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August 30, 2010

HAND DELIVERED

The Honorable Pamela L. Reeves
Chief Judge, United States District Court
Eastern District of Tennessee
Howard H. Baker Jr. U.S. Courthouse
800 Market Street, Suite 145
Knoxville, Tennessee 37902

Re: *Vacatur of Tennessee Board of Professional Responsibility Formal Ethics
Opinion 2017-F-163*

Dear Chief Judge Reeves:

This letter responds to your correspondence dated August 26, 2019, concerning the Tennessee Supreme Court's decision to vacate Tennessee Board of Professional Responsibility ("BPR") formal ethics opinion 2017-F-163 ("the FEO").

I wholeheartedly support your expectation that all attorneys, and especially Assistant U.S. Attorneys, practicing before the United States District Court for the Eastern District of Tennessee will aspire to the highest standards of professional conduct. And, I expect that you would agree with me that my office's commitment to that aspiration is essential to furthering the multi-faceted objective of the criminal justice system – that is, the production of just results by following procedures that aim to protect the innocent, to hold the guilty accountable, *and* to minimize the risk of physical harm, harassment, and other prejudice to victims and witnesses who, often through no fault of their own, become necessary participants in the journey toward justice.

Although the FEO may have intended to advance the laudable sentiment of fairness to the accused, it did so in a manner that disrupted the federal criminal justice system's deliberately careful balancing of the interests identified above – especially those of witnesses and victims of crime. This office, joined by colleagues in Nashville and Memphis, first asked the BPR to reconsider the FEO in light of that balancing of interests. When the BPR refused to withdraw or amend the FEO, it was this office's commitment to the highest standards of professional conduct

that prompted our support for the judicial review of an FEO that, among other failings, effectively undermined the protection of victims and witnesses in federal criminal cases.¹

Rest assured that the U.S. Attorney's Office does not view the Tennessee Supreme Court's decision as a reason to meet only "minimal standards" of professional conduct. If that is your concern, please allow me to dispel it. In our view, the Tennessee Supreme Court's ruling restored the proper balance of interests in federal criminal cases developed over the past half century through the interweaving of constitutional doctrine,² statutory directive,³ and procedural rules,⁴ but summarily ignored by the vague manner in which the BPR sought to express itself through the FEO.⁵

You can be assured that, in the wake of the FEO's vacatur by the Tennessee Supreme Court, our office will continue to aspire to the highest standards of professional conduct by following the discovery policy of the United States Department of Justice (Justice Manual (JM) § 9-5001 *et seq.*), which, among other obligations, requires prosecutors to disclose: (1) "[e]xculpatory information ... reasonably promptly after it is discovered," all the while taking an expansive view of materiality; (2) "[i]mpeachment information ... [once the government has determined its likely case-in-chief witnesses] ... at a reasonable time before trial to allow the trial to proceed efficiently;" and, (3) "[e]xculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, ... no later than the court's initial presentence investigation." (JM § 9-5001(D).)

¹ With this letter, I have enclosed a copy of the *amicus* brief submitted to the Tennessee Supreme Court by the United States Department of Justice in the matter *In re Petition to Stay Effectiveness of FEO 2017-F-163*.

² See *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995).

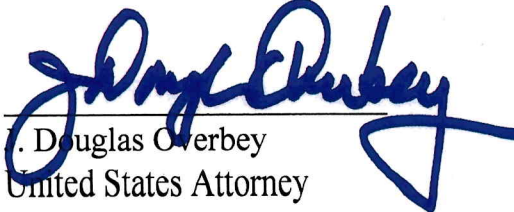
³ See 18 U.S.C. §§ 3500 (Jencks Act) and 3771 (Crime Victims' Rights Act).

⁴ See Fed. R. P. 16, 26.2.

⁵ The BPR ultimately conceded to the Tennessee Supreme Court that the FEO was flawed and required revision to avoid confusion. See *In re Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163*, No. M2018-01932-SC-BAR-BP, 2019 WL 3978583, at *4-*5 (Tenn. Aug. 23, 2019) (vacating the FEO and observing that (1) the BPR "conceded that the [FEO's] phrase 'information favorable to the defense' is different from the language used in Rule 3.8(d) and thus potentially confusing [and] expresse[d] its willingness to replace all references of 'information favorable to the defense' with 'information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense' so that the [FEO]'s language in this regard would be identical to the language used in Rule 3.8(d);" and (2) the BPR "ha[d] no objection to modifying the [FEO] to make clear that the ethical responsibilities created by [Rule] 3.8(d) only apply to 'information known to the prosecutor' as opposed to information known to the State and that all the circumstances, including a prosecutor's good faith, should be considered in determining a prosecutor's compliance with the Rules of Professional Conduct."')

I trust that this office's commitment to follow DOJ discovery policy⁶ will meet or exceed your expectations of the professionally responsible manner in which the United States will fulfill its various discovery obligations in criminal cases. To the extent that it does not, I would be pleased to meet with you to discuss this further at your convenience.

Very truly yours,


J. Douglas Overbey
United States Attorney

Cc(w/enc.): Hon. Thomas A. Varlan
Hon. Harry S. Mattice, Jr.
Hon. Travis R. McDonough
Hon. Clifton L. Corker
Hon. R. Leon Jordan
Hon. Thomas W. Phillips
Hon. Curtis L. Collier
Hon. J. Ronnie Greer
Ms. Elizabeth B. Ford

⁶ The entirety of the Department of Justice's discovery policy may be found at www.justice.gov/jm/jm-9-5000.