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Ms. Lorrie Platt, Secretary
New Hampshire Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03303

Re: Proposed Amendments to Rules of Professional Misconduct Rule 3.8

Dear Ms. Platt,

I have read the letter by Attorney Apfel on behalf of the NHACDL and I agree with the letter and will not repeat the detailed analysis contained therein. I write to focus on what I call a “good faith” exception contained in Rule 3.8 (d).

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

I have brought my copy of *Prosecutorial Misconduct* by Joseph F. Lawless, which as you can see from the multiple tabs, gets a lot of use. The first part of this book that I want to read suggests that this rule is of little consequence because most defense lawyers don't report prosecutorial misconduct as they are “inclined to put the interests of occupational camaraderie over the interests of their client.” Joseph F. Lawless, *Prosecutorial Misconduct: Law, Procedures*, Fourth Ed., Forward at xi.

This observation is supported by my own research. Last year I read every single published opinion by the N.H. Supreme Court Attorney Discipline Office and did not find one single published case where a defense attorney filed a complaint against a prosecutor for a violation of this rule. This rule will provide even less incentive to report misconduct as it will likely be an exercise in risking the ire of the prosecutor without any resulting benefit.

The second quote I want to read from in this book goes to the heart of this “good faith” exception created by section (d). This quote observes that most prosecutors who engage in the suppression of evidence do so “not because they are hatching diabolical plots” but instead “out of what they regard as the noblest of motives; the need to convict the guilty and reduce the scourge of crime.” *Id.* at xii. This is because:

(As) most prosecutorial misconduct is directed against defendants whom the prosecutor honestly believes is guilty, it follows that “most prosecutors do not view their misconduct as hindering the search for the truth...[but] instead see their actions as calculated to produce a true verdict: the conviction of a guilty defendant.” *Id.* at xii.

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With this in mind, and because nearly all prosecutorial misconduct involves prosecutors who honestly believe that the defendant is guilty, this exception to accountability will swallow the rule – a rule the violation of which is rarely, if ever, reported.

By having this decision turn on the prosecution's good faith belief in the defendant's guilt, this rule makes the prosecution the judge, jury and executioner.

I struggled to decide which of the multitude of experiences that I have had involve discovery violations to share with this Court – there have been many. *U.S. v. Alrai* and *U.S. v. Craigue*¹ are public cases, and I need not repeat those facts here. I will share my experience in one case involving an undercover drug purchase. I filed a notice of entrapment claiming that my client was entrapped by an informant working with law enforcement. For over a year we litigated trying to get information about this informant's motives when he set up the drug deal with my client. Then one day, I got a call from client telling me that the guy who set him up was in the newspaper for a pending charge that alleged that he distributed fentanyl with a death resulting during the period he was working with the police to set up my client for selling a small amount of cocaine. This evidence was not only material impeachment evidence as to the informant, but also material impeachment evidence for the officer who worked with the informant as the officer claimed the informant was a "good Samaritan." This prosecutor's decision making on this issue would likely pass the "good faith" rule in section (d).

The N.H. Supreme Court has found that "a trial court may impose various sanctions for the prosecution's inexcusable failure to disclose evidence, including, but not limited to, citation for contempt, suspension for a limited time of the right to practice before the court, censure, informing the appropriate disciplinary bodies of the misconduct, and imposition of costs." *State v. Cotell*, 143 N.H. 275, 279 (1998). A lawsuit isn't a viable remedy. See *Connick v. Thompson*, 131 S.Ct. 1350, 1354 (2011). Dismissal isn't a viable remedy. See *State v. Cotell*, 143 N.H. at 280. Advising the appropriate disciplinary body of the misconduct will not be a viable remedy if there is a good faith exception.

My experience is that these sanctions are rarely, if ever, used. A "good faith" exception will only further disincentivize attorneys from reporting misconduct and holding prosecutors accountable.

One of the questions that I hear the most from my clients is, "Why is that when I break a rule I get in trouble and when the prosecution breaks a rule they don't get in trouble?" When the public perceives that the rules don't apply to prosecutors, this erodes the entire criminal justice system. A recent National Registry of Exonerations study of 2,400 exonerations found that almost a third included prosecutorial misconduct.² A good faith exception will continue to erode the public belief that prosecutors don't have to play by the rules and it will risk more wrongful convictions. Therefore, section (d) should be excluded.

I propose that prosecutors instead head the advice of Justice Souter:

¹ The facts of these cases are detailed in Attorney's Apfel's letter dated December 1, 2022.

² [Brooklyn Law School - Law School Forum Looks at Human Impacts of Prosecutorial Misconduct \(brooklaw.edu\)](https://brooklaw.edu/brooklyn-law-school-law-school-forum-looks-at-human-impacts-of-prosecutorial-misconduct)

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. (citations omitted) This is as it should be. Such disclosure will serve to justify trust in the prosecutor as “the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.”

Kyles v. Whitley, 514 U.S. 419, 439 (1995)

Thank you for listening to my comments and considering this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'Donna J. Brown', with a long horizontal flourish extending to the right.

Donna J. Brown