of

justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Mass. R. Prof. C. 3.8, comment 1. The prosecutor:

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). "In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused . . . a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused." Mass. R. Prof. C. 3.8, comment 5. Accord National District Attorneys Association National Prosecution Standards (3d ed.) ("NDAA Standards"), Standard 2-14.2. Rule 3.8 simply requires the prosecutor to exercise reasonable care to minimize the possibility that investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor will strike foul blows that the prosecutor may not. Devine v. Robinson, 131 F. Supp.2d at 971.

The Commonwealth has expressed a concern that imposition of a "reasonable care" obligation with respect to persons not under its supervisory control will make the prosecutor strictly liable for the comments of others over whom the prosecutor has no control. It does not. A prosecutor

may become responsible for a prejudicial statement by a non-lawyer that the prosecutor could not have made if the prosecutor fails to comply with the reasonable care obligations imposed by this Order. Similarly, a prosecutor may become liable if, with the knowledge of the specific conduct, the prosecutor ratifies the conduct involved; or if the prosecutor has direct supervisory authority over the person, knows of the conduct at a time when its consequences can be avoided or mitigated, and fails to take reasonable remedial action. See Mass. R. Prof. C. 5.3(c).

In sum, the prosecutor's obligation under the Order to exercise reasonable care is not limited to those individuals under the prosecutor's supervisory control. Nothing in the Order imposes obligations on the Commonwealth that are not within its power to implement. Moreover, the Order applies equally to defense counsel. Even though the reasonable efforts required of defense counsel by the Massachusetts Rules of Professional Conduct are only with respect to individuals, whether employees or independent contractors, over whom defense counsel has direct supervisory authority, the defendant has agreed to assume the same obligations as the prosecutor.

In order to provide clarity to the parties of what is expected in this particular case by way of reasonable care, the Court includes in the Order specific steps to be followed in this litigation.⁷ An objective standard applies to the reasonable care obligation, and what steps a reasonably prudent and competent lawyer would undertake will vary depending on the circumstances of the particular case. As the Commonwealth points out, "[o]rdinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals." ABA Model Rules of Prof. Conduct, Rule 3.8(f), comment 6, pp. 113-114 (2013 ed.).

⁷ Mass. R. Prof. C. 9.1(j) defines "reasonable" as follows: "When used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer."

The extraordinary level of media attention to this case requires something more than what “ordinarily” may be sufficient. The realities of this case lead the Court to conclude that it is not enough for the Commonwealth merely to issue appropriate cautions to law enforcement personnel and others.

Every precaution that prosecutors must take in order to comply with Rule 3.8(e) cannot be spelled out. Cf. Devine v. Robinson, 131 F. Supp.2d at 970 (rejecting vagueness challenge to Model Rule 3.8 and noting that “ethics rules need not spell out a prosecutor’s obligations to every conceivable person in every conceivable situation...”). Nonetheless, this Court can set out some standards. What is reasonable may vary depending on whether the prosecutor does in fact have supervisory control over the non-lawyer. Accordingly, unlike the order proposed by the defendant, the Order issued by the Court, where appropriate, distinguishes between those two categories of individuals.⁸

The Commonwealth requests that the Court enter an order that would result in its duty to exercise reasonable care being fulfilled if prosecutors provide to persons under their supervisory control a copy of the Order, the relevant rules of professional conduct, and written guidance regarding the handling of requests for information from members of the public, and if they make themselves available to agents of the Commonwealth who might have questions about their responsibilities regarding extrajudicial statements. However, “[t]he measures involved in supervising

⁸ The Court rejects the defendant’s characterization of all persons assisting or associated with the prosecutor as “agents of the Commonwealth” because the word “agent” is a legal term implying a degree of control that may not be present with respect to some such individuals. An agent is one who manifests assent or consents to act on behalf of and subject to the control of another. Restatement (Third) of Agency § 1.01 (2006). See also Theos & Sons, Inc. v. Mack Trucks, Inc., 431 Mass. 736, 742 (2000). The Court also rejects the Commonwealth’s use of the term “agents” because it is used in the Commonwealth’s proposed order in order to limit the category of persons to whom reasonable care must be addressed to those under the prosecutors’ supervisory control.

non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.” Mass. R. Prof. C. 5.3, comment 1. Thus, it is not enough to promulgate written policies for compliance with the ethical obligations concerning extrajudicial statements; rather, counsel must take steps to ensure that non-lawyer personnel actually read, understand, and are willing to comply with such policies. See, e.g., *id.* (lawyer should give non-lawyer assistants “appropriate instruction and supervision concerning the ethical aspects of their employment”); MBA Committee on Prof. Ethics, Opinion 05-04 at *2 (“reasonable efforts” to ensure that vendor protects attorney’s confidential information could include both drafting procedures for protecting information, examining vendor’s policies and procedures, and obtaining written assurance from vendor that confidentiality will be maintained); Attorney Grievance Comm’n v. Glenn, 671 A.2d 463, 480-481 (Md. Ct. App. 1996) (attorney violated Rule 5.3 where he prepared instruction manual explaining ethical duties in handling client funds, but bookkeeper never read it, and attorney never undertook reasonable efforts to ensure that she complied with it); Michigan Standing Committee on Professional and Judicial Ethics, Opinion No. RI-104, 1991 WL 519857 at *2 (with respect to client confidentiality, lawyer should supply consultant with copies of applicable Rules of Professional Conduct, discuss any features consultant does not understand, and obtain statement that consultant recognizes obligations and will make every effort to ensure they are complied with). See also Sabrina A. Mason, Policing the Police: How Far Must a Prosecutor Go to Keep Officers Quiet?, 26 S. Ill. U. L. J. 317, 330-332 (Winter 2002) (suggesting that “reasonable care” under Model Rule 3.8(f) should include providing police and others with copies of relevant ethical rules; issuing written guidelines; explaining rules in training session; making prosecutor available to police for advice in handling particular situations, particularly media requests for information; providing continuing

education program to periodically re-train police officers and others; and securing written statement from each covered individual acknowledging that they have received training, understand their obligations, and pledge continued compliance with ethical rules).

For example, under the NDAA Standards, a prosecutor should encourage, cooperate with, and, where possible, assist in law enforcement training, including by conducting periodic classes, discussions, or seminars. NDAA Standards 2-5.3, 2-5.4. In addition, a prosecutor may provide legal advice to local law enforcement officers concerning specific prosecutions. NDAA Standard 2-5.6. The prosecutor should assist law enforcement and other investigative agencies in understanding their statutory responsibilities with respect to the release of criminal justice information and should train them on subject matters to avoid when discussing pending criminal investigations or prosecutions with the media. NDAA Standard 2-14.6. Cf. United States Attorneys Manual (2013) (“USAM”) § 1.7.401G (all Department of Justice employees must avoid any public statement that violates legal rules and requirements).

In this case, the Court concludes that the prosecutor’s duty of reasonable care includes, but is not limited to, providing non-lawyer personnel assisting or associated with the prosecutor with a copy of the Order, the relevant Rules of Professional Conduct, the relevant Rule of Criminal Procedure regarding grand jury proceedings, and written guidelines concerning proper versus improper extrajudicial statements and the obligation to keep grand jury material secret. It also includes being being available to respond to questions.⁹ In addition, it includes providing written

⁹ In view of the types of statements reported in the media that triggered the defendant’s renewed motion for an Order, the Court deems it appropriate that persons assisting or associated with the prosecutors be provided with a copy of Rule 5(d) of the Massachusetts Rules of Criminal Procedure and guidelines regarding the obligation to keep grand jury information secret.

guidelines regarding media requests for information that include directing or requesting, depending on the level of supervisory control, that requests for information be directed to a prosecutor, or to the Bristol County District Attorney's Director of Communications or such other person in the Bristol County District Attorney's Office designated to act as a point of contact on matters pertaining to this case and the media. Cf. USAM § 1-7.220 (each U.S. Attorney's Office shall designate one or more persons to act as point of contact for media); USAM § 1-7.401E (any public communication by investigative agency or employee about pending investigation or pending case must be approved by prosecutor); USAM § 1-7.530A (personnel shall not respond to questions about existence, nature, or progress of ongoing investigation, including issuance or service of subpoena prior to its public filing); USAM § 1-7.530B (investigative agency shall consult and obtain prosecutor's approval prior to disseminating information to media in rare case where release of information about ongoing investigation is required).

