

IN RE: MATTER JOHN C. VERNER
BBO No. 645940

The following opinion was posted at the time it was issued. It may be subject to appeal and may not be the final decision in the case. Readers are advised to check the BBO and SJC websites for more information.

**BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT**

BAR COUNSEL, Petitioner)	
)	
v.)	
)	
KRIS C. FOSTER, Esq.,)	BBO File No. C1-17-248283
)	
ANNE K. KACZMAREK, Esq.,)	BBO File No. C1-17-248284
)	
JOHN C. VERNER, Esq.,)	BBO File No. C1-17-255238
)	
Respondent)	

BOARD MEMORANDUM

In these consolidated cases, we consider the conduct of three Assistant Attorneys General in connection with the prosecution of a chemist at the Massachusetts state drug lab in Amherst.

Factual Background

We adopt the factual findings of the Special Hearing Officer (“SHO”); they are supported by the record evidence. B.B.O. Rules, § 3.53.

On Saturday, January 19, 2013, officers of the Massachusetts State Police (“MSP”) arrested Sonja Farak, a chemist at the Massachusetts state drug lab in Amherst. Arraigned on January 22, 2013, Farak was charged with two counts of evidence tampering, possession of cocaine, and possession of heroin.

Administered by the MSP, the Amherst drug lab tested substances seized in narcotic¹ cases to determine whether the substances were illegal drugs and to provide additional

¹ We follow the SHO’s lead and common parlance in using the term “narcotic,” even though Farak’s malfeasance included use of cocaine, which is not, strictly speaking, a “narcotic.”

information about the substance (such as weight). Farak's job responsibilities included analyzing suspected narcotics submitted by law enforcement and issuing drug analysis certificates, testifying in court about her analyses, and maintaining lab equipment. Farak's arrest followed by a few days the discovery by a co-worker and a supervisor that cocaine samples were missing from the lab's evidence locker. Subsequent investigation of Farak's work area disclosed that one of the samples had been adulterated with a foreign substance.

The day before Farak's arrest, January 18, 2013, the MSP notified the Massachusetts Attorney General's Office (AGO), which agreed to undertake further investigation and potential prosecution of Sonja Farak. Respondent John Verner, the chief of the AGO's Criminal Bureau, assigned respondent Anne Kaczmarek, a prosecutor in the AGO's Enterprise and Major Crimes Division, as lead prosecutor on the Farak case. The SHO found that Kaczmarek was primarily responsible for the Farak prosecution with Verner available for support and assistance as needed. Because the AGO was prosecuting Farak, it bore the concomitant responsibility to disclose to the district attorneys' offices handling the drug lab cases all exculpatory evidence it gathered in its investigation and prosecution.

Verner and Kaczmarek understood that defendants who had been convicted on the basis of Farak's drug analysis would be entitled to receive from the prosecuting district attorney's offices potentially exculpatory evidence obtained by the MSP and AGO (including information in the possession of a police officer) and that information inculpatory toward Farak was potentially exculpatory toward defendants who had been convicted based on drug samples she had tested. Indeed, at the time she was assigned to the Farak case, Kaczmarek was working on another case arising from a different drug lab scandal: the case involving the Hinton drug lab in Boston and chemist Annie Dookhan. In the Dookhan case, Verner had directed his bureau to

turn over “everything” from the AGO’s investigation to lawyers for defendants whose drug samples had been tested by Annie Dookhan. Because the AGO was not the prosecuting entity in criminal drug cases, evidence was sent to district attorney’s offices, which had prosecuted defendants with connections to the Hinton lab.

In the early morning hours of January 19, 2013, prior to Farak’s arrest, the MSP executed a search warrant for her car. The “return” of the warrant listed items seized from the car, including several zip lock bags containing capsules, pills, and a white powder, as well as manila envelopes dated as early as 2008 and 2009. Certain items were labeled as “lab paperwork.” On January 25, 2013 (two days after arraignment), a search warrant was executed on a tote bag found in Farak’s work area at the Amherst lab. The return listed twenty items, none of which were papers.

In January 2013, Verner and Kaczmarek obtained information indicating that Farak’s tampering had started as early as 2005. The information came from a prosecutor in Hampden County who informed MSP Sergeant Joseph Ballou (the MSP officer assigned to lead the Farak investigation) about a case in 2005 where the amount of cocaine had decreased by four grams between the time it initially was weighed by the police and when it was returned by Farak. Ballou also informed Verner and Kaczmarek about a 2012 case involving Oxycodone pills in which Farak returned more pills than she had received from the police and the pills were different in appearance than those submitted to the lab.

Despite the evidence recited in the prior paragraph and despite the fact that the Farak case was “a matter of high importance in the AGO and in the community generally” (Hearing Report (“HR”) ¶ 26), Ballou, Verner, and Kaczmarek appeared to operate on the theory and strategy that Farak’s drug use and tampering were confined to cocaine and of relatively recent origin, dating

back to November or December 2012 (mere months before her arrest). This assessment appears to have infected the entire office. The Attorney General at the time suggested to a press conference the day after the arrest that Farak’s transgressions were limited in scope.² After receiving emails from Ballou about the two discrepant Hampden County cases, Kaczmarek responded, “Please don’t let this get more complicated than we thought. If she were suffering from a back injury – maybe she took some oxys?” (HR ¶ 50). Despite her attempt to minimize the variety and duration of Farak’s drug use, the SHO did not credit Kaczmarek’s purported failure to recognize the exculpatory nature of the 2005 and 2012 cases. As he explained in his report, Kaczmarek had years of experience as a prosecutor. She knew that the hypothetical challenge in prosecuting Farak for the 2012 pill case and the 2005 “light cocaine” case is not the same standard for whether evidence is exculpatory. (HR ¶ 55). Her approach, which the SHO characterized as “disregard for the rights of defendants” (HR ¶ 56), notably contrasted with Verner, who recognized that the 2005 and 2012 incidents were “potentially exculpatory.” (HR ¶ 55).

