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December 5, 2022

Advisory Committee on Rules
c/o Lorrie Platt, by email only
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RE: Comment on the proposal to amend Rule of Professional Conduct 3.8

Dear Supreme Court Rules Advisory Committee Members:

Thank you for the opportunity to comment on the proposal to amend Rule of Professional Conduct 3.8. As officials and attorneys entrusted with the just prosecution of accused offenders, we appreciate the proponents' assurance that the submission is not intended to suggest any existing deficiency in how New Hampshire prosecutors conduct themselves. As prosecutors we are ever mindful of our responsibilities to do justice and obligations to disclose exculpatory evidence as required by court rules and case law.

The draft comment suggests that the proposed rule is "intended to proactively provide guidance to prosecutors" relative to "their obligations regarding post-conviction evidence." With full appreciation of that stated objective, we have concerns about the proposal in its current form. Among them:

- Who is "a prosecutor" for purposes of the proposed rule? A clearer definition would be appreciated. Is the obligation only imposed upon an attorney currently employed as a prosecutor? Does the obligation follow an attorney who prosecuted a case but subsequently leaves the prosecutor's office to take a position as a private practitioner, criminal defense attorney, public sector civil litigator, academic, or other role that does not involve criminal prosecution?
- Is the obligation imposed upon the individual(s) who prosecuted a case, or does it extend to successor prosecutors after the original prosecutor(s) departure? If the ethical obligation falls upon a successor who was not involved in the underlying

prosecution how is that person to determine whether certain evidence is, in fact, “new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense?” Current prosecutors unfamiliar with the particulars of closed cases may feel compelled—at risk of losing their livelihood—to reopen them to assess whether certain evidence meets the triggering mechanism for other obligations under the rule. Prosecutors staggering to meet their obligations with heavy active caseloads are not well situated to reopen and review closed cases each time they are presented with purportedly “new evidence.”

- The triggering mechanism in the proposed rule is the discovery of “new, credible and material evidence.” The party seeking a new trial based on newly discovered evidence in New Hampshire must establish, among other things, that the new evidence is admissible, material, and not cumulative. *State v. Etienne*, 163 N.H. 57, 96 (2011); *Rautenberg v. Munnis*, 109 N.H. 25, 26 (1968). Should the proposed rule be modified to align with the New Hampshire standard?
- The proposed rule distinguishes between “new, credible and material evidence creating a reasonable probability the convicted defendant did not commit an offense of which the defendant was convicted” and “clear and convincing evidence that a defendant . . . was convicted of an offense that the defendant did not commit.” In the latter instance, “the prosecutor shall seek to remedy the conviction.” However, the rule that is intended to provide proactive guidance to prosecutors does not specify what measures meet the ethical obligation to “remedy the conviction.” The proposed comments suggest those measures may include several which are required for the former category of new evidence. To the extent that the measures required for the former category of evidence may meet the requirements for the latter category of evidence, would it be preferable to have the lower threshold as the single triggering mechanism?
- Insofar as the proposed rule is offered to provide clear, workable guidance to a prosecutor aspiring to meet her ethical obligations, would it be more appropriately codified in the Rules of Criminal Procedure rather than the Rules of Professional Conduct?

At last count slightly less than half of United States’ jurisdictions have adopted a version of the proposed rule. New Hampshire stands among good company with the majority of states that have not. Nevertheless, if the Committee finds a need to codify a directive within the Rules of Professional Conduct, we respectfully offer an alternative proposal for your consideration:

Rule 3.8, Special Responsibilities of a Prosecutor¹:

¹ There remains the need to more clearly define who a prosecutor is for purposes of the rule.

(b) When a prosecutor knows of new, credible, and material evidence relevant to a criminal conviction occurring in the prosecutor's jurisdiction, which when considered with the evidence available at trial, creates a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted, the prosecutor shall disclose that evidence to the sentencing court and to the defendant.

(c) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraph (b), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Consistent with the proposed rule's stated goal, this alternative codifies a requirement that a prosecutor provide both the sentencing court and the defendant with notice of new, credible, and material evidence that undermines the integrity of a conviction. Such a notice requirement would be consistent with current New Hampshire practice and existing law. For example, New Hampshire Rule of Criminal Procedure 12(b)(1)(E), requires prosecutors to provide all exculpatory materials to the defendant. That requirement does not end and is ongoing. That is reflected in New Hampshire Rule of Criminal Procedure 12(b)(7), which requires the parties to supplement their discovery responses "on a timely basis as additional materials" are generated, or when a party learns that "discovery previously provided is incomplete, inaccurate, or misleading." The additional discovery that must be provided includes information about the expected testimony of trial witnesses that has not been previously provided. That is something prosecutors routinely do via a mechanism commonly referred to as a *Zwicker* letter. See, *State v. Zwicker*, 151 N.H. 179, 192 (2004).

A rule that contains the notice requirement we propose forestalls the need for the prosecutor to affirmatively request that an unrepresented defendant be appointed counsel, as found in subsection (b)(2)(i) of the committee's proposal, by ensuring that the court is provided with evidence that meets the requirement of the rule. The determination whether to appoint counsel for a defendant under the circumstances should be left to the presiding court, taking into consideration the due process factors articulated in both *Stapleford v. Perrin*, 122 N.H. 1083 (1982), *State v. Gibbons*, 135 N.H. 320 (1992) and *State v. Parker*, 155 N.H. 89 (2007). To otherwise lay this affirmative obligation on the prosecutor, rather than leave it to the discretion of the court, would subject the prosecutor to the potential of taking inconsistent positions on the issue of appointment of counsel given the extensive case law on such matters.

The alternative proposal would also eliminate the requirement contained in the original proposal's subsection (b)(2)(ii) that the prosecutor undertake an investigation into the propriety of the conviction, a requirement that raises significant concern. The

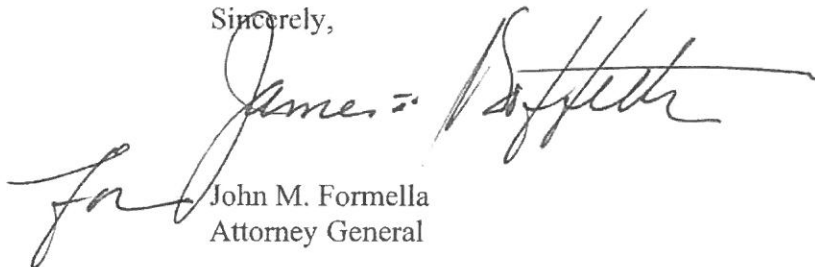
requirement that a prosecutor undertake an investigation impacts the immunity afforded to prosecutors and would result in an ethical rule that exposes that prosecutor to civil liability. *Compare, Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (prosecutor is immune from liability for initiating a prosecution and presenting the State's case) (quotations omitted); *with Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (qualified immunity applies to prosecutors performing investigatory functions) (quotations omitted).

The alternative proposal's notice provision properly balances the roles of the prosecutor and the courts and reflects the reality that the defendant--and counsel, if a court decides to appoint counsel or if counsel is otherwise retained--is often in a much better position to evaluate the weight and impact of certain evidence given their knowledge of facts to which the State is typically not privy. Our proposal also recognizes that the proposal before this Court is an amendment to the ethical rules for prosecutors and not an amendment to procedural rules for the courts.

Finally, the alternate proposal does not include the imperative to "remedy" a prior conviction. As noted earlier and as reflected in the draft comments to the proposed rule, the remedial measures required beyond disclosure are not well-defined. Nevertheless, under the proposed rule, a prosecutor's failure to sufficiently pursue an ambiguous "remedy" would incur potential disciplinary action.

For all the foregoing reasons, we respectfully ask the committee not to adopt the proposed amendment to Rule of Professional Conduct 3.8. If the committee feels compelled to enact some version of the proposed amendment, we urge your favorable consideration of our suggested alternative. The alternative's focus on notice and disclosure is more consistent with existing New Hampshire practice and law. Such a measured approach is appropriate considering the Board of Governors Ethics Committee's recognition of the state of prosecution practice in New Hampshire.

Sincerely,

A handwritten signature in dark ink, appearing to read "John M. Formella", is written over a printed name and title. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John M. Formella
Attorney General

/s/ Thomas P. Velardi

Thomas P. Velardi
Strafford County Attorney

/s/ Michaela D. Andruzzi

Michaela D. Andruzzi
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/s/ Andrew Livernois

Andrew Livernois
Belknap County Attorney

/s/ Martha Ann Hornick

Martha Ann Hornick
Grafton County Attorney

/s/ D. Chris McLaughlin

D. Chris McLaughlin
Cheshire County Attorney

/s/ Paul A. Halvorsen

Paul A. Halvorsen
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