It also is appropriate to require that the prosecutor warn persons assisting or associated with the prosecutor that, depending on the level of supervisory control, they will be disciplined or their supervisor will be requested to discipline them should they make an extrajudicial statement that the prosecutor would be prohibited from making.¹⁰ Other reasonable steps required by the Order include requiring the prosecutor to attempt to ensure that persons assisting or associated with the prosecutor understand the materials provided to them by requiring or seeking, depending on the level of supervisory control, such persons to sign a certification that they have read the materials provided,

¹⁰ Counsel for the parties are not obligated by this Order to advise individuals who may be assisting or associated with them that any breach of their responsibilities may result in their being held in contempt of court, prosecuted and subjected to fines and/or imprisonment. The obligations under this Order run to counsel.

understand their responsibilities and intend to comply with them.¹¹ To the same end, the prosecutor is required by the Order, depending on the level of supervisory control, either to conduct a training session for individuals assisting or associated with the prosecutor or to request the ability to conduct such training sessions from the supervisors of those individuals.¹²

Finally, the Court determines that it is appropriate in this case to require the prosecutor to investigate reports of prohibited extrajudicial statements and, if a violation is has occurred, pursue or recommend discipline for any non-lawyer personnel who violates his or her obligations with respect to extrajudicial statements. Under the NDAA Standards, a prosecutor is obligated to respond to professional misconduct with the potential to interfere with the proper administration of justice by addressing misconduct in accordance with internal procedures, reporting it to a higher authority within the District Attorney's Office, and if no action is taken internally to remedy the misconduct, reporting it to appropriate officials outside the District Attorney's Office. NDAA Standard 1-1.6.

Defense counsel has agreed to implement the procedures required of the prosecutors with respect to all persons assisting or associated with the defense, including those over which they do not have supervisory control. Therefore, despite the fact that Rule 3.8 is addressed specifically to

¹¹ The Court rejects the defendant's request that certifications be ordered to be under pains and penalties of perjury and that each person associated with or assisting the prosecution also be required to swear that they have not previously communicated information that would constitute a prohibited extrajudicial statement. The Order is forward-looking.

¹² The Court does not require, as is suggested by the Commonwealth, that counsel provide a statement signed under penalties of perjury, attesting to their compliance with the Order. The Court has no reason to doubt that counsel will attempt, in good faith, to comply. Further, it is unnecessary at this time for the Court to order counsel to disclose the names of all individuals who are assisting in or associated with their investigations. Cf. Mass. R. Crim. P. 14(a)(1)(A)(v) (Commonwealth must disclose names of prospective law enforcement trial witnesses); Mass. R. Crim. P. 14(a)(1)(B)(defendant must disclose names of persons intended to be called as witnesses); Reporter's Notes to Mass. R. Crim. P.14(a)(1)(A)(vi) (2004) (Commonwealth not required to produce information regarding expert who was consulted during investigation but will not be used at trial).

prosecutors, defense counsel will be required, by the terms of the Order, to implement the same steps required of the prosecutors in order to assure that persons assisting or associated with defense counsel do not make an extrajudicial statement that defense counsel could not make.

The Court declines the Commonwealth's request to order that any report of an alleged violation promptly be reported to the Court and that any such report be impounded until such time as the Court may determine that there is a good faith basis for believing that a violation has, in fact, occurred. Counsel have discretion, by way of an appropriate motion, to bring an alleged violation to the Court's attention. Automatic impoundment of such a motion would violate the Uniform Rules on Impoundment Procedure set forth at Trial Court Rule VIII. See Commonwealth v. Silva, 448 Mass. 701, 704-705 (2007) (Rule VIII should be followed in criminal cases).

Finally, it must be emphasized that the requirements of the Order are tailored to the needs and realities of this particular case and are not intended to be, nor should they be construed as, mandatory in all criminal cases.

ORDER

For the reasons set forth above, it is **ORDERED** that the defendant's Renewed Motion for Order Prohibiting Prejudicial Extrajudicial Statements of Counsel and Their Agents be and hereby is **allowed** in part and **denied** in part, and it is further **ORDERED** that:

1. None of the lawyers appearing in this case or any person with supervisory authority over them shall release or authorize the release of information about this proceeding that a reasonable person would expect to be disseminated by any means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing potential trial jurors or witnesses or will have a substantial likelihood of heightening public condemnation of the accused.
2. Specifically, none of the lawyers appearing in this case shall release or authorize the release of any extrajudicial statement that a reasonable person would expect to be

disseminated by any means of public communication concerning any of following subjects related to this case:

- a. the prior criminal record or the character, credibility, reputation, or prior bad acts of the defendant or any co-defendant;
 - b. the existence or contents of any statements made by the defendant or any co-defendant to any law enforcement personnel or the refusal or failure of the defendant or any co-defendant to make any statements to law enforcement personnel;
 - c. the results of any forensic testing;
 - d. the prior statements or credibility of any prospective witness;
 - e. the substance of any evidence a party, at the time of said release, anticipates seeking to introduce at trial; and
 - f. the existence and subject matter of any ongoing grand jury or other criminal investigation of the defendant or of any co-defendant.
3. This Order shall not be construed to prevent any of the lawyers appearing in this case from:
- a. quoting or referring without further comment to public court filings;
 - b. announcing the scheduling or result of any step in the judicial process;
 - c. requesting assistance from individuals or the public in obtaining evidence; or
 - d. stating an expectation or hope, without further explanation or elaboration, about the ultimate outcome of the proceedings.
4. The duty to refrain from prejudicial disclosures requires all lawyers appearing in this action to take reasonable precautions to prevent all persons who have been, are now, or will be participants in, assisting or associated with the investigations conducted by the prosecution and defense from making any statements or releasing any documents that are not in the public record, that are reasonably expected to be publicly disseminated, and that the lawyers appearing in this case would be prohibited from making under this Order or Rules 3.6 or 3.8 of the Massachusetts Rules of Professional Conduct.
5. In accordance with the special responsibilities of a prosecutor set forth in Massachusetts Rules of Professional Conduct 3.8(e), the prosecutors in this action shall exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor, including but not limited to private independent contractors (collectively referred to herein as "Prosecution Assistants/Associates"), whether or not such persons are under the direct supervisory authority of the prosecutors, from making an extrajudicial statement that a prosecutor would be prohibited from making under this Order or

Rules 3.6 and 3.8 of the Massachusetts Rules of Professional Conduct.

6. Specifically, in order to implement the special responsibilities of a prosecutor imposed by Rule 3.8 of the Massachusetts Rules of Professional Conduct, the prosecutors appearing in this action shall:
 - a. compile and keep current a list of all Prosecution Assistants/Associates;
 - b. provide the following to all Prosecution Assistants/Associates:
 - i. a copy of this Order;
 - ii. a copy of the relevant rules of professional conduct, including Rules 3.6 and 3.8 of the Massachusetts Rules of Professional Conduct;
 - iii. a copy of Rule 5(d) of the Massachusetts Rules of Criminal Procedure;
 - iv. written guidelines regarding the types of extrajudicial statements that cannot be made by Prosecution Assistants/Associates;
 - v. written guidelines regarding the obligation of Prosecution Assistants/Associates to keep secret information about the issuance or service of grand jury subpoenas, the subject matter of grand jury investigations, and the substance of evidence presented to a grand jury;
 - vi. written guidelines regarding the handling of requests for information from members of the public, including the media, that include:
 - (1) to Prosecution Assistants/Associates who are under the prosecutor's direct supervisory authority, a written directive to refer, without responding, any request for information from members of the public or the media to a prosecutor who has appeared in this action or to the Bristol County District Attorney's Director of Communications or such other person in the Bristol County District Attorney's Office designated to act as a point of contact on matters pertaining to this case and the media, and
 - (2) to Prosecution Assistants/Associates who are not under the prosecutor's direct supervisory authority, a written request urging that they refer, without responding, any request for information from members of the public or the media to a prosecutor who has appeared in this action or to the Bristol County District Attorney's Director of Communications or such other person in the Bristol County District Attorney's Office designated to act as a point of contact on matters pertaining to this case and the media; and
 - vii. written warnings, including:
 - (1) to Prosecution Assistants/Associates who are under the prosecutor's direct supervisory authority, a written warning

- that they will be appropriately disciplined should they violate their obligation not to make an extrajudicial statement that the prosecutor would be prohibited from making under this Order or Rules 3.6 and 3.8 of the Massachusetts Rules of Professional Conduct, and
- (2) to Prosecution Assistants/Associates who are not under the prosecutor's direct supervisory authority, a written warning that the prosecutor will recommend to the supervisor of such persons that they be appropriately disciplined should they violate their obligation not to make an extrajudicial statement that the prosecutor would be prohibited from making under this Order or Rules 3.6 and 3.8 of the Massachusetts Rules of Professional Conduct.
- c. take appropriate steps to ensure that Prosecution Assistants/Associates have been apprised of and understand the materials described in Paragraph 6(b) of this Order, including:
- i. confirm that each Prosecution Assistant/Associate understands his/her obligations and will comply with them by:
 - (1) obtaining from each Prosecution Assistant/Associate who is under the prosecutor's direct supervisory authority a written certification that he/she has read all the materials described in Paragraph 6(b), understands his or her responsibilities regarding extrajudicial statements, and will comply with those responsibilities;
 - (2) requesting from each Prosecution Assistant/Associate who is not under the prosecutor's direct supervisory authority a written certification that he/she has read all the materials described in Paragraph 6(b), understands his or her responsibilities regarding extrajudicial statements, and will comply with those responsibilities;
 - ii. for those Prosecution Assistants/Associates who have not already attended a prosecutor-led training session:
 - (1) conduct training session(s) for Prosecution Assistants/Associates under the prosecutor's direct supervisory authority, and
 - (2) for Prosecution Assistants/Associates not under the prosecutor's direct supervisory authority, actively encourage training, cooperate with their supervisors, and, where possible, assist in the training of such individuals concerning their responsibilities regarding extrajudicial statements;
 - iii. be available to respond to questions from Prosecution Assistants/Associates concerning their responsibilities regarding extrajudicial statements.

- d. take appropriate action to investigate reports of prohibited extrajudicial statements that come to the attention of a prosecutor and that are reasonably susceptible to an interpretation that they were made by one or more Prosecution Assistants/Associates:
 - e. with respect to any Prosecution Assistant/Associate found to have violated his or her obligations regarding extrajudicial statements:
 - i. arrange for the appropriate discipline of any such Prosecution Assistant/Associate who is under the prosecutor's direct supervisory authority, and
 - ii. recommend to the supervisor of any Prosecution Assistant/Associate who is not under the prosecutor's direct supervisory authority that the Prosecution Assistant/Associate be appropriately disciplined; and
 - f. document the prosecutor's efforts to comply with this order by maintaining:
 - i. records documenting the distribution of the materials specified in Paragraph 6(b) of this Order;
 - ii. copies of the signed certifications identified in Paragraph 6(c)(i) of this Order;
 - iii. records documenting the identities of Prosecution Assistants/Associates who attend a training session held pursuant to Paragraph 6(c)(ii) of this Order;
 - iv. records regarding the scope and results of any investigation undertaken pursuant to Paragraph 6(d) of this Order and any disciplinary action taken as a result of any such investigation.
7. In carrying out defense counsel's obligations under Paragraphs 4 of this Order, defense counsel shall implement the procedures specified in Paragraph 6 with respect to Defense Assistants/Associates.
8. Lawyers appearing in the case remain subject to all the relevant provisions of the Massachusetts Rules of Professional Conduct, including Rules 3.6, 3.8, 5.1 and 5.3.



E. Susan Garsh
Justice of the Superior Court

DATED: February 10, 2014

EXHIBIT F

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: SJ-2014-0095

SUPERIOR COURT DEPARTMENT
BRISTOL SUPERIOR COURT
No. BR CR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

CORRECTED MEMORANDUM OF DECISION

This matter came before me on the Commonwealth's petition pursuant to G. L. c. 211, § 3, seeking relief from a Superior Court judge's order allowing the defendant's renewed motion for an "Order Prohibiting Prejudicial Extrajudicial Statements of Counsel and Their Agents." Relief under G. L. c. 211, § 3, is extraordinary, and is rarely granted in an appeal of an interlocutory ruling by a trial judge, even where the Commonwealth may have no other remedy. See Commonwealth v. Platt, 464 Mass. 1006, 1006 (2012), quoting Commonwealth v. Richardson, 454 Mass. 1005, 1005-1006 (2009) ("The fact that the Commonwealth has no other remedy does not make [G. L.] c. 211, § 3, review automatic 'We have rarely allowed Commonwealth appeals of interlocutory matters under our

supervisory powers We will review interlocutory matters in criminal cases only when 'substantial claims' of 'irremediable' error are presented . . . and only in 'exceptional circumstances'. . . where 'it becomes necessary to protect substantive rights'").

The Commonwealth has made no showing in this case that there has been an "irremediable error" in "exceptional circumstances" affecting its substantive rights. Additionally, the Commonwealth has not shown that it has no other avenue of relief, where all of the relief that it seeks could be sought, in the first instance, by motion in the trial court. Therefore, the Commonwealth is not entitled to relief pursuant to G. L. c. 211, § 3.

Moreover, on this record, the Commonwealth has shown nothing but speculative future harm should it or the defendant make, or determine there is a need to make, an extrajudicial statement concerning some as yet to be determined event. Nor has the Commonwealth established the existence of any error, much less an abuse of discretion, in the carefully crafted order of the Superior Court judge, issued after a hearing, and after recommendations submitted by both parties as to the steps necessary to enforce any future violation of the first five paragraphs of that order, which, in essence, simply require compliance with the Massachusetts Rules of Professional Conduct. See New England Internet Cafe, LLC v. Clerk of Superior Court for

Criminal Business in Suffolk County, 462 Mass. 76, 83-84 (2012); Commonwealth v. Shanley, 455 Mass. 752, 762 (2010). Accordingly, a judgment shall enter denying the Commonwealth's petition.

Background. The defendant, a well-known sports figure, has been indicted for murder in the first degree. The investigation and the pre-trial proceedings have been the subject of close scrutiny and widespread publicity in various media outlets;¹ many such media reports have attributed information therein to "law enforcement sources." At the defendant's arraignment on June 26, 2013, a District Court judge allowed the defendant's unobjected-to motion for an order prohibiting prejudicial extrajudicial statements, but media reports containing similarly-attributed information continued thereafter. On October 10, 2013, a Superior Court judge denied without prejudice the defendant's "Motion for Order Prohibiting Prejudicial, Extrajudicial Statements of Counsel and Their Agents" because she concluded, after a hearing, that

"the order being sought would, in effect, simply require the parties to comply with Supreme Judicial Court Rule 3:07, the Massachusetts Rules of Professional Conduct, and the parties have stipulated that they will be bound by that Rule. The Commonwealth opposes entry of the requested order in light of its stipulation. At this stage, the Massachusetts Rules of Professional Conduct constitute the least restrictive alternative

¹ The Superior Court judge noted in her memorandum of decision that defense counsel represented that his Internet searches on the proceedings to date had produced over twenty-one million responses.

"At this time, the Court concludes that the Rules of Professional Conduct, coupled with an admonition from the Court, make it unnecessary to issue an order that would hold out the prospect of enforcing a violation of Rules 3.6 and 3.8 by way of civil and criminal contempt. A substantial likelihood that, without the threat of contempt, the Commonwealth will violate its obligations under the Rules of Professional Conduct has not been shown. The reasons for issuing an order may become more compelling as trial nears and if the rules are flouted."

The judge reminded the attorneys participating in the litigation or the investigation of their obligations under Mass. R. Prof. C. 3.6 and 3.6(a), and urged the attorneys to "take steps, preferably in writing, to remind any lawyer associated in a firm or government agency with such an attorney" of those obligations, as well as to take similar actions with regard to their non-attorney agents. She also "strongly admonished" "any attorney who is participating or who has participated in the investigation or litigation of this matter as a prosecutor . . . to read and to comply with Rule 3.8(g) and to exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."

On October 27, 2013, a few weeks after the denial of the defendant's motion, members of the Massachusetts State police, at the direction of the office of the district attorney for Bristol County, served a grand jury subpoena on a professional football player who was in Massachusetts with his team for a professional

football game. The subpoena involved a grand jury investigation of the defendant for alleged offenses unrelated to the murder indictment. Service of the subpoena took place immediately after the completion of that game, outside the visiting team's locker room at Gillette Stadium, in the presence of reporters from Sports Illustrated, a widely read national sports magazine, who were apparently waiting, with a photographer, for service of the subpoena to take place. The New England Patriots football team, which owns the stadium and was hosting the game, was reportedly unaware that the subpoena was to be served in this manner, nor was the visiting team given any advance notice of the intended service. The story was reported that night by numerous major news outlets; according to the defendant, a few days later, more than 100,000 reports were available on the Internet, through a "Google" search, asserting that the defendant was being investigated for, or was involved in, interstate gun trafficking. Media coverage of this investigation cited, among other similar phrases, "a source with knowledge of the matter," "a source with knowledge of the investigation," "a separate law enforcement source," or "a law enforcement official who was not authorized to speak publically about the case."

Thereafter, in November, 2013, the defendant filed a "Renewed Motion for Order Prohibiting Prejudicial, Extrajudicial Statements of Counsel and Their Agents." The motion was accompanied by an affidavit from defense counsel, copies of a

number of news articles, and a transcript of an October 28 television broadcast by a national sports network, as well as a proposed order.² The Commonwealth filed an opposition, stating that it was unaware of any conduct by any member of the prosecution team that violated the rules of professional conduct. A hearing on the motion was conducted on December 23. At that hearing, the judge concluded, as she later stated in her February memorandum and order, that "the Commonwealth unequivocally withdrew its opposition to the entry of an order and unequivocally agreed to paragraphs one through five of the order proposed by the defendant." The judge then requested that the parties submit proposed language for an intended sixth paragraph setting forth "reasonable steps" necessary for compliance by both parties with Mass. R. Prof. C. 3.6, and for compliance by the Commonwealth with Mass. R. Prof. C. 3.8. On January 8, 2014, the defendant filed a proposed order that included the first five paragraphs as agreed at the hearing, and a sixth paragraph addressing "reasonable steps." On January 15, the Commonwealth submitted a proposed order in which it provided different language for each of the first five paragraphs, as well as recommended language for the sixth paragraph. The defendant

² The first five paragraphs of the proposed order set forth the obligations of both parties to comply with the Massachusetts Rules of Professional Conduct, in particular Mass. R. Prof. C. 3.6, and the obligation of the Commonwealth to comply with the "special responsibilities of a prosecutor" as described in Mass. R. Prof. C. 3.8.

thereafter filed an opposition to the Commonwealth's proposed modifications, and the Commonwealth filed a response. On February 13, 2013, the judge issued a memorandum of decision and order on the defendant's renewed motion for an order prohibiting prejudicial extrajudicial statements.

The Commonwealth did not seek reconsideration, or modification of the terms of the order, in the Superior Court. Instead, a month later, on March 13, 2013, the Commonwealth filed its petition pursuant to G. L. c. 211, § 3. At the same time, the Commonwealth filed a motion for a stay of enforcement of the Superior Court order pending a decision on its petition. On March 14, the Commonwealth filed a motion for a temporary stay in the Superior Court; the judge took no action on that motion pending the Commonwealth's filing in the Superior Court of a copy of the petition before this court, and a response from the defendant. On March 17, the defendant filed an opposition in this court to the motion for a stay, and, on March 18, the defendant filed an opposition to the motion for a stay in the Superior Court. The judge then denied the motion for a temporary stay. On March 25, the defendant filed his opposition to the Commonwealth's G. L. c. 211, § 3, petition, and, on March 27, the Commonwealth filed a response.

Discussion. As the motion judge determined, there is no support for the Commonwealth's contention that an order prohibiting prejudicial extrajudicial statements by counsel may

be issued only after a finding that counsel has violated the rules of professional conduct. The order does not apply to potential trial witnesses, places no restraints on the media or on public access to any courtroom proceeding, and does not involve attorney discipline for violation of the rules of professional conduct. Undoubtedly, "free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-560 (1976). The order does not impinge on such free and robust reporting, and meets the standard set out in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

To the extent that the Commonwealth maintains that the judge misunderstood the conditions to which the assistant district attorney assented at the hearing on December 23,³ the Commonwealth did not attach a copy of the transcript of the

³ The Commonwealth concedes that, at the hearing on December 23, 2003, an assistant district attorney responded, "absolutely your honor" when asked if he agreed that the Rules of Professional Conduct "at this point could be turned into an order of the Court," and replied, after review of the proposed order, "Yes, your Honor, we agree to that" in response to the judge's question as to the defendant's proposed order, "so [paragraphs] 1 through 5, there's no opposition?" The Commonwealth contends, however, that the assistant district attorney only intended to agree to "those portions of the proposed order that precisely tracked the Rules of Professional Conduct," and that he did not assent to the order as drafted.

hearing to its petition, nor does it point to any specific statement by the assistant district attorney in which he might have raised an objection. The Commonwealth may of course seek modification of the terms of the order by motion in the Superior Court.

To the extent that the Commonwealth asserts the order is unduly burdensome because of the expense of the implementation requirements set forth in paragraph six, the judge found the Commonwealth's assertions as to the anticipated costs unpersuasive.⁴ The Commonwealth may, however, seek reconsideration, an evidentiary hearing, or modification of the order in the Superior Court, with documentation to establish that the asserted "significant costs of compliance" are prohibitive.

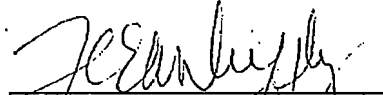
To the extent that the Commonwealth maintains it will be unable to respond to a prejudicial extrajudicial statement by the defendant, the order explicitly provides that the parties shall notify the trial judge of any purported violations of the prohibition on such statements. At any point that the Commonwealth determines that such a statement may have been made by the defendant, it may file motions in the Superior Court, requesting sanctions and any relief it deems necessary.

The Commonwealth has failed to establish that the

⁴ The judge found that "[t]he Commonwealth has not made a credible showing that any of the required steps are beyond its power to implement or unduly burdensome."

extraordinary relief available under G. L. c. 211, § 3, see Commonwealth v. Yelle, 390 Mass. 678, 687 (1984), is appropriate. Accordingly, an order shall enter denying the Commonwealth's petition pursuant to G. L. c. 211, § 3.

By the Court



Fernande R.V. Duffly
Associate Justice

Entered: April 11, 2014