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|   | COMMONWEALTH OF MASSACHUSETTS   |   |
|  | Office of   | Worcester County<br>(Middle District)<br>(508)-755-8601 |
|   | District Attorney Joseph D. Early, Jr.  |   |
|   | Worcester County Courthouse<br>225 Main St. G301 Worcester, MA 01608<br>www.worcesterda.com |   |

BY E-MAIL AND HAND DELIVERY

September 8, 2011

Robert E. Terk, Esq.  
5 Almount Terrace  
Fitchburg, MA 01420

Re: *Commonwealth v. Benjamin Laguer*  
Worcester Superior Court Indictment Nos. 83-103391 to 83-103394

Dear Attorney Terk:

The Commonwealth has discovered that one of the documents in Volume 1 of the exhibits you filed with the Court on July 5, 2011, and cited in your memorandum of law (Laguer's Memorandum at p. 8, n.23), but did **not** include in your 118-item "List of Exhibits" (Docket No. 174), is an intentional fabrication. As such, pursuant to the Massachusetts Rules of Professional Conduct, you should take reasonable remedial measures to disclose this false evidence to the Court. *See* Rules 1.2, 3.3, and 8.4.

FACTUAL EVIDENCE

Included in Volume 1 of your exhibits is a letter without a signature dated "January 17, 1984," allegedly written, but not signed, by former Assistant District Attorney James R. Lemire and addressed to your client's trial counsel, "Peter Ettenberg, Esquire." (*See* **fraudulent unsigned letter** addressed to "Peter Ettenberg, Esquire" and dated "January 16, 1984," attached as **EXHIBIT 1**) (emphasis added). The second paragraph of this unsigned letter states as follows:

Per our conversation at the courthouse, this office is prepared to offer the defendant a twenty year Concord sentence in exchange of [sic] his guilty plea. The victim's family is quite concern [sic] over her physical and mental health. They are in agreement with this recommendation. The police department has no

opinion. We expect no objections from Mr. John J. Conte, given the delicate circumstances and possibly his own inclination to spare us all the grief of a trial.

(EXH 1 ¶ 2) (emphasis added). Note the writer's grammatical errors, his self-important use of the first-person plural "we" and "us," and the unwarranted conjecture about "Mr. John Conte's" possible "inclination" -- all unlike former Assistant District Attorney Lemire's authentic, formal business letters.

You also included in Volume 1 an authentic, signed letter from former Assistant District Attorney James R. Lemire, attached to a "list of prospective witnesses." (See authentic signed letter dated "January 16, 1984" and addressed to "Peter Ettenberg, Esquire," and attached as EXHIBIT 2). Like the fraudulent unsigned letter (EXH 1), the authentic signed letter is dated "January 17, 1984" and addressed to "Peter Ettenberg, Esquire." (EXH 2). The captions on the authentic letter and the attached witness list also refer to your client as "BENJAMEN LAGUER" (EXH 2), not "BENJAMIN" as in the fraudulent unsigned letter. (EXH 1).

Because you were not counsel of record at your client's April 22, 2010 parole hearing, you may not be aware that your client repeatedly argued that former ADA Lemire had offered him a plea bargain, a claim that the Commonwealth strongly disputed. In response to your client's claims at the hearing, a week or so later, on May 3, 2011, the Commonwealth submitted a post-hearing letter to the Parole Board, with Exhibits 1, 2, & 3. (See the Commonwealth's May 3, 2010 post-hearing letter to the Parole Board and Exhibits 1, 2 & 3, attached as EXHIBIT 3).

Exhibit 1 to the Commonwealth's post-hearing letter was a sworn affidavit from former Assistant District Attorney James R. Lemire (now a Superior Court judge), signed under the pains and penalties of perjury, stating in part:

....

4. [In 1983 and 1984] . . . Benjamin Laguer was represented by an experienced Worcester defense attorney, Peter L. Ettenberg.
5. The Laguer case involved a vicious attack against a fifty-nine-year-old woman, who was brutally beaten and repeatedly raped in her own apartment over the course of eight hours starting around 9:00 p.m. on July 12, 1983. The victim suffered serious injuries and has a heart attack shortly after she was brought to the hospital on the morning of July 13, 1983.

6. In the months before trial, which took place in January 1984, I was concerned that the victim might not be able to testify due to her fragile medical condition.
7. I recall having general conversations with Attorney Ettenberg about the case when we appeared for pre-trial conferences at the old courthouse at 2 Main Street in Worcester.
8. I never would have made a plea offer to Attorney Ettenberg without first meeting with the victim to decide what she wanted to do.
9. Because this was such a horrendous crime, the victim would have had to be on board before I made any plea offer to Attorney Ettenberg's client.
10. I distinctly remember meeting with the victim and her son-in-law, Robert Barry, shortly before trial in one of the rooms in the District Attorney's Office at the old courthouse to discuss our options in the case.
11. When I met with the victim, she insisted on testifying and told me, "I'm going to do this."
12. The victim told me that she wanted to testify because her attacker should not get away with what he did to her.
13. I never made any plea offer to Attorney Ettenberg because the victim insisted on testifying at trial.
14. In 1983 and 1984, the protocol in our office was that all plea offers made in Superior Court cases had to be approved by the District Attorney, John J. Conte; Assistant District Attorneys were not authorized to make any plea offers without the District Attorney's approval.
15. I never asked District Attorney Conte to approve a plea offer in the Laguer case, because the victim insisted on going to trial.
16. Defense attorneys who regularly practiced in Worcester Superior Court in 1983 and 1984 knew that the District Attorney had to approve any plea offers made by prosecutors.
17. I told Attorney Ettenberg that the victim insisted on going forward with the trial. . . . .
21. I am certain that no plea offers were ever made to Benjamin Laguer.

Signed under the pains and penalties of perjury this 30<sup>th</sup> day of April, 2010.

\_\_\_\_\_/s/  
James R. Lemire

(EXH 3-1, ¶¶ 13-21) (emphasis added).

In short, Judge Lemire's sworn affidavit confirms that no plea offer was ever made to your client or approved by the former District Attorney, because the victim "insisted on testifying" and "going to trial." (EXH 3-1, ¶¶ 11-13, 15, 17).

In his sworn affidavit, Judge Lemire also states that he "**distinctly remember[s] meeting with the victim and her son-in-law, Robert Barry, shortly before trial,**" and that the victim "**insisted on testifying.**" (EXH 3-1, ¶¶ 10-11) (emphasis added). As such, the claim in the unsigned letter that "[t]he victim's family . . . [was] in agreement with this [twenty-year Concord plea] recommendation" is false, with no basis in fact. (EXH 1). Moreover, due to the "horrendous" nature of the violent, sexual attack on the 59-year-old victim, which lasted eight hours (EXH 3-1, ¶¶ 5, 9), it is highly unlikely that "[t]he police [would have] no opinion" if the rapist had been offered a "twenty year Concord sentence." (EXH 1)

In his sworn affidavit, Judge Lemire also refers to former District Attorney John J. Conte as "**the District Attorney, John J. Conte,**" "**District Attorney Conte**" and "**the District Attorney,**" using his title and his middle initial (EXH 3-1, ¶¶ 14-16, 18-19) (emphasis added), as opposed to "Mr. John Conte," the designation used in the unsigned letter. (EXH 1).

In addition to Judge Lemire's sworn affidavit (EXH 3-1), the second exhibit to the Commonwealth's post-hearing letter was a portion of the sentencing transcript from your client's 1984 trial (EXH 3-2), which shows that, in arguing against the Commonwealth's proposed life sentence, Attorney Ettenberg never mentioned a plea offer. (EXH 3-2). The third exhibit to the Commonwealth's post-hearing letter consisted of your client's *pro se* "Motion to Stay Execution of Sentence" and *pro se* affidavit, filed shortly after trial on November 19, 1984, in which your **client never mentioned a plea offer.** (EXH 3-3). If in fact a twenty-year Concord sentence had been offered to your client before trial, both Attorney Ettenberg and your client would have mentioned it.

On May 10, 2010, your client's parole lawyer, Attorney Isaac Borenstein, also submitted a post-hearing letter to the Parole Board, with Exhibits A & B. (See Attorney Borenstein's May 10, 2010 post-hearing letter to the Parole Board, with Exhibits A & B, attached as **EXHIBIT 4**). Exhibit A to Attorney Borenstein's letter was an affidavit from Attorney Ettenberg, signed under the pains and penalties of perjury, stating in part:





recent printouts from [www.benlaguer.org](http://www.benlaguer.org), "Original Documents, and EXHIBIT 7, printout of e-mail from "Ben Laguer" dated August 3, 2011, and page 1 of attached "Bibliographical Notes").

Filing a fraudulent unsigned letter in support of your client's new trial motion -- a letter not included in your 118-item "List of Exhibits" (Docket No. 174) -- and quoting from that letter in your memorandum of law (Laguer's Memorandum at p. 8, n.23) both raise serious concerns, particularly when viewed in light of your client's intentional pre-trial tampering with his court-ordered saliva sample, which resulted in an "inconclusive" blood-type result and no blood-type evidence being presented at trial (Laguer's Memorandum at p. 32 & nn.130-135), and your and your client's direct involvement in the "serious lobbying" of an elderly juror who was "baited and hooked" in 1988 into signing "an affidavit containing wildly exaggerated and uncorroborated allegations" that the trial judge found were "not essentially true." (See attached EXHIBIT 8, "Memorandum of Decision on Defendant's Motion for New Trial" (Mulkern J.), dated Sept. 3, 1991 (Docket No. 71) and a copy of the "Commonwealth's Opposition to Application for Further Appellate Review, FAR-07222, filed 5/2/94). Such conduct reflects an ongoing "pattern or scheme to defraud." *Rockdale Management Co., Inc. v. Shawmut Bank, N.A.*, 418 Mass. 596, 600 (1994) (emphasis in original).

#### ETHICAL OBLIGATIONS

Under the Massachusetts Rules of Professional Conduct, "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Rule 8.4 (c). "A lawyer shall not . . . assist a client[] in conduct that the lawyer knows is criminal or fraudulent . . .," Rule 1.2 (d), and "shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Rule 3.3 (a) (2). "A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent." Rule 1.2, Comment [7]. "If a lawyer has offered . . . material evidence and the lawyer comes to know of its falsity, the lawyer shall immediately take reasonable remedial measures." Rule 3.3 (a) (4).

As explained in the "Comment" to Rule 3.3 of the Rules of Professional Conduct:

. . . Rule 3.3 (a) is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against the contamination of the judicial process. Thus, for example, a lawyer who knows that a client has committed fraud on a tribunal and has refused to rectify it must disclose that fraud to avoid assisting the client's fraudulent act.

....

[5] When false evidence is offered by a client, . . . [u]pon ascertaining that material evidence is false, the lawyer should seek to persuade the client . . . if the evidence has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Rule 3.3, Comment [2A] & [5] (emphasis added).


“[U]nless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer remain silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.” Rule 3.3, Comment [6] (emphasis added). *Compare Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1121 (1<sup>st</sup> Cir. 1989) (noting that “Aoude (not his lawyer) conceived the fraudulent scheme; Aoude (not his lawyer) introduced the apocryphal agreement into the discussions with the defendant; [and] Aoude gave the document to the lawyer and authorized the filing of the complaint, knowing that the fake agreement was appended to it”).

According to the Supreme Judicial Court, even when “faced with a ‘conflicting’ duty to his client and to the court, . . . [a]s an officer of the court, an attorney is a ‘key component of a system of justice,’ . . . and is bound to uphold the integrity of that system by being truthful to the court and to opposing counsel.” *In re Neitlich*, 413 Mass. 416, 423 (1992) (citations omitted). “Where this duty [to disclose the existence of false evidence] is in seeming conflict with the client’s interest in zealous representation, the latter’s interest must yield.” *Id.*

Every Massachusetts lawyer swears to “do no falsehood, nor consent to the doing of any in court,” G.L. c. 221, § 38, and “is responsible for observance of the Rules of Professional Conduct.” Mass. R. Prof’l Conduct, Preamble and Scope, Preamble: A Lawyer’s Responsibilities (11). The rules require that “[a] lawyer should also aid in securing their observance by other lawyers,” *id.*, which is the purpose of this letter.

The phone number for the District Attorney’s Office is (508) 755-8601.

Very truly yours,

  
Jane A. Sullivan, Assistant District Attorney  
Chief, Appeals Unit



*Sandra L. Hautanen*

Sandra L. Hautanen, Assistant District Attorney

enclosures

cc: District Attorney Joseph D. Early, Jr.

Senior First Assistant District Attorney Daniel J. Bennett