

Testimony in Support of LD 425 An Act to Establish a Conviction Integrity Unit in the  
Attorney General's Office

Dear Maine State Legislature,

This letter/testimonial is in support of LD 425 An Act to Establish a Conviction Integrity Unit in the Attorney General's Office.

1. Establish the Maine Conviction Integrity Unit Advisory Board

First, for a Conviction Integrity Unit in the Maine AG's Office to function as the legislature intends, a Maine Conviction Integrity Unit Advisory Board will need to be established similar to the one that exists in the Conviction Review Unit of the Minnesota Attorney General's Office.

The Minnesota Conviction Review Unit Advisory Board advises the MN Attorney General 1) on the establishment, functioning, and hiring of the unit, 2) on national best practices and evolving issues related to wrongful convictions and sentencing, and makes policy recommendations, and 3) on developing the charter for the Conviction Review Unit, and to make a recommendation to the Attorney General about hiring the unit director.<sup>1</sup>

As a JD, CHC, I express an interest in serving on an established Maine Conviction Integrity Unit Advisory Board.

2. The Legislature Needs to Understand the Differences Between ABA Model Rule 3.8 and Maine Rules of Professional Conduct Rule 3.8 as related to LD 425

The proposed statute in LD 425 states, "the Conviction Integrity Unit shall submit such evidence to the Board of Overseers of the Bar."

The Maine Board of Overseers of the Bar has never adopted much of ABA Model Rule 3.8, which is a disservice to the State of Maine and the legislative intent of this proposed statute. For example, ABA Model Rule 3.8(h) states, "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."<sup>2</sup> Maine has never adopted Model Rule 3.8(h).

In Maine's Reporter Notes for Rule 3.8, it states, "After consultation and discussion, the Task Force concluded that Model Rule 3.8 imposed restrictions and obligations on

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<sup>1</sup> MN AG CRU Advisory Board. <https://www.ag.state.mn.us/Office/CRU/AdvisoryBoard.asp>

<sup>2</sup> Model Rule 3.8(h)

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/)

prosecutors that could not be easily enforced; indeed, some of the obligations imposed upon prosecutors by the Model rule are not required by substantive law.”<sup>3</sup>

The proposed LD 425 makes a severely flawed assumption that Maine prosecutors presently have any ethical duty to act “[w]hen 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...”<sup>4</sup> Maine prosecutors have never had any ethical obligation to act under ABA Model Rule 3.8(h) when a prosecutor knows about a wrongful conviction. Read Maine Rules of Professional Conduct Rule 3.8 to see for yourself.

Therefore, the Legislature should consider adopting ABA Model Rule 3.8(h) and codifying it into the Maine Revised Statutes Annotated (or even baked into LD 425) because presently, Maine Rule 3.8 Reporter Notes mock this fact that, “indeed, some of the obligations imposed upon prosecutors by the Model rule are not required by [Maine] substantive law.”<sup>5</sup>

### 3. Maine Does Not Have a Wrongful Incarceration Exception to Rules 1.6 and 3.8 to Allow Any Licensed Attorney to Speak About Wrongful Incarceration

Maine licensed attorneys (prosecutors and defense attorneys) have always been under a code of silence about wrongful incarceration because Maine Rule 1.6(a) states, “A lawyer shall not reveal a confidence or secret of a client unless, (i) the client gives informed consent; (ii) the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b).”<sup>6</sup>

Massachusetts has remedied this problem by adopting the following language in the Massachusetts Rules of Professional Conduct Rule 1.6(b)(1), which states, “A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information: (1) to prevent reasonably certain death or substantial bodily harm, **or to prevent the wrongful execution or incarceration of another;**”<sup>7</sup> (bold and underlined emphasis added).

Maine has never remedied this problem of wrongful incarceration. Because prosecutors have no obligation under Maine Rule 3.8 to speak or act when they know by

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<sup>3</sup> See Maine Rule 3.8 [https://mebaroverseers.org/regulation/bar\\_rules.html?id=88228](https://mebaroverseers.org/regulation/bar_rules.html?id=88228)

<sup>4</sup> Model Rule 3.8(h)

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/)

<sup>5</sup> See Maine Rule 3.8 [https://mebaroverseers.org/regulation/bar\\_rules.html?id=88228](https://mebaroverseers.org/regulation/bar_rules.html?id=88228)

<sup>6</sup> Maine Rule 1.6. [https://mebaroverseers.org/regulation/bar\\_rules.html?id=88169](https://mebaroverseers.org/regulation/bar_rules.html?id=88169)

<sup>7</sup> Massachusetts Rule 1.6(b)(1). <https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-16-confidentiality-of-information>

clear and convincing evidence that a person is facing actual innocence when wrongfully convicted and because Maine has never adopted a wrongful incarceration exception to the attorney-client ethical rules of confidentiality under Maine Rule 1.6(b)(1), there will continue to be lawyers (prosecutors and criminal defense lawyers) who know of instances of Maine wrongful incarceration, but are ethically prohibited under Rule 1.6 from speaking up and are not obligated to act under Maine Rule 3.8 to address wrongful conviction. Until the legislature expressly addresses these issues, any conviction integrity unit in Maine will not be as effective as it could be.

#### 4. Expressly Allow Law Students to In-Person and/or Remotely Participate in Conviction Integrity Unit Cases in the Maine AG's Office

Minnesota's Conviction Review Unit (CRU) has had success because it has expressly allowed law students in juris doctorate degree programs from all over the United States of America to remotely participate in their CRU cases for law school externship course credits.

I invite Maine to expressly allow law students in any state-accredited or ABA-accredited law school in the United States of America to be permitted to in-person and/or remotely participate in Conviction Integrity Unit cases in the Maine AG's Office.

I support LD 425, but the bill needs a lot of work to be most effective.

Thank you,

Ted Berry, JD, CHC of Rockland, Maine

Tuesday, Feb. 18, 2025