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VIA ELECTRONIC FILING SYSTEM

October 23, 2023

Timothy A. Gudas, Clerk
New Hampshire Supreme Court
1 Charles Doe Drive
Concord, New Hampshire 03301

Re: R-2023-0004
(Proposed Amendment to N.H. Rule of Professional Conduct 3.8)

Dear Clerk Gudas:

In response to the September 21 request of the New Hampshire Supreme Court for comments regarding proposed changes to New Hampshire Rule of Professional Conduct 3.8, the New Hampshire Association of Criminal Defense Lawyers [hereinafter "NHACDL"] respectfully submits the following remarks.

Preliminarily, please be advised that on December 1, 2022, NHACDL submitted comments regarding the proposed changes to the New Hampshire Supreme Court Advisory Committee on Rules. NHACDL stands by these comments, which are attached to this letter for reference. NHACDL further urges the Court to adopt the proposed changes to Rule 3.8 set out in the letter of December 1 for the reasons there stated.

As now proposed by the Advisory Committee on Rules, the modification to Rule 3.8 requires a prosecutor to take action if and only if he or she "knows of clear and convincing evidence that a defendant was convicted of an offense that the defendant did not commit." (Emphasis added). This proposal is highly problematic for multiple reasons.

Most concerning is that the proposed "knowledge of clear and convincing evidence" standard both runs contrary to established United States Supreme Court and New Hampshire case

law and diminishes constitutional protections previously recognized by this Court and the United States Supreme Court.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The same is true even when only a general request for exculpatory evidence or even no request at all was made. United States v. Agurs, 427 U.S. 97, 106-07 (1976); State v. Dery, 134 N.H. 370, 376 (1991). The rule also applies to impeachment materials. See United States v. Bagley, 473 U.S. 667, 676; Dery, 134 N.H. at 375. Favorable evidence is material under the federal standard "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682 (Blackmun, J., joined by O'Connor, J.); see 473 U.S. at 685 (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.). Under the federal standard, the defendant has the burden of proving this "reasonable probability." 473 U.S. at 685 (White, J., concurring). Creating a clear and convincing evidence standard in Rule of Professional Conduct 3.8 thus undermines the more protective (and constitutionally required) reasonable probability standard enshrined in federal law.

The requirement that a prosecutor must know by a "clear and convincing evidence" standard that evidence is exculpatory also effectively overturns this Court's holding in State v. Laurie, 139 N.H. 325 (1995). When I represented Mr. Laurie before this Court, I identified a pervasive flaw in the federal scheme. Namely, prosecutors were withholding evidence from defendants based on their determinations that such evidence, even though exculpatory, was not "material." The Court agreed and found that part I, article 15 requires prosecutors to prove beyond a reasonable doubt that knowingly withheld evidence is not material. Id. at 329-30. The underlying rationale of this holding was to discourage prosecutors from engaging in independent (albeit good faith) determinations about the value of evidence and encourage the production of all evidence that might impact the outcome of a criminal case. The proposed change to Rule 3.8 effectively reinstitutes the weighing by prosecutors of how important evidence is when assessing their ethical obligation to disclose that evidence to the defense. While more work is required (as NHACDL's December 1 comment makes clear), New Hampshire has made tremendous progress in the production of exculpatory evidence by prosecutors in the past three decades. It would be a travesty of justice to forego these advances through the rule-making process.

A "clear and convincing evidence" standard also runs contrary to other provisions of the rules of professional conduct. For example, Rule 3.4(a) prohibits a lawyer from concealing "a document or other material having potential evidentiary value." As modified, Rule 3.8 would allow a prosecutor to hide potential evidence from view unless the evidence is exculpatory by clear and convincing evidence.

Notably, ABA Model Rule 3.8(g) requires prosecutors produce "new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted." Presumably, the American Bar Association proposed this standard because it is consistent with federal law. In its May 22, 2023 report, the subcommittee of the New Hampshire Supreme Court Advisory Committee on Rules identified 23 jurisdictions that have adopted Rule 3.8(g) verbatim, 2 other jurisdictions that have adopted a modified version of the "new, credible and material evidence" standard, and none that have adopted the "clear and convincing evidence" standard. Similarly, the Ethics Committee of the New Hampshire Bar Association also proposed adopting the language of Model Rule 3.8(g). Said another way, the "clear and convincing evidence" standard now proposed is without precedential support. Quixotically, a majority of the subcommittee of the Advisory Committee concluded "that the proposed Rule 3.8(g) and the various alternatives include language that may have unintended consequences of impacting criminal procedure, which are better addressed through Rules of Criminal Procedure or decided through case law." Substituting a higher standard of clear and convincing evidence, however, would impact current rules of criminal procedure and controlling case law in just the manner the subcommittee purportedly seeks to avoid.

The Advisory Committee on Rules and its subcommittee do not explain the rationale for adopting a "clear and convincing evidence" standard as a prerequisite to a prosecutor's obligation to disclose exculpatory evidence. It would appear, however, that this language is taken from the related but distinct obligation set out in ABA Model Rule 3.8(h), which reads as follows:

> When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Model Rule 3.8(h), deals with a prosecutor's obligation to seek to remedy a conviction, not his or her obligation to disclose exculpatory evidence. Conflating these two obligations into one would be a mistake. Taking the higher standard from a proposed duty to seek a remedy, imposing it on the lower standard for disclosure of exculpatory evidence, and then eliminating entirely the duty to seek a remedy is even less supportable, not only under federal and state constitutional law but also as a matter of moral duty and sound public policy.

Very truly yours,

Gary Apfel

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December 1, 2022

Ms. Lorrie Platt, Secretary
New Hampshire Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, New Hampshire 03301

Re: Proposed Amendments to Rule of Professional Conduct 3.8 and Supreme Court Rule 53.1

Dear Ms. Platt:

In response to the October 26 request of the New Hampshire Supreme Court Advisory Committee on Rules for comments regarding proposed changes to New Hampshire Rule of Professional Conduct 3.8 and New Hampshire Supreme Court Rule 53.1, the New Hampshire Association of Criminal Defense Lawyers [hereinafter "NHACDL"] respectfully submits the following remarks:

New Hampshire Rule of Professional Conduct 3.8

NHACDL is pleased that the New Hampshire Bar Association Ethics Committee, in proposing modifications to Rule 3.8, has recognized the continuing responsibility of prosecutors to do justice even after a criminal conviction has been obtained and supports specific incorporation of that responsibility into New Hampshire's Rules of Professional Conduct. Unfortunately, portions of the proposed rule and commentary run contrary to the due process provisions of part I, article 15 of the New Hampshire Constitution. Both the rule and the comment therefore require modification.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The same is true even when only a general request for exculpatory evidence or even no request at all was made. United States v. Agurs, 427 U.S. 97, 106-07 (1976); State v. Dery, 134 N.H. 370, 376 (1991). The rule also applies to impeachment materials. See United States v. Bagley, 473 U.S. 667, 676; Dery, 134 N.H. at 375.

Favorable evidence is material under the federal standard "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682 (Blackmun, J., joined by O'Connor, J.); see 473 U.S. at 685 (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.). Under the federal standard, the defendant has the burden of proving this "reasonable probability." 473 U.S. at 685 (White, J., concurring).

An unfortunate consequence of this jurisprudence has been that prosecutors across the Untied States oftentimes fail to reveal evidence they know to be exculpatory after determining that the evidence is not "material" (i.e., that it would not make a difference in the outcome of the case). These decisions are not necessarily made in bad faith. They are, however, made by advocates who still want to win cases and deny opponents evidence if they are not obligated to disclose it.

In 1999, the New Hampshire Supreme Court recognized that this state of affairs was untenable and contrary to the due process protections enshrined in part I, article 15 of the New Hampshire Constitution. Accordingly, it ruled in State v. Laurie that the State bears the burden of proving the withheld exculpatory evidence is not material. 139 N.H. 325, 329-30 (1999).

The facts of the Laurie case are emblematic of why the decision whether to withhold exculpatory evidence cannot be entrusted to a prosecutor. One of the key investigators in Mr. Laurie's case was Franklin Police Department Detective-Sergeant Steven Laro. Two highly respected prosecutors in the Office of the New Hampshire Attorney General determined that the following evidence regarding Detective-Sergeant Laro – contained within a 1986 pre-employment investigation file associated with his application for employment with the New Hampshire State Police as well as his personnel file with the Franklin Police Department – was not material and therefore failed to disclose it to the defense:

– According to Deputy Chief Russell of the Boxford, Massachusetts Police Department where Laro was formerly employed, Laro had amassed a personnel file more than three inches thick, consisting primarily of letters of complaint. " 'The letters, often [seven] or [eight] pages in length, stated [that] Laro would come on strong, often verbally abusive, and if questioned about his demeanor, [he] would manhandle the subject, often choking the person or threatening him with physical harm.'"

- In Deputy Chief Russell's opinion, Laro was an extremely volatile person.

- Laro was suspended from the Boxford Police Department for neglect of duty.

- On another occasion, Laro was again suspended from the Boxford Police Department for threatening a civilian with a weapon while off duty.

- While with the Boxford Police Department, Laro repeatedly failed polygraph examinations, resulting in tainted prosecutions.

- The Boxford Police Department sent Laro to a psychologist, who concluded that "Laro should not be entrusted with a gun and badge and that he should be referred to counseling."

- When Laro interviewed for the New Hampshire State Police position, he "described his Boxford personnel file as "full of commendations with few, if any, complaints," and stated that he was never disciplined. A review of Laro's training and commendations listed in his application disclosed that the commendations originated from the American Police Hall of Fame, the only requirements for which were a police department position and a ten dollar fee. Laro also represented that he had been selected to attend schools sponsored by elite military organizations, which he could not substantiate upon questioning, stating that 'the Army must have lost the records of his having attended these schools.'"

- Laro's Boxford personnel file also included two reports from fellow officers of incidents of inappropriate use of firearms and reports from former co-workers of Laro, describing him as a "liar" and "not to be trusted."

- Laro's Franklin personnel file contained reports of misrepresentation and misuse of firearms.

- In response to Laro's claim on his application with the Boxford department that he had attended a four week Alcohol Enforcement Program at the Puerto Rico Police Academy, the associate dean of the academy wrote a letter stating that no Steven Laro had attended such a course.

- In 1990, Laro telephoned the Franklin Family Planning Clinic and demanded records for one of its clients, threatening the arrest of personnel and the closing of the clinic if there was no compliance. He falsely asserted that his actions were authorized by the chief of police and the

> county attorney, indicated that the clinic was named in a "Class A felony suit," that anyone with a medical license would have it revoked, and that "the [attorney general was] hopping mad about this."
>
> – In 1991, William Lyons of the New Hampshire Attorney General's Office telephoned Franklin Police Chief Douglas Boyd and stated "If you had a homicide tonight in Franklin, I would instruct you that Sgt. Laro not be involved in the case in any capacity."

139 N.H. at 330-32.

I have previously testified before the New Hampshire legislature regarding the facts of the Laurie case. When our citizen legislators learned that the prosecutors suffered no negative repercussions, they were aghast. While no extended discussion ensued, it was clear that, as lay people, they deemed the failure to disclose this evidence as unethical and questioned why these lawyers not only maintained positions of responsibility but also rose to higher posts. Any rule of professional conduct that condones such behavior will only serve to foment distrust of the legal profession by the public at large.

It is also noteworthy that one of the Laurie prosecutors who subsequently entered service as a federal prosecutor has apparently remained unchastened by the Laurie decision and has continued his practice of withholding exculpatory evidence. In United States v. Imran Alrai, Federal District Judge Joseph N. LaPlante overturned the defendant's conviction in 2021 after learning that the prosecutors (including the Laurie prosecutor) failed to disclose impeachment evidence (including 600 e-mails and 18 documents) after repeatedly assuring the court that all evidence had been turned over to the defense. In United States v. Nathan Craigue, the government was forced to drop charges mid-trial earlier this year after it came to light that the prosecution team (including the Laurie prosecutor) failed to disclose that one of it's witnesses was previously paid money by the Concord Police Department for testimony about Craigue before a grand jury. United States District Judge Landya McCafferty, who presided over the case, expressed grave concern about the government's repeated failure to disclose information to the defense, noting that: "The fact that highly similar misconduct has happened at least twice in this United States Attorney's Office within a short time span raises concerns about the seriousness to which the government takes its constitutional disclosure obligations." It is further noteworthy that the Laurie prosecutor's superior, then United States Attorney John Farley, attempted to justified the withholding of exculpatory evidence on the grounds that the federal judge failed to find intentional misconduct in the Alrai case. Finally, it is noteworthy that these cases have garnered considerable attention in the New Hampshire press. See, e.g.:

> https://news.yahoo.com/judge-faults-prosecutors-withholding-evidence-040100045.html;

https://www.laconiadailysun.com/news/state/federal-prosecutor-facing-new-accusations-of-misconduct/article_9dd7fb1c-886a-11ec-98eb-f39d9b99f9e2.html;

https://www.concordmonitor.com/Charges-against-Nate-Craigue-local-contractor-dropped-41076270;

https://www.unionleader.com/news/courts/allegations-of-prosecutorial-misconduct-emerge-in-two-federal-trials/article_f47fdcc4-f248-500e-8656-2f563caeed87.html

Reluctance to disclose exculpatory evidence has not been limited to the Laurie prosecutors. In 2020, the Strafford County Superior Court declared a mistrial in Timothy Verrill's double homicide trial after it was discovered that large swaths of evidence had not been shared with the defense. In response, the New Hampshire Attorney General's office told the superior court that "[a]lthough the acknowledged Discovery violations in this case have been serious, they were neither willful nor malicious, and were the product of unique and unprecedented negligent oversight rather than systematic dysfunction by either police or prosecutors."

In August 2017, State Trooper Haden Wilber illegally obtained evidence regarding Robyn White, causing her to be wrongly incarcerated for 13 days and subjected to multiple invasive searches of her body. He then lied repeatedly to investigators about this conduct. Although prosecutors eventually dismissed all charges against Ms. White, Trooper Wilber was not terminated as a police officer until August 2021. In the interim, his name was not placed on the New Hampshire Attorney General's Exculpatory Evidence Schedule, and few if any defendants or their lawyers were informed by prosecutors of Trooper Wilber's dishonesty. Presumably, Trooper Wilber made hundreds of arrests in the interim, and many defendants entered guilty pleas or were convicted at trial without benefit of this highly exculpatory evidence.

In 2004, then Attorney General Peter Heed issued a New Hampshire Department of Justice memorandum entitled "Identification and Disclosure of Laurie Materials." The Heed Memorandum was produced to update law enforcement on the developments in the law since the Laurie case was decided. The Heed Memorandum also established standardized guidelines and policies for prosecutors and police departments to identify, manage, and disclose exculpatory evidence contained in police personnel files. The ensuing list colloquially became known as the "Laurie List." It is now referred to as the Exculpatory Evidence Schedule (hereinafter "EES").

While an important development, the EES has not ensured the production of exculpatory evidence as required by the New Hampshire Constitution. The failure of prosecutors to disclose known information about Trooper Wilber and in State v. Verrill are only two of numerous cases known to the defense bar, and one can only speculate as to many other cases of which no defendant or defense lawyer has yet become aware. Furthermore, the EES has become a source of

independent litigation regarding the statutory rights of police officers to maintain confidentiality in their personnel records. See, e.g., Duchesne v. Hillsborough County Attorney, 167 N.H. 774 (2015) (finding error for refusal to order removal of petitioners' name from list); Gantert v. City of Rochester, 168 N.H. 640 (2015) (upholding placement of officer's name on list); Doe v. Attorney General, No. 2020-0447, 2022 N.H. LEXIS 90 (determining that R.S.A. 105:13-b, II did not authorize the trial court to review the contents of a police officer's personnel file outside the scope of a particular criminal case and thus did not provide grounds for appellant officer to seek review of his personnel file and removal from the EES); N.H. Ctr. for Pub. Interest Journalism v. N.H. DOJ, 173 N.H. 648 (2022) (EES not exempt from disclosure under the Right-to-Know Law based on R.S.A. 105:13-b). This litigation only obscures the constitutional rights of criminal defendants to obtain and the ethical duty of prosecutors to identify and produce exculpatory evidence in the State's possession.

Integrity and public trust in the New Hampshire criminal justice system cannot be maintained so long as prosecutors are allowed to withhold exculpatory evidence, even if they determine in good faith that such evidence is not material. Sections (b), (c), and (d) of the proposed rule runs counter to these necessities for several reasons:

1. By requiring that evidence be material before a disclosure obligation arises, section (b) vitiates the obligation in section (a)(4) to reveal all exculpatory evidence, whether or not it is material.

2. A prosecutor is obligated to disclose all previously undisclosed exculpatory evidence, not just new undisclosed evidence.

3. Unless a prosecutor seeks a protective order (e.g., a determination that evidence is not material), he or she is constitutionally obligated to disclose exculpatory evidence to the defense and not just to judicial officials.

4. A prosecutor's ultimate duty it is to seek justice and not merely obtain a conviction. See Berger v. United States, 295 U.S. 78, 88 (1935) (stating duty); Bruce A. Green, Why Should Prosecutors "Seek Justice"?, 26 Fordham Urb. L.J. 607, 612-18 (1999) (exploring the origin and meaning of the duty to "seek justice"). Accordingly, he or she should bear an obligation to seek a new trial or re-sentencing whenever exculpatory and material evidence has been withheld, as the defendant has by definition been denied due process of law. A clear and convincing evidence standard runs contrary to both Brady's and Laurie's definition of materiality (i.e., if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different). Similarly, the determination whether a defendant did not commit an offense is one for the finder of fact, not the prosecutor.

5. The safe harbor provision of section (d) runs contrary to part I, article 15 as interpreted by Laurie and its progeny. If a prosecutor withholds exculpatory evidence, he or she bears the burden of proving it is not material. Allowing a prosecutor to escape ethical responsibility under a claim of good faith is untenable and will continue to allow the all to frequent conduct described in this letter. If a prosecutor knows that evidence is both exculpatory and material, there is no reason not to disclose it to the defense. If the prosecutor knows evidence to be exculpatory but questions whether it is material, there is no reason not to seek a ruling (ex parte if necessary) from the court. Failure to take either course must necessitate meaningful consequences for inappropriate decisions given the massive powers that prosecutors possess.

Accordingly, NHACDL proposed the following modifications to sections (b) and (c) of proposed Rule 8.4:

> (b) When a prosecutor becomes aware following a defendant's conviction that there exists previously undisclosed exculpatory evidence, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court and to the prosecutorial authority in the jurisdiction where the conviction occurred,
>
> (2) promptly disclose the evidence to the defendant unless excused from doing so by a protective order from the court in subsection (1) to which the disclosure has been made, and
>
> (3) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly request that the Court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.
>
> (c) When a prosecutor learns following any proceeding that exculpatory evidence has not previously been disclosed and that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of a proceeding would have been different, the prosecutor shall seek to remedy any potentially adverse consequences to a defendant as a consequence of the proceeding.

In light of these proposed modifications, NHACDL recommends that section (d) be removed in its entirety. NHACDL further recommends that the comments to proposed Rule 8.4 be re-written as necessary to accommodate these proposals.

New Hampshire Supreme Court Rule 53.1

The proposed modification to Rule 53.1 apparently attempts to address the unavailability of legal services for needy New Hampshire citizens. This goal is laudable, especially given the breadth and depth of the current crisis. Allowing less well-trained lawyers to serve these individuals, however, is not the proper response.

The New Hampshire Supreme Court requires lawyers to engage in minimum continuing legal education to ensure that their clients are served by professionals who maintain competence in their areas of practice. Reducing the continuing education requirement for pro bono lawyers establishes a public policy that our State's poor are not entitled to the same quality of legal services as their more well-to-do neighbors. We would not tolerate less competent public defenders for indigent defendants charged with crimes. Similarly, the New Hampshire Bar Association's Lawyer Referral Service requires specialized training and experience for those seeking felony-level referrals. The standard can be no less in the civil arena. Accordingly, this proposal should be abandoned.

Very truly yours,

Gary Apfel

Gary Apfel