

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
INDICTMENT NOS. 83-103391 to -94

COMMONWEALTH OF MASSACHUSETTS )  
 )  
 ) COMMONWEALTH'S  
v. ) MOTION TO DISMISS  
 ) LAGUER'S NINTH MOTION  
BENJAMIN LAGUER, ) FOR NEW TRIAL DUE TO  
 ) "FRAUD ON THE COURT"  
DEFENDANT )

The Commonwealth hereby supplements its opposition to "Laguer's [Ninth] Motion for New Trial and Evidentiary Hearing" and moves to dismiss defendant's motion on the grounds that defendant has submitted to the Court, and quoted in his memorandum of law, an unsigned, fraudulent, letter that is "wholly false and a deliberate and intentional fraud on the court." *Munshani v. Signal Lake Venture Fund II*, 60 Mass. App. Ct. 714, 717 (2004). (See attached **EXHIBIT 1**, an **unsigned, fraudulent letter** allegedly sent by former Assistant District Attorney James R. Lemire (now Associate Justice of the Superior Court) and addressed to "Peter Ettenberg, Esquire," dated "January 16, 1984").

"Dismissal for fraud on the court has been . . . [ordered] in cases involving similar conduct." *Rockdale Management Co., Inc. v. Shawmut Bank, N.A.*, 418 Mass. 596, 599 (1994) (affirming dismissal where party "forged a letter . . . in an effort to prove damages" and submitted letter in response to interrogatories); *Munshani*, 60 Mass. App. Ct. at 716-17 (dismissal where party manufactured evidence and caused his lawyer to file a false e-mail that was "allegedly received from [a company]'s president . . . [but] was not in fact written or sent by [him]"); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1116 (1<sup>st</sup> Cir. 1989) (dismissal where party "concocted, backdated, and persuaded [someone else] to sign a bogus purchase agreement").

"Because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms." *Aoude*, 892 F.2d at 1118. Viewing defendant's current misconduct in light of his prior bad acts of first, "destroying evidence and otherwise impeding the discovery process," *Rockdale*, 418 Mass. at 600, through defendant's admitted, intentional pre-trial tampering with a court-ordered saliva sample by mixing another inmate's saliva with his own, which resulted in an

“inconclusive” blood-type result and no blood-type evidence presented at trial (*see* Laguer’s Memorandum at p. 32 & nn.130-135), and second, “creating and presenting false evidence in support of a claim” raised in his sixth motion for new trial, *Rockdale*, 418 Mass. at 599, through defendant’s and his current lawyer’s involvement in the “serious lobbying” of an elderly juror who felt “baited and hooked” in 1988 into signing “an affidavit containing wildly exaggerated and uncorroborated allegations” of jury bias, which after an investigation and hearing, the trial judge found were “not essentially true” (*see* attached **EXHIBIT 9**, “Memorandum of Decision on Defendant’s Motion for New Trial” (Mulkern J.), dated Sept. 3, 1991 (Docket No. 71); **EXHIBIT 10**, copy of “Commonwealth’s Opposition to Application for Further Appellate Review, FAR-07222, filed at SJC on 5/2/94 on appeal from denial of sixth new trial motion;<sup>1</sup> and **EXHIBIT 11**, transcript sections from Vol. I and Vol. II of hearings held by the trial judge on remand on 8/26/91 and 8/27/91), it is clear that defendant’s current “fraudulent conduct is part of a *pattern or scheme* to defraud” that began before trial in 1983 and is still going on twenty-eight years later. *Rockdale*, 418 Mass. at 600 (emphasis in original). “[T]he [continuing] involvement of an attorney (an officer of the court) in the perpetration of the fraud,” *Paternity of Cheryl*, 434 Mass. 23, 36 (2001) (citations omitted), only makes it worse.<sup>2</sup>

#### FACTUAL BACKGROUND

The unsigned, fraudulent letter EXH 1) that defendant filed with the Court on July 5, 2011 in Volume I of his “exhibits,” and quoted in his memorandum of law (Laguer’s Memorandum at p. 8, n.23) -- but did **not** include in his 118-item “List of Exhibits” (Docket No. 174) -- is “clearly not authentic.” *Munshani*, 60 Mass. App. Ct. at 717. The unsigned, fraudulent letter is dated “January 17, 1984,” and is allegedly written, but not signed, by former Assistant District Attorney James R. Lemire and addressed to defendant’s trial counsel, “Peter Ettenberg, Esquire.” (*See* **unsigned, fraudulent letter** attached as **EXH 1**). The second paragraph of this unsigned letter states as follows:

**Per our conversation at the courthouse, this office is prepared to offer the defendant a twenty year Concord sentence in exchange of [sic] his guilty plea. The victim’s family is quite concern [sic] over her physical and mental health.**

<sup>1</sup> A certified copy from the SJC was not currently available but can be provided to the Court.

<sup>2</sup> Every lawyer in Massachusetts swears to “do no falsehood, nor consent to the doing of any in court,” G.L. c. 221, § 38. “[I]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation,” Rule 8.4 (c), and “[a] lawyer shall not . . . assist a client[] in conduct that the lawyer knows is criminal or fraudulent . . .” Rule 1.2 (d).

They are in agreement with this recommendation. The police department has no opinion. We expect no objections from Mr. John J. Conte, given the delicate circumstances and possibly his own inclination to spare us all the grief of a trial.

(EXH 1 ¶ 2) (emphasis added). The writer's grammatical errors, his self-important use of the first-person plural "we" and "us," and the unwarranted conjecture about "Mr. John Conte's" possible "inclination" are in stark contrast to former Assistant District Attorney Lemire's authentic, formal business letters.

Defendant also included in Volume 1 of his "exhibits" a signed, authentic letter from former Assistant District Attorney James R. Lemire, attached to a "list of prospective witnesses." (See signed, authentic letter dated "January 16, 1984" and addressed to "Peter Ettenberg, Esquire," and attached as EXHIBIT 2). Like the unsigned, fraudulent letter (EXH 1), the authentic signed letter is dated "January 17, 1984" and addressed to "Peter Ettenberg, Esquire." (EXH 2). The captions on the authentic letter and the attached witness list also refer to defendant as "BENJAMEN LAGUER" (EXH 2), not "BENJAMIN" as in the unsigned letter. (EXH 1).

At his recent parole hearing on April 22, 2010, defendant repeatedly argued that former ADA Lemire had offered him a plea bargain, a claim that the Commonwealth strongly disputed. In response to defendant's claims at the hearing, a week or so later, on May 3, 2011, the Commonwealth submitted a post-hearing letter to the Parole Board, with Exhibits 1, 2, & 3. (See the Commonwealth's May 3, 2010 post-hearing letter to the Parole Board and Exhibits 1, 2 & 3, attached as EXHIBIT 3).

Exhibit 1 to the Commonwealth's post-hearing letter (EXH 3-1) was a sworn affidavit from former Assistant District Attorney James R. Lemire (now a Superior Court judge), signed under the pains and penalties of perjury, stating in part:

....

4. [In 1983 and 1984] . . . Benjamin Laguer was represented by an experienced Worcester defense attorney, Peter L. Ettenberg.
5. The Laguer case involved a vicious attack against a fifty-nine-year-old woman, who was brutally beaten and repeatedly raped in her own apartment over the course of eight hours starting around 9:00 p.m. on July 12, 1983. The victim suffered serious injuries and has a heart attack shortly after she was brought to the hospital on the morning of July 13, 1983.

6. In the months before trial, which took place in January 1984, I was concerned that the victim might not be able to testify due to her fragile medical condition.
7. I recall having general conversations with Attorney Ettenberg about the case when we appeared for pre-trial conferences at the old courthouse at 2 Main Street in Worcester.
8. I never would have made a plea offer to Attorney Ettenberg without first meeting with the victim to decide what she wanted to do.
9. Because this was such a horrendous crime, the victim would have had to be on board before I made any plea offer to Attorney Ettenberg's client.
10. I distinctly remember meeting with the victim and her son-in-law, Robert Barry, shortly before trial in one of the rooms in the District Attorney's Office at the old courthouse to discuss our options in the case.
11. When I met with the victim, she insisted on testifying and told me, "I'm going to do this."
12. The victim told me that she wanted to testify because her attacker should not get away with what he did to her.
13. I never made any plea offer to Attorney Ettenberg because the victim insisted on testifying at trial.
14. In 1983 and 1984, the protocol in our office was that all plea offers made in Superior Court cases had to be approved by the District Attorney, John J. Conte; Assistant District Attorneys were not authorized to make any plea offers without the District Attorney's approval.
15. I never asked District Attorney Conte to approve a plea offer in the Laguer case, because the victim insisted on going to trial.
16. Defense attorneys who regularly practiced in Worcester Superior Court in 1983 and 1984 knew that the District Attorney had to approve any plea offers made by prosecutors.
17. I told Attorney Ettenberg that the victim insisted on going forward with the trial. . . . .
21. I am certain that no plea offers were ever made to Benjamin Laguer.

Signed under the pains and penalties of perjury this 30<sup>th</sup> day of April, 2010.

\_\_\_\_\_  
/s/  
James R. Lemire

(EXH 3-1, ¶¶ 13-21) (emphasis added).

In short, Judge Lemire's sworn affidavit confirms that no plea offer was ever made to defendant or approved by the former District Attorney, because the victim "insisted on testifying" and "going to trial." (EXH 3-1, ¶¶ 11-13, 15, 17).

In his sworn affidavit, Judge Lemire also states that he "**distinctly remember[s] meeting with the victim and her son-in-law, Robert Barry, shortly before trial,**" and that **the victim "insisted on testifying."** (EXH 3-1, ¶¶ 10-11) (emphasis added). As such, the claim in the unsigned letter that "[t]he victim's family . . . [was] in agreement with this [twenty-year Concord plea] recommendation" is false, with no basis in fact. (EXH 1). Moreover, due to the "horrendous" nature of the violent, sexual attack on the 59-year-old victim, which lasted eight hours (EXH 3-1, ¶¶ 5, 9), it is highly unlikely that "[t]he [Leominster] police [would have] no opinion" if the rapist had been offered a "twenty year Concord sentence" resulting in two years to serve. (EXH 1)

In his sworn affidavit, Judge Lemire also refers to former District Attorney John J. Conte as "**the District Attorney, John J. Conte,**" "**District Attorney Conte**" and "**the District Attorney,**" using his title and middle initial (EXH 3-1, ¶¶ 14-16, 18-19) (emphasis added), as opposed to "Mr. John Conte," the designation used in the unsigned letter. (EXH 1).

In addition to Judge Lemire's sworn affidavit (EXH 3-1), the second exhibit to the Commonwealth's post-hearing letter was a portion of the sentencing transcript from defendant's 1984 trial (EXH 3-2), which shows that, in arguing against the Commonwealth's proposed life sentence, Attorney Ettenberg never mentioned a plea offer. (EXH 3-2). The third exhibit to the Commonwealth's post-hearing letter consisted of defendant's *pro se* "Motion to Stay Execution of Sentence" and *pro se* affidavit, filed on November 19, 1984, in which **defendant never mentioned a plea offer.** (EXH 3-3). If in fact a twenty-year Concord sentence had been offered to defendant before his January, 1984 trial, Attorney Ettenberg and defendant surely would have mentioned it at sentencing or in filings made within a year of the trial.

On May 10, 2010, defendant's parole lawyer, Attorney Isaac Borenstein, also submitted a post-hearing letter to the Parole Board, with Exhibits A & B. (See Attorney Borenstein's May 10, 2010 post-hearing letter to the Parole Board, with Exhibits A & B, attached as **EXHIBIT 4**). Exhibit A to Attorney Borenstein's letter (EXH 4-A) was a sworn affidavit from defendant's trial



5. **Assistant District Attorney James R. Lemire never made a formal plea offer to me in writing, in regard to Benjamin Laguer.**

Signed under the pains and penalties of perjury this 6<sup>th</sup> day of September, 2011.

/s/  
Peter L. Ettenberg

(EXH 5) (emphasis added).

The two (2) sworn affidavits from Attorney Ettenberg and the sworn affidavit from Judge Lemire clarify the fact that, in the months before defendant's 1984 trial, because the prosecutor was "concerned that the victim might not be able to testify," the two lawyers did have "general conversations . . . about the case" during which they "discussed . . . the possibility of a plea agreement" and "discussed an offer for a joint recommendation." (EXH 4-A, Ettenberg Affidavit, ¶¶ 3-4); EXH 3-1, Lemire Affidavit, ¶¶ 6-7). But because "the victim insisted on testifying" and "going to trial," Judge Lemire "told Attorney Ettenberg that the victim insisted on going forward with the trial" (EXH 3-1, ¶ 17). Therefore, Judge Lemire "never asked District Attorney Conte to approve a plea offer in the case" and "never made any plea offer to Attorney Ettenberg." (EXH 3-1, ¶¶ 11-13, 15). Judge Lemire is "certain that no plea offers were ever made to Benjamin Laguer." (EXH 3-1, ¶ 21). Attorney Ettenberg confirms that he "did not see or receive [the fraudulent unsigned] letter in 1984" and saw it for the first time "in 2010," and that former "Assistant District Attorney James R. Lemire never made a formal plea offer to [Attorney Ettenberg] in writing, in regard to Benjamin Laguer." (EXH 5, ¶¶ 3 & 5).

All of this evidence -- in particular, **the three (3) sworn affidavits (EXHS 3-1, 4-A & 5) from the lawyers who purportedly sent and received the unsigned letter** -- confirms that the trial prosecutor did **not** formally offer defendant "a twenty-year Concord sentence in exchange of [sic] his guilty plea" (EXH 1) and did **not** send Attorney Ettenberg a letter in 1984 memorializing such an offer. Therefore, the unsigned letter (EXH 1) that defendant included in Volume I of his "exhibits" and quoted in his memorandum of law (Laguer's Memorandum at p. 8, n.23) constitutes "fabricated evidence." *Munshani*, 60 Mass. App. Ct. at 715.

Despite all this evidence -- including the fact that defendant is well aware of all the post-hearing letters, affidavits, and other exhibits that Attorney Borenstein and the Commonwealth filed with the Parole Board in May of 2010 (EXHS 3 & 4), which do not include the unsigned letter -- defendant and his supporters have been promoting the unsigned, fraudulent letter as

though it were true since at least June of 2010, just weeks after defendant's April 22, 2010 parole hearing. (See attached **EXHIBIT 6**, printouts from the "Live, Love, Learn" blog of John Hosty-Grinell, dated June 11, 2010). Defendant continues to trumpet the unsigned, fraudulent letter on at least one of his websites (see attached **EXHIBIT 7**, recent printouts from [www.benlaguer.org](http://www.benlaguer.org), under "Original Documents"), and in attachments to his e-mails (see, e.g., attached **EXHIBIT 7**, printout of e-mail from "Ben Laguer" dated August 3, 2011, and page 1 of attached "Bibliographical Notes") as proof that he was offered a plea.

It strains credulity that a letter that defendant touts as having been written and mailed in 1984 would appear out of nowhere in June of 2010, only **after** the Commonwealth challenged defendant's plea bargain claims before the Parole Board in April and May of 2010.

#### ARGUMENT

**Defendant's intentional filing of a fabricated letter in 2011, after admittedly tampering with court-ordered evidence in 1983 and intentionally preparing and filing a false affidavit from an elderly juror in 1988, demonstrates a long-standing pattern or scheme to defraud that justifies dismissal.**

"A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Hug v. Gargano & Assocs., P.C.*, 75 Mass. App. Ct. 520, 527-28 (2010) (citations omitted). "A party seeking to demonstrate fraud on the court must prove 'the most egregious misconduct involving a corruption of the judicial process itself. Examples are bribery of judges, employment of counsel to 'influence' the court, bribery of the jury and **the involvement of an attorney (an officer of the court) in the perpetration of fraud.**" *Paternity of Cheryl*, 434 Mass. at 36 (citations omitted).

"The essence of fraud on the court is when 'a party lies to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process.'" *Passlogix, Inc., v. 2FA Tech, LLC*, 708 F. Supp. 2d 378, 393 (S.D.N.Y. 2010) (quoting *McMunn v. Memorial Sloan Kettering Cancer Ctr.*, 191 F. Supp. 2d 440, 445 (S.D.N.Y. 2002)). "Generally, to determine whether to sanction a party with dismissal, the court considers five factors: (1) whether the misconduct was the **product of intentional bad faith**; (2) whether and to what extent the misconduct prejudiced the other party; (3) whether there is **a pattern of misbehavior**,



rather than an isolated instance; (4) whether and when the misconduct was corrected; and (5) whether misconduct is likely to continue in the future.” *McMunn*, 191 F. Supp. 2d at 446 (emphasis added). In this case, there has been a decades-long pattern or scheme of intentional and repeated misbehavior by defendant since 1983, and by defendant and his lawyer since the late 1980s, which, if left unpunished could well continue into the future.

In this case, defendant has persisted in promoting and now presenting to the Court in support of his motion, and quoting in his memorandum of law, an unsigned fraudulent letter (EXH 1) whose content is directly contradicted by a sworn affidavit from the alleged author, a Superior Court judge. (EXH 3-1). Defendant’s blithe insistence on continuing to promote an unsigned letter that he cannot believe in good faith to be truthful, and continuing to do so before this Court despite countervailing evidence, constitutes an ongoing fraud on the court that “seriously affects the integrity of the judicial process,” especially when viewed in light of defendant’s previous high-profile transgressions. *Passlogix*, 708 F. Supp. 2d at 393-94. (See EHS 9, 10 & 11).

“When a fraud on the court is shown through clear and convincing evidence to have been committed in an ongoing case” as “part of a pattern or scheme to defraud,” the Court has “the inherent power to take action in response to fraudulent conduct.” *Rockdale*, 418 Mass. at 598, 600. To punish defendant’s bad behavior and deter future wrongs -- particularly in this case, where the bad acts stretch back to 1983 and are still ongoing -- a “trial court is permitted to say, under proper circumstances, that enough is enough.” *Dotson v. Bravo*, 202 F.R.D. 559 (N.D. Ill. 2001) (quoting *Pyramid Energy, Ltd., v. Heyl & Patterson, Inc.*, 869 F.2d 1058, 1062 (7<sup>th</sup> Cir. 1989)). With his history, defendant would no doubt conclude that he has everything to gain, and nothing to lose, if the unsigned, fraudulent letter were merely excluded while he continues to pursue a new trial. *Dotson*, 202 F.R.D. at 575-76. Litigants must know that the courts are not open to persons who seek justice, or the media spotlight, via fraudulent means. *Id.* at 576.

In this case, dismissal of defendant’s ninth motion for new trial, which both fails to comply with numerous rules of procedure “and has **no factual support**” (see “Commonwealth’s Opposition to Laguer’s Ninth Motion for New Trial and Evidentiary Hearing” (Docket # 172)) is the only proper response to defendant’s cavalier attitude toward the administration of justice.

**CONCLUSION**

For all of these reasons, and the reasons cited in the Commonwealth's original opposition and in its renewed opposition, defendant's **ninth** new trial motion should be dismissed.

Respectfully submitted,  
COMMONWEALTH OF MASSACHUSETTS

*Sandra L. Hautanen*

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Dated: 9/9/11

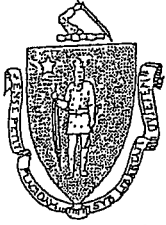
**CERTIFICATE OF SERVICE**

I, Sandra L. Hautanen, Assistant District Attorney, do hereby certify that on September 9, 2011, I caused to be served in hand a copy of the "Commonwealth's Motion to Dismiss Laguer's Ninth Motion for New Trial due to Fraud on the Court," along with this Certificate of Service, to the following counsel of record for defendant Benjamin Laguer:

Robert E. Terk, Esq.  
5 Almount Terrace  
Fitchburg, MA 01420  
robert.terk@yahoo.com

*Sandra L. Hautanen*

Sandra L. Hautanen



JOHN J. CONTE  
DISTRICT ATTORNEY

COMMONWEALTH OF MASSACHUSETTS

OFFICE OF THE  
DISTRICT ATTORNEY  
MIDDLE DISTRICT

WORCESTER COUNTY COURTHOUSE  
WORCESTER, MASSACHUSETTS 01608

TELEPHONE  
725-8801  
AREA CODE 617

January 17, 1984

Peter Ettenberg, Esquire  
390 Main Street  
Worcester, MA 01608

RE: COMMONWEALTH V. BENJAMIN LAGUER

Dear Mr. Ettenberg:

This is to answer your question concerning who was present in the hospital room when the victim made statements to Detective Ronald Carignan on July 14, 1983 at approximately 8:30 a.m. I have reread the report in question and spoke with Detective Carignan. The only other person present was her daughter Elizabeth Barry. I hope this answers your question.

Per our conversation at the courthouse, this office is prepared to offer the defendant a twenty year Concord sentence in exchange of his guilty plea. The victim's family is quite concerned over her physical and mental health. They are in agreement with this recommendation. The police department has no opinion. We expect no objections from Mr. John Conte, given the delicate circumstances and possibly his own inclination to spare us all the grief of a trial.

Again, the fingerprint reports have not been received as of yet. As I have told you since you began asking, I will provide all reports as soon as I get them.

If you have any further questions, feel free to contact me at any time.

Very truly yours,

JAMES R. LEMIRE  
Assistant District Attorney

JRL/ljl



JOHN J. CONTE  
DISTRICT ATTORNEY

COMMONWEALTH OF MASSACHUSETTS

OFFICE OF THE  
DISTRICT ATTORNEY  
MIDDLE DISTRICT

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TELEPHONE  
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January 17, 1984

Peter Ettenberg, Esquire  
370 Main Street  
Suite 881  
Worcester, MA 01608

RE: COMMONWEALTH V. BENJAMEN LAGUER

Dear Mr. Ettenberg:

The following is a list of prospective  
commonwealth witnesses.

If you have any questions, feel free to  
contact me at any time.

Very truly yours,

A handwritten signature in cursive script that reads "James R. Lemire".

JAMES R. LEMIRE  
Assistant District Attorney

JRL/ljl

Enclosure

COMMONWEALTH OF MASSACHUSETTS V. BENJAMEN LAGUER

Prospective Commonwealth Witnesses

Officer Mazzeralla  
Leominster Police Department

Officer Raymond  
Leominster Police Department

Officer DiPerri  
Leominster Police Department

Ronald Carignan  
Leominster Police Department

Raymond S. Cochran  
106 Waterways Apartment 312  
Leominster, Massachusetts

Officer Monahan  
Leominster Police Department

Lt. Hebert  
Leominster Police Department

Elizabeth Barry  
42 North Street  
Leominster, Massachusetts

Mr. Dennis Benoit  
100 C Building  
Waterway Apartments  
Leominster, Massachusetts

Mr. Raymond Benoit  
97 A Building  
Waterway Apartments  
Leominster, Massachusetts

Keeper of the Records  
Leominster Hospital  
Leominster, Massachusetts

Dr. William Siegel  
c/o Leominster Hospital  
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