Yet another instance of Kaczmarek’s disregard of potentially exculpatory evidence concerned a positive drug test by Farak on January 23, 2013 (a few days after her arrest) and Farak’s admission to using cocaine on Friday January 18, 2013. The SHO found that the positive test was potentially exculpatory and Kaczmarek’s explanations to the contrary were not credible. (HR ¶ 58). As the SHO explained, that Farak used drugs (and may have done so on a

² As reported by WBUR, the Attorney General attempted to reassure the public as follows: "These allegations do not implicate any system-wide practices that would implicate the reliability of drug certificates or would in any way, as we have seen in the allegations against Annie Dookhan, implicate the fairness of trials against defendants." (<https://www.wbur.org/news/2013/01/20/amherst-lab-chemist>).

workday) was “compelling and irrefutable evidence [that] a defense attorney would have used to great advantage” (Id.).³

On February 14, 2013, Sergeant Ballou opened the manila envelopes recovered from the search of Farak’s car on January 23, 2013. Contrary to his expectation that the envelopes would contain “lab paperwork” (*see above*), he found personal papers, including “psychological worksheets.” (HR ¶ 61). Realizing the worksheets’ potentially inculpatory value in the Farak prosecution, he called Kaczmarek. The same day, he scanned and emailed eleven pages to his supervisor, Detective Lieutenant Robert Irwin, as well as Kaczmarek and Verner.

When Kaczmarek received the documents, she renamed her electronic copy of them “mental health worksheets” and printed a copy, which she placed into a manila folder, also labeled “mental health worksheets.” The SHO found she spent about 30 minutes reviewing the worksheets and doing limited research (on the internet and speaking with a chemist) to try to understand some of the abbreviations. The folder landed in her “trial box,” where it apparently remained without further notice or disclosure to anyone. Ballou and Kaczmarek had a follow-up telephone call about the worksheets, and he advised her that she should “come out and look” at all of the items seized from Farak’s car, not just the eleven pages he had emailed to her. (HR ¶ 73). She never did.

The first four pages from the envelope consisted of news articles from 2011 about drug use by law enforcement officers, exhibited handwritten marginalia that appeared to be in Farak’s hand and had been printed in 2011. The SHO credited Ballou’s testimony recognizing the exculpatory nature of the articles, including the logical inference that they showed Farak’s drug

³ In the view of the SHO, it is no defense to claim, as Kaczmarek apparently did, that evidence of Farak’s drug use was generally known by the public and the bar. (HR ¶ 58).

use dating back to at least 2011. (HR ¶ 67). Ballou sent the papers to Kaczmarek and Verner for this reason, among others.

The remaining seven pages consisted of a lab report from Quest Diagnostics with the participant's name scratched out, showing a positive morphine test on January 28 2011; two undated documents called "Emotion Regulation Worksheet" with handwritten notes; a sheet of paper with a handwritten grid labeled "pros" and "cons" at the top and "resisting" and "TB" on the left side; another handwritten sheet with columns listing emotions, number values, and days of the week; and a document entitled "ServiceNet Diary Card" with another grid listing days and dates from "Dec 20" to "Dec. 26;" and an undated grid of "skills" with handwritten marks covering a one-week period and a hand-written self-reflection.

Handwritten notes on the documents referred to people named "Anna," "Becky," and "Jim." The notes also referred to the risk of getting caught and the option of lying about various things; lying on a DEA application; having "12 urge-ful [sic] samples to analyze out of next 12"; having urges to use a "good sample" at work, "knowing that I will be the only one here after lunch;" and the option to "give in and go w/ [sic] urge." On one page, Farak wrote, "Thursday: tried to resist using @ [sic] work, but ended up failing" and "Friday: "@ [sic] work use w/out [sic][debating doing it." (HR ¶¶ 68-70).⁴

The SHO found that Kaczmarek and Verner knew the documents were exculpatory. (HR ¶ 70). He rejected as not credible Verner's denial that he neither read Ballou's email nor opened the attachment. (HR ¶ 72). As the SHO pointed out, while Verner received in his own words between 75-100 emails daily and paid less attention to those where he was only copied, Ballou's email was different. In all capital letters, the subject line alerted the reader to "FARAK

⁴ There is no dispute that the handwriting was Farak's.

Admissions.” The Farak case was one of the most important in the office; Verner, who the SHO found was “detail-oriented,” paid extra attention to high-profile matters. (HR ¶ 72).

The SHO described in detail the significance of the documents in his hearing report and attached them as an appendix to his report. He found that, “[a]ny prosecutor or criminal defense counsel who spent even a few minutes reviewing the attachments to Ballou’s February 14 email would have recognized their significance: highly inculpatory to Farak, and highly exculpatory to all Farak defendants.” (HR ¶ 70). Indeed, the evidence contained in the mental health worksheets led to the discovery of vitally important evidence to criminal defendants whose cases had involved Sonja Farak. The SHO described one such case in his report. (HR ¶ 111).

Similarly, the SHO determined that the exculpatory nature of the worksheets was “patent and obvious.” (HR ¶ 110). He recognized that, once the mental health worksheets came to light, they formed the critical factual basis for multiple motions for new trials. (HR ¶ 111). He rejected as not credible Kaczmarek’s testimony to the contrary. He rejected as not credible her defense that it was not her responsibility to disclose potentially exculpatory evidence to defendants in underlying criminal matters. Among other things, on numerous occasions, Kaczmarek acknowledged in correspondence her obligation to do so. (HR ¶¶ 113-116).

Kaczmarek and Verner discussed whether to present the worksheets to the grand jury in Farak’s case. Verner advised Kaczmarek to not use the worksheets, since they had enough evidence to indict without the documents. After Ballou learned of this decision, the original worksheets remained in the MSP evidence locker in Springfield (with a digital copy on Kaczmarek’s and Verner’s computers and a hard copy in Kaczmarek’s trial box). At no subsequent time did Kaczmarek review the full set of evidence at the MSP offices. The SHO found that Kaczmarek “willfully neglected her duty to investigate fully the scope of Farak’s

misconduct.” (HR ¶ 99). He also found that she “actively misled others in the AGO as to what had been produced to the [district attorneys].” (HR ¶ 117).

Verner and Kaczmarek continued to discuss the mental health worksheets in connection with their preparation of a prosecution memorandum against Farak. Kaczmarek prepared the initial draft of the prosecution memo, and Verner extensively revised and commented on it. With particular relevance here, next to a reference to the mental health worksheets, Verner wrote, “this paperwork NOT turned over to the DAs office yet.” (HR ¶ 84, emphasis in original). The SHO found that Verner and Kaczmarek discussed the documents during this time and Verner knew they included written admissions damaging to Farak. (HR ¶ 84). At the hearing, Verner admitted the documents “absolutely” should have been disclosed. (*Id.*). The SHO further found (contrary to her denials) that Kaczmarek read Verner’s comment about the worksheets not being turned over “yet,” when the prosecution memo was returned to her. (HR ¶¶ 86-87).

After four days of grand jury testimony (including presentation of the four pages of newspaper articles from the manila envelopes seized from Farak’s car), Farak was indicted on April 1, 2013 on four counts of evidence tampering, two counts of unlawful possession of a Class B controlled substance [cocaine], and four counts of theft of a controlled substance [cocaine] from a dispensary.

In March 2013, the Attorney General’s Office began receiving inquiries from various district attorney’s offices for discovery in response to requests from criminal defendants. The SHO found in a credibility determination that Verner and Kaczmarek understood their obligation to provide to county prosecutors material that was exculpatory in underlying criminal cases where Farak had been involved in testing narcotics. A decision was made (as it was in the

Dookhan case) to turn over evidence to individual district attorney's offices who would then make decisions about disclosure on a case-by-case basis. On March 27, 2013, Verner signed a letter (drafted apparently by Kaczmarek) to district attorneys that included 210 pages of potentially exculpatory material, but which excluded the mental health worksheets, any reference to the 2005 light cocaine case, the 2012 Oxycodone case, and Farak's January 23, 2013 urinalysis. As the SHO found, at the time of the letter Verner knew this information had not been disclosed "yet," but understood that his office had an obligation to do so. (HR ¶ 94). Although he discussed the issue with Kaczmarek, he did not follow up with her. He did not review the two successive discovery packages that his office provided to the district attorneys. The SHO found that, while it would have been reasonable for Vener to expect that Kaczmarek would turn over all exculpatory evidence, as her supervisor he had a responsibility to make sure she did. (Id.).

After Farak's Superior Court arraignment on April 22, 2013, Kaczmarek oversaw document production to Farak's lawyer, Elaine Pourinski. The discovery consisted of five disks, the second of which included the lab report from Quest Diagnostics and six pages of mental health worksheets.⁵ As the SHO found, the discovery provided to Attorney Pourinski contained items such as the mental health worksheets that had not been provided to the district attorneys.⁶ Also omitted from production to the district attorneys was the information concerning the 2005 and 2012 cases.

Beginning in the spring of 2013, multiple criminal defendants filed subpoenas and discovery requests for information relating to Sonja Farak, and the matters were consolidated

⁵ The SHO incorrectly referred to "seven pages" of mental health worksheets. (HR ¶¶ 96 and 341).

⁶ There were two subsequent productions of documents to district attorneys, comprising grand jury minutes and exhibits. Neither production contained the mental health worksheets.

before Superior Court Judge C. Jeffrey Kinder. Judge Kinder assigned Frank Flannery, the First Assistant District Attorney of Hampden County, to act as lead counsel on behalf of the government and Attorneys Luke Ryan and Jared Olanoff to serve as lead counsel for the defendants. Judge Kinder set a hearing for September 9, 2013. There followed numerous communications among Flannery, Kaczmarek and MSP Sergeant Ballou concerning the scope of discovery and Ballou's testimony. Attorney Ryan served Kaczmarek and Ballou with subpoenas *duces tecum* in a matter captioned Commonwealth v. Penate, seeking, among other things, documents pertaining to the scope of evidence tampering at the Amherst drug lab. Kaczmarek admitted that she did not review the document request attached to the subpoenas. In addition to these subpoenas, the AGO received several other subpoenas and discovery motions for the September 9, 2013 hearing. These included a discovery motion in Commonwealth v. Rodriguez (also a Ryan case) as well as Commonwealth v. Watt (handled by Attorney Olanoff). All the subpoenas sought substantially the same documents, for example, "all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory." (HR ¶ 169).

On August 23, 2013, respondent Foster, who had no experience responding to subpoenas, was assigned to serve as the AGO's lead lawyer in the matter. The SHO was unable to determine whether the lawyer who assigned her, Randall Ravitz (the chief of the AGO's Appeals Division), knew of Foster's inexperience at the time. (HR ¶ 162). A few days later, Ravitz met with Foster to provide her information (and sample motions and briefs) on the process for responding to subpoenas. Ravitz could not recall specifically whether he instructed Foster to review the files to determine which, if any, documents were privileged. The SHO rejected as not credible Ravitz's "testimony to the effect that he was sure he would have done so." (HR ¶ 164).

Under the direction of Susanne Reardon, the Deputy Chief of the AGO's Appellate Division, Foster prepared a motion to quash Ballou's and Kaczmarek's subpoenas in the Watt case. Despite being directed to speak with Ballou and Kaczmarek to determine what documents had been produced, Foster failed to do so. (HR ¶ 189). She did not ask Kaczmarek for her actual file. (HR ¶ 196). In addition, Foster did not review Ballou's file (HR ¶ 202), which the SHO found was readily available to her.⁷ On September 6, 2013, Foster filed a motion to quash the Watt subpoena to Ballou. On the same day, she filed a brief in opposition to the discovery motion in Rodriguez.

Her as-filed papers argued generally that the discovery requests were unreasonably broad and sought documents outside the scope of the issues to be litigated at the hearing on September 9, 2013. She asserted that Ballou had limited first-hand knowledge of the events described in the document requests, some documents were protected by the qualified law enforcement privilege, and Ballou should not be compelled to reveal his thought processes or the work product of the AGO.

To prepare for the September 9 hearing, defense counsel requested to review the evidence at the MSP office in Springfield. Kaczmarek, in an email to Ballou and his supervisor, Detective Lieutenant Robert Irwin, responded, "No. This is still an open criminal case. I do not want defense attorneys going through evidence on a fishing expedition." (HR ¶ 176). In a subsequent

⁷The SHO found that, rather than review the file, Foster relied solely on Kaczmarek's recollection of what had been produced, a strategy the SHO found to be unreasonable (HR ¶ 203). She explained her dereliction by claiming that she had been told "not to reinvent the wheel and to copy wholesale from the sample motions she had been given." (HR ¶ 202). Foster and Kaczmarek exchanged several emails during the time Foster drafted the motion to quash, but Foster never requested access to the documents other than Ballou's grand jury testimony, nor did Foster request the documents that had been sent to the district attorneys. If she had reviewed Kaczmarek's emails, for example, she would have discovered the mental health worksheets. (HR ¶ 196 and 203). Neither Ravitz nor Reardon followed up with Foster to confirm she actually had reviewed the file. Reardon testified that she assumed Foster had reviewed the file based on statements in the motion.

email exchange, Verner instructed Kaczmarek to object to the subpoena's request that the MSP bring all of the Farak evidence to the hearing.

During this time (prior to September 9, 2013), Kaczmarek met with John Bossé, an Assistant District Attorney in Berkshire County, who had been assigned responsibility for the office's response to all motions for new trial filed by defendants in cases where Farak had analyzed the narcotics. At a meeting in her office on September 4, 2013, Kaczmarek told Bossé that he should advise defense lawyers that, "all relevant discovery had been provided to the district attorneys' [offices]." (HR ¶ 185). The SHO found the statement to Bossé (which he repeated in a letter to defense counsel one month later) was materially false and intentionally misleading. (HR ¶ 188).⁸ Among other things, Kaczmarek could not have known whether all relevant evidence had been provided to the district attorneys, since she had made no effort to look at the evidence.

In a stunning abdication of competence, no one from the AGO prepared Ballou for the September 9th hearing. Kaczmarek did not review his file, even though he was ordered to bring his file and to testify. She did not meet with him. The SHO viewed her failure to do as a "dereliction of [] duty," noting that, "Any prosecutor should want to review the contents of the lead investigator's file and all the evidence he had collected." (HR ¶ 208). Similarly, Foster did not meet with Ballou, even though she was the lawyer from AGO who appeared in court on the motions. Indeed, the only lawyer who spoke with him was Olanoff, a defense attorney.

At the September 9, 2013 hearing, Judge Kinder denied Foster's motion to quash the subpoena in Watt. Foster admitted to the judge that she had not personally reviewed the documents responsive to the subpoenas and did not know what documents, if any, were

⁸ He rejected as not credible her denial that she had advised Bossé that "all relevant discovery" had been sent to the district attorneys. The credibility determination finds adequate support in the record. (HR ¶ 187-188).

potentially protected under the work product doctrine. When Ballou was called to the stand, he brought his file with him. Even then, Foster did not ask to see it.⁹ Ballou testified at the September 9th hearing that “everything in my case file has been turned over.” (HR ¶ 217). While this statement may have been true as to his personal file, it was untrue as to the entire universe of evidence, including the mental health worksheets, which were at the MSP’s Springfield office. Minimal pre-hearing preparation would have shown that his file did not contain the mental health worksheets and therefore had not been “turned over.” Indeed, Foster did not learn of the worksheets until the day after the hearing (HR ¶ 220). On the other hand, the SHO found that Kaczmarek knew of the worksheets, and she knew – significantly – that they had not been produced. (HR ¶ 220).

At the conclusion of the hearing, Judge Kinder ordered Foster to send to the court for *in camera* review all responsive documents for which a claim of privilege was asserted. The order related both to the subpoena to Ballou in the Watt case as well as the discovery motion in Rodriguez. After the hearing Ballou and Foster (inexplicably) did not speak. Foster left court still with no idea what was in Ballou’s file. As the SHO found, “Foster should have discussed with Ballou what he was bringing to [c]ourt, should have met with him, should have reviewed with him the contents of his file, should have prepared him to answer questions, and should have better prepared herself to answer questions from Judge Kinder.” (HR ¶ 226).

Multiple emails circulated the day after the September 9th hearing. Without going into all of the details of the emails (they are recited in the SHO’s report at ¶¶ 227-247), the crux is that Verner, in his position as head of the Criminal Bureau and the person who had assigned Kaczmarek as Farak’s lead prosecutor, was under the impression that Foster and Kaczmarek had

⁹ Ballou’s file contained his reports, search warrants, and returns, but not the “actual evidence,” which was in the evidence locker in Springfield. (HR ¶ 218). His file did not contain the worksheets.

reviewed (or would soon review) Ballou's file, were aware of the mental health worksheets, and had produced them to the district attorneys.¹⁰ As the SHO found, Verner's belief was reasonable: Foster represented Ballou in court and logically would have reviewed his file to prepare for the hearing; nine months into the case, it would have been logical for Kaczmarek, the lead prosecutor, to know the file.

Kaczmarek and Foster, but not Verner, knew of the distinction between Ballou's file and the larger collection of documents in the MSP's evidence locker in its Springfield office. (HR ¶ 238); Kaczmarek never clarified for Verner that she had not reviewed the material in Springfield. Foster never asked whether anyone in the AGO had reviewed the evidence. Nevertheless, the mental health worksheets existed in several places: on their own in the evidence locker as well as attachments to emails between Ballou and Kaczmarek and in Kaczmarek's "trial box."

On September 12, 2013, Ballou brought his file to the AGO in Boston. No one in the AGO reviewed it, apparently believing that it would be the responsibility of someone else. Verner, who was not responsible to review the materials, assumed that Kaczmarek or Foster or both of them would review Ballou's file. The SHO found that Kaczmarek, "deliberately continued to avoid her duty to know what Ballou had and to determine the accuracy of Ballou's September 9 testimony." He also found that, "Verner did not comply with his supervisory duty

¹⁰ In one email on September 10, 2013, Kaczmarek (responding to an inquiry about the scope of Judge Kinder's order for production of Ballou's file), wrote, "Joe has all his reports and all reports generated in the case. All photos and videos taken in the case. His search warrants and returns. Copies of the paperwork seized from her car regarding new[s] articles and her mental health worksheets." (HR ¶ 232). Verner assumed Kaczmarek knew "exactly what was in Ballou's file and had reviewed it." (HR ¶ 233). The assumption was incorrect. At the hearing before the SHO, Kaczmarek claimed that, while her email referred to "mental health worksheets," the reference did not remind her of their existence. The SHO rejected the testimony as not credible, a finding that we will accept in that it is based on his assessment of her credibility along with ample supporting facts. (HR ¶ 234). Based on Kaczmarek's email, the SHO found that Verner was aware of the worksheets and believed they had been produced. However, the SHO found, Verner did not follow up with Kaczmarek to confirm his assumption. (HR ¶ 244).

to follow through and determine what was in Ballou’s file and whether it had been turned over.” (HR ¶ 244). Likewise, the SHO characterized Foster’s failure to review the file and lack of preparedness— particularly after her embarrassing appearance at the September 9 hearing where she admitted that she was unfamiliar with Ballou’s file – as, “at best inconvenient and at worst incompetent.” (HR ¶ 246).

On September 16, 2013, Foster wrote a letter to Judge Kinder in response to his order that the AGO provide him by September 18 all documents in Ballou’s file withheld on the basis of privilege. In her letter, Foster repeated the position that all documents already had been produced. She wrote, “After reviewing Sergeant Ballou’s file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports. Therefore, there is nothing for the Attorney General’s Office to produce for your review on September 18, 2013.” The statements in this letter were the direct result of Kaczmarek’s deceptive statements after the September 9th hearing that “everything had been turned over.” Foster’s supervisor, Ravitz, reviewed and approved the text.¹¹ The SHO found the letter misleading, disingenuous, and “intentionally vague.” (HR ¶ 275-276). Foster did not distinguish for the judge the distinction between Ballou’s file that had been turned over to the district attorneys and the larger set of evidence in the MSP evidence locker. Due to the deliberate obfuscation, the SHO found, Judge Kinder ultimately concluded that the Farak defendants had not met their burden to show that the chemist’s misconduct had occurred early enough to make a difference in their cases.

In the meantime, Kaczmarek and Foster continued to resist defense counsel Ryan’s attempts to view the evidence in the custody of the MSP. The SHO found that Kaczmarek’s

¹¹ The SHO rejected as not credible Ravitz’s testimony that he did not discuss the letter with Foster or review it before it was sent. (HR ¶ 272).

position (which was conveyed to defense counsel by Foster) was in bad faith, driven mostly by an unreasonable annoyance at defense counsel's requests.¹² Foster, on the other hand, having never herself looked at the evidence, could not understand its potential relevance to a criminal defendant.

On September 17, 2013, Ryan served on the AGO as well as the Massachusetts Department of Public Health a motion to compel production of documents (Mass. R. Crim. P. 17(a)(2)) in his Penate case. Foster filed a response.

The parties returned to court on October 2, 2013. Once again, Foster represented to the court that the entire contents of Ballou's file had been produced. In response to Ryan's argument for permission to view the actual evidence seized in the search of Farak's car, workstation, and tote bag, Foster objected, claiming the evidence was irrelevant and that by allowing one defense lawyer to look at it, the court would "open the floodgates" to similar requests by other defendants. (Of course, since Foster had not actually looked at the evidence, she could not truthfully represent to the judge that it was irrelevant). In response to Ryan's request for inter-office and intra-office correspondence among employees of the AGO, MSP and district attorneys offices, Foster objected on the basis of work product. Judge Kinder specifically focused Foster on the issue whether emails could shed light on the scope of Farak's misconduct. She admitted that she had not reviewed all of the emails and correspondence, but that, "I have talked to [Kaczmarek and Ballou] and both of them said there's nothing – there's no smoking gun"

¹² In a similar fashion, Kaczmarek deceived Sean Farrell, a lawyer for the MSP who responded to a motion to compel filed by Attorney Ryan. As she had on other occasions, Kaczmarek instructed Farrell to resist the document request, referring to it sarcastically as a "gem" and advising Farrell to "not give this attorney an inch, he is very rude and aggressive." (HR ¶ 284). She failed to correct an email from Sergeant Ballou to Attorney Farrell that he had turned over his "entire investigative file," failing to inform Farrell (who in turn failed to advise Ryan) that Ballou's file had only been sent to the AGO and that additional evidence resided at the MSP offices in Springfield. The SHO found a pattern of trying to shut down inquiries by defense counsel, who – the SHO noted – were just "doing their jobs." (HR ¶ 291).

(HR ¶ 302). The SHO found this representation to be false. He was presented with no evidence that Foster had discussed with Kaczmarek or Ballou the contents of Ballou's file or the evidence generally. (HR ¶ 303). Further, the SHO found the statement about the "smoking gun" was inaccurate and misleading. (HR ¶ 304). Indeed, the mental health worksheets were quintessential exculpatory evidence, as became painfully clear one year later. In general, the SHO found that, at the October 2, 2013 hearing, Foster made several statements on critical issues without any factual foundation. She misled the judge by stating that she had personal knowledge about evidence when she had failed to make any inquiry.

As a result of the confusion, Judge Kinder denied Ryan's motions to compel in the Penate case. He based his decision at least partly on Foster's misrepresentation that the physical evidence (in the MSP evidence locker) had been described in detail and photographed. At Verner's direction, Foster filed a motion for clarification of Judge Kinder's order insofar as it pertained to internal communications within the AGO and among AGO employees and employees of other agencies. The crux of the motion was an argument that Penate had failed to make a *prima facie* showing that he was entitled to protected communications including internal emails. Verner and Kaczmarek (as well as others in the AGO who are not respondents in this case, such as Foster's supervisor, Ravnitz, who "edited it heavily" (HR ¶ 313)) reviewed drafts of the motion. The SHO found that, even after reviewing the draft, Kaczmarek failed to ensure that all potentially exculpatory information known to her had been turned over to the district attorneys. (HR ¶ 314). On October 23, 2013, Judge Kinder clarified that, "It was my intention to order ... any correspondence which reflects that state employees were aware of the alleged misconduct by Farak prior to the criminal investigation, whether such correspondence is in the possession of the Attorney General, The Department of Public Health, the Executive Office of

Public Safety and Security or the Massachusetts State Police.” (HR ¶ 317). He excepted work product, Criminal Offender Record Information, or grand jury information not already disclosed.

In October and November 2013, Judge Kinder denied discovery motions filed by multiple defendants. In general, he reasoned that the defendants had failed to show that Farak had been abusing drugs (and thus potentially tampering with evidence) when the defendants had been arrested, in 2011 or earlier. He denied a motion to dismiss filed by Ryan in Penate because there was insufficient evidence that Farak had engaged in conduct in November 2011 and January 2012 when the defendant had been arrested and drug samples tested.¹³ At the disciplinary hearing in this case, the SHO found specifically that “defense counsel could have used the undisclosed mental health worksheets to show that Farak was engaged in drug tampering and drug abuse in 2011, and perhaps could have used the light cocaine case to attempt to show that Farak’s drug tampering and drug abuse had extended back many years before 2011.” (HR ¶ 321).

Matters came to a head in 2014 after Farak pled guilty to four counts of evidence tampering, four counts of larceny of a controlled substance from a dispensary and two counts of unlawful possession of a controlled substance (Class B). After the guilty plea and sentencing, the AGO had no basis to object to turning over evidence to defendants in underlying criminal matters.¹⁴ On October 30, 2014, after the AGO assented to a motion to inspect physical evidence, Attorney Ryan was granted access to all the evidence from the MSP evidence locker which had been moved to the AGO office in Boston. For the first time, Ryan saw the mental

¹³ Some of the defendants appealed Judge Kinder’s decision, arguing in one case (Cotto) that Farak’s misconduct predated his 2009 guilty plea. The Supreme Judicial Court affirmed Judge Kinder, observing that, “the scope of Farak’s misconduct does not appear to be comparable ... to the enormity of Dookhan’s misconduct.” Commonwealth v. Cotto, 475 Mass. 97, 111 (2015).

¹⁴ Despite this freedom, the AGO did nothing to compel testimony from Farak as to the extent of her misconduct. Not until September 2015 and then under a grant of immunity did Sonja Farak testify about the extent of her criminal conduct.

health worksheets and immediately recognized their significance. The SHO found that October 30, 2014 was the first time any Farak defendant gained access to the mental health worksheets and other potentially exculpatory evidence.

Ryan wrote an eleven-page letter to the AGO, detailing the withheld evidence, explaining its exculpatory value, and observing that, “[i]t would be difficult to overstate the significance of these documents.” (HR ¶ 329). At the AGO, shock and panic ensued. Verner convened a meeting. Verner himself reviewed the entirety of the Farak material “to make sure there was nothing else.” (HR ¶ 340). On November 13, 2014, the AGO transmitted to the district attorneys 289 pages of previously-undisclosed documents, including the mental health worksheets “and other papers supporting a strong inference that Farak’s misconduct began before 2012.” (HR ¶ 341).

Prior to Ryan’s discovery, Kaczmarek had left the AGO to take a position in the Criminal Clerk’s Office of the Suffolk Superior Court. Foster left the AGO in 2015.

Multiple criminal defendants filed motions to dismiss and motions for new trial. In December 2016, the consolidated cases, captioned as Commonwealth v. Cotto, Superior Court Indictment Number 2007-770, were heard by Superior Court Judge Richard Carey over a six-day evidentiary hearing. All three respondents testified.¹⁵ Judge Carey granted relief to some of the defendants, focusing mostly on those whose drug certificates had been signed by Farak.

The Committee for Public Counsel Services and others (including two defendants denied dismissal by Judge Carey) sought relief in the Supreme Judicial Court pursuant to the Court’s

¹⁵ Their testimony was admitted into evidence in the bar discipline case, although the SHO did not give preclusive effect to Judge Carey’s findings and conclusions and (with the exception of a few pages) did not admit the Superior Court Memorandum of Decision into evidence. The SHO found discrepancies between Foster’s testimony in Superior Court and her testimony in the bar discipline case. For example, she admitted before Judge Carey that she had purposely used vague language in her September 16, 2013 letter to defense counsel. At the hearing in this matter, she denied that this was the case. (HR ¶ 347). The SHO rejected as not credible her explanation that she had not been properly prepared for her testimony in 2016. (HR ¶ 350).

general superintendence authority. Mass G. L. c. 211, § 3 and 231A, § 1. On October 11, 2018, the Supreme Judicial Court ordered relief for additional Farak defendants, dismissing, “(1) all convictions based on evidence that was tested at the Amherst lab on or after January 2009 regardless of the chemist who signed the drug certificate and (2) all methamphetamine convictions where the drugs were tested during Farak’s tenure at the Amherst lab.”¹⁶ In total, about 8,000 cases were dismissed or vacated prior to the SJC decision, although the number grew as a result of the decision. (HR ¶ 358). In holding that such a huge number of defendants were entitled to dismissal, the SJC relied on its jurisprudence from the Dookhan cases. Bridgeman v. District Attorney for Suffolk Dist., 476 Mass. 298, 321-322 (2017) (“Bridgeman II”). In general, the court balanced “the rights of defendants affected by government misconduct and society’s interest in administering justice.” CPCS v. AGO, 480 Mass. at 723. The court recognized that, “The only reason to dismiss criminal charges because of nonprejudicial but egregious police misconduct would be to create a climate adverse to repetition of that misconduct that would not otherwise exist.” CPCS v. AGO, 480 Mass. at 724, *citing* Commonwealth v. Lewin, 405 Mass. 566, 587 (1989). In the Dookhan cases, the SJC held that, because the chemist’s misconduct was not accompanied by prosecutorial misconduct, the admittedly “strong medicine” of wholesale dismissal was not required. Bridgeman II, 476 Mass. at 322-323. However, and with relevance to this bar discipline proceeding, the court in CPCS v. AGO approved the dismissal of thousands of cases. The court appreciated that the case involved not only police misconduct (in the person of a drug lab chemist) but reprehensible prosecutorial misconduct. CPCS v. AGO, 480 Mass. at 725 (“The government misconduct by Farak and the assistant attorneys general was ‘so intentional and so egregious’ that harsher sanctions than the

¹⁶ Committee for Public Counsel Services v. Attorney General, 480 Mass. 700, 729 (2018) (hereinafter, “CPCS v. AGO”).

Bridgeman II protocol are warranted”). Indeed, the district attorneys had agreed to dismiss all convictions based on certificates signed by Farak, a move the court approved. CPCS v. AGO, 480 Mass. at fn. 11.¹⁷

Prior Proceedings

On June 28, 2019, bar counsel filed a three-count petition for discipline against Kaczmarek, Foster, and Verner.¹⁸ Trial was held by videoconference over 23 nonconsecutive days, beginning on September 21, 2020 and ending on December 1, 2020. The SHO’s factual findings are set forth, in pertinent part, above.

The Special Hearing Officer’s Legal Conclusions of Rules Violations

On **Count One**, the SHO concluded that Kaczmarek violated Mass. R. Prof. C. 1.1 (provide competent representation); 1.3 (act with diligence in representing a client); and 3.4(a) (do not obstruct another’s access to evidence), 3.4(c) (do not knowingly disobey an obligation under the rules of a tribunal), 3.8(d) (prosecutor to timely disclose to defense all evidence or information known to prosecutor that tends to negate guilt or mitigates the offense), and 8.4(d) (conduct prejudicial to the administration of justice).

The SHO concluded that Verner violated Mass. R. Prof. C. 1.3 and 5.1(b) (duties of supervising attorney to make reasonable efforts to ensure that supervised lawyer’s conduct conforms to the Rules of Professional Conduct). He concluded that bar counsel had not proven violations of Rules 1.1, 3.4(a), 3.4(c), 3.8(d) or 8.4(d). He based the conclusions on his view that Verner played a minor role after the initial stage of the case and that primary responsibility rested with Kaczmarek. Similarly, he concluded that bar counsel had not proven that Verner had

¹⁷ The court did not dismiss every case involving the Amherst lab during the time Farak worked there. It limited dismissal to cases on or after January 1, 2009.

¹⁸ Kaczmarek and Verner were named in all three counts; Foster only in Count Three.

violated Rule 5.1(c)(2) (lawyer is responsible for another's violations of the Rules of Professional Conduct if lawyer knows of misconduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action). Although the SHO found and concluded that Verner violated Rules 1.3 and 5.1(b) by failing to follow up in March 2013 to make sure the mental health worksheets (which he knew existed) had been disclosed, he found that Verner was not actually aware of the dereliction until much later, November 2014. At that time, the SHO found he acted promptly and appropriately. (HR ¶ 343).

Count Two concerns Kaczmarek's exchanges with Sean Farrell (MSP counsel), John Bossé (Berkshire County Assistant District Attorney), and First Assistant District Attorney Frank Flannery (Hampden County) as well as Verner's interactions with Flannery and MSP Sergeant Joseph Ballou. The SHO concluded that, by knowingly failing to disclose to Flannery, Farrell, and Bossé potentially exculpatory evidence and by knowingly making materially misleading statements to Bossé and Farrell, Kaczmarek violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 4.1(a) (knowing false statement of material fact to a third person), 8.4(a) (knowingly assist or induce another to violate Rules of Professional Conduct or do so through the acts of another, 8.4(c), 8.4(d), and 8.4(h) (conduct that adversely reflects on fitness to practice law). He also concluded that Kaczmarek violated Rules 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 5.3(b) (responsibilities of supervisory lawyer over nonlawyer to make sure nonlawyer's conduct complies with lawyer's obligations), 8.4(a), 8.4(d) and 8.4(h) by failing to direct Sergeant Joseph Ballou to provide Flannery with potentially exculpatory information known to her. Lastly, he found that Kaczmarek violated Rules 5.3(c)(2) (duty of supervisory lawyer to take remedial

action to avoid or mitigate misconduct by nonlawyer) by failing to take remedial action when she learned that Ballou had not disclosed potential exculpatory evidence to Flannery.¹⁹

On the other hand, the SHO concluded that Verner did not violate the Rules of Professional Conduct with regard to Farrell or Ballou and therefore was not responsible for any of the alleged rules violations on Count Two. He concluded as such with respect both to the initial failure to disclose as well as the failure to take timely remedial action. He based the conclusion on his finding that Verner did not have “regular, supervisory contact over Ballou with regard to the Farak matter after Farak was indicted.” (HR ¶ 368).

Count Three implicates all respondents. The SHO concluded that Kaczmarek violated Rules 1.1, 1.3 and 3.4(c) by failing to review her file and produce documents responsive to the subpoenas and discovery requests and to alert Foster to the undisclosed documents. She also violated Rules 1.1, 1.3, 3.4(a) and 8.4(d) by not reviewing her file after the defendants filed their Motion to Clarify in Superior Court to ensure that potentially exculpatory evidence known to her had been disclosed to the district attorneys.

By contrast, the SHO concluded that bar counsel did not prove that Verner violated Rules 1.1, 1.3, 3.4(a) and 8.4(d) when he did not ensure that potentially exculpatory evidence had been disclosed to the district attorneys after the defendants filed their Motion to Clarify.

Bar counsel’s allegations as to Foster implicated her response to the Watt subpoena and the discovery motions in Rodriguez and Penate as well as her response to Judge Kinder’s order that she personally review Ballou’s file and ensure that it had been reviewed. The SHO held that bar counsel had proven violations of Rules 1.1, 1.2(a) (lawyers should seek lawful objectives of

¹⁹ He concluded that, if Ballou were a lawyer, his failures would have violated Rules 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 8.4(d) and 8.4(h).

their clients), and 1.3, but not Rules 3.4(a), 3.4(c), 8.4(a), 8.4(d) or 8.4(h). He reasoned that Foster had acted “incompetent[ly]” (HR ¶ 372) but not with intention.

The SHO agreed partly with bar counsel that Foster violated Rules 1.1, 1.2(a), 1.3, 8.4(d) and 8.4(h) but not Rules 3.3(a)(1) (knowing false statement of material fact to a tribunal), 4.1(a) or 8.4(c) in her September 16, 2013 letter to Judge Kinder. He reasoned that Foster unreasonably and incompetently relied on her superiors but she did not make a knowingly false statement to the court. Similarly, he concluded that Foster did not violate Rules 3.3(a)(1) (knowingly fail to correct false statement of material fact or law previously made to tribunal), 8.4(c), 8.4(d) or 8.4(h) when she failed to correct the false statements she had made in court or in her follow-up letter.

The Special Hearing Officer’s Findings on Mitigation and Aggravation

As to Kaczmarek, the SHO found nothing in mitigation. He found several aggravating factors, including her lack of remorse, her failure to appreciate her role in the controversy, her multiple rules violations, and her lack of candor at the disciplinary hearing. In addition, the SHO expressed unease with Kaczmarek’s lack of respect for defense counsel and their ethical obligations to their clients. Lastly, he recognized that Kaczmarek’s misconduct caused substantial harm.

As to Foster, the SHO found three mitigating circumstances: her inexperience in handling subpoenas; the fact that she was misled by Kaczmarek as to what the AGO had disclosed to the district attorneys; and the fact that she showed the September 16, 2013 letter to her supervisor, who approved its “intentionally vague” language. (Supplemental Report on Aggravating Factors, Mitigating Factors, and Recommended Sanctions (“SHR”) ¶ 15).

In aggravation, the SHO found that Foster was untruthful in her testimony to Judge Kinder (at the October 2, 2013 hearing), Judge Carey (under oath at the December 2016 evidentiary hearing) and the SHO himself. In particular, the SHO considered Foster's lies to Judge Kinder as uncharged intentional misconduct. (SHR ¶ 19-27). He found also that Foster failed to show remorse or an appreciation of her wrongdoing. He found that Foster's victims – criminal defendants – were vulnerable. Lastly, he found that her conduct undermined the public's confidence in the bar.

As to Verner, the SHO found as mitigating his reliance on Kaczmarek's September 10, 2013 email implying that the mental health worksheets had been produced to the district attorneys. (*See* footnote 10, above). He also relied on the lack of a causal connection between Verner's failure to follow up with Kaczmarek and any resulting harm. He rejected as mitigating the adverse publicity of the case. He also rejected Verner's proffered evidence of "good character and good works" because Verner had failed to raise the issue in his Answer to the Petition for Discipline. (SHR ¶ 1-4 *citing* B.B.O. Rules, Section 3.15(f)). While declaring that he would not consider the facts in mitigation, the SHO found that Verner had demonstrated, "candor, remorse and a recognition and responsibility for his mistakes." (SHR ¶ 10).

In aggravation, the SHO found that Verner was an experienced lawyer and prosecutor, but he declined to factor the experience into his sanction recommendation.

The Special Hearing Officer's Recommended Sanctions

The SHO recommended a two-year suspension for Kaczmarek, a one-year plus one-day suspension for Foster, and a public reprimand for Verner.

The Appeals

Verner and Kaczmarek have not appealed any aspect of the hearing report or the recommended sanction. Foster has appealed, arguing generally that the SHO improperly considered uncharged misconduct in aggravation and that her position as a subordinate lawyer should have been considered mitigating.

Bar counsel has appealed all three cases, although he does not challenge the SHO's findings of fact. Bar counsel argues that Kaczmarek should be disbarred; Foster should be suspended for one year and one day; and Verner should receive a term suspension of unspecified length.²⁰ As to Foster, he takes issue with the SHO's conclusion that the misconduct was unintentional and therefore not in violation of Mass. R. Prof. C. 8.4(c). Bar counsel asserts that the SHO improperly considered in mitigation that Verner reasonably relied on Kaczmarek's statement on September 10, 2013 that all exculpatory evidence had been disclosed. Bar counsel also challenges the SHO's rejection of five aggravating factors as to Verner (*see above*).

Legal Conclusions

In this section of the Memorandum, we will address the SHO's legal conclusions and the arguments raised by the parties on appeal. Where pertinent, we will discuss findings in mitigation or aggravation. We will leave for the next section, discussing our Recommended Disposition, an analysis of the overall effect of the conclusions and factors on the sanction we recommend.

Anne Kaczmarek

We adopt the SHO's legal conclusions and consideration of aggravating factors as to respondent Kaczmarek's misconduct, as listed above. We will not repeat them here but will

²⁰ In his brief on disposition filed before the SHO, bar counsel argued that Verner should receive the same suspension as Foster, one year and one day. On appeal, his position has changed slightly. He does not advocate for a specific length of time.

address them in more detail when discussing our recommended sanction. Hereafter, we address Kaczmarek's appellate arguments:

On appeal, Kaczmarek argues that Mass. R. Prof. C. 3.8(d) does not apply to her because her conduct arose in a post-conviction context and because she was not prosecuting a specific Farak defendant. The argument incorrectly constricts Rule 3.8(d). Nothing in the text of the rule limits its scope to pre-conviction matters. Indeed, exculpatory evidence often comes to light after a defendant is convicted. Moreover, many of the Farak defendants were awaiting trial at the time of the events in this case. Nor is the rule limited only to a prosecutor with direct responsibility for a specific defendant. It applies to anyone in the office who knows of exculpatory evidence. Otherwise, the facts may never come to light. As the facts in this case show, prosecution offices are large, complex organizations with multiple levels of operations and authority. If a prosecutor could avoid responsibility by claiming that she was not directly responsible for a specific case, exculpatory information could remain hidden.

Not only would Kaczmarek's argument eviscerate Rule 3.8(d), it would compromise the constitutional protections for criminal defendants under the Fourteenth Amendment to the United States Constitution and Article 12 the Massachusetts Declaration of Rights.²¹ The Constitution and the Declaration of Rights apply to any person in a prosecutor's office as well as other law enforcement offices. Matter of Grand Jury Investigation, 485 Mass. 641, 646-647 (2020) (prosecutor must disclose to defendant exculpatory information that is material to guilt or punishment); Strickler v. Greene, 527 U.S. 263, 280-281 (1999); Commonwealth v. Smith, 90

²¹ See, e.g., Brady v. Maryland, 373 U.S. 83 (1963). Comment [3A] to Rule 3.8 provides that, "The obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by the substantive law. Disclosure is required when the information tends to negate guilt or mitigates the offense without regard to the anticipated impact of the information." In this case, there is no question that the mental health worksheets, the 2012 case, and the 2005 case would be considered exculpatory under the rules of professional conduct as well as the substantive law.

Mass. App. Ct. 261, 268 (2016) (duty to disclose exculpatory evidence extends to prosecutors from separate counties and police officers); Commonwealth v. Martin, 427 Mass. 816, 824 (1998) (duty of disclosure extends to “information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor’s office concerning the case”).

For similar reasons, we reject the argument that Rule 3.4(a), which proscribes interfering with another’s access to information or evidence, does not apply to Kaczmarek because she was not the direct prosecutor of the Farak defendants. Kaczmarek knew of the mental health worksheets and other exculpatory facts. As the Farak lead prosecutor (HR ¶ 179), she was deeply involved in marshalling the evidence and therefore was in a position to produce it or suppress it. As the SHO found, “[i]n her role as Farak’s lead prosecutor, [Kaczmarek] clearly saw herself as in charge of and in control of all of the Farak evidence, including evidence in the custody and control of the MSP. Furthermore, Kaczmarek knew that others saw her as the gatekeeper with regard to access to Farak evidence.” (Id.). She had an obligation to make sure the information was disclosed to criminal defendants. Because of her misconduct, the evidence remained hidden.²² For the same reasons, the SHO correctly applied Rule 3.4(c) to Kaczmarek, because her failure to turn over exculpatory evidence violated Judge Kinder’s orders that the entire file (with limited irrelevant exceptions) be disclosed.

Kaczmarek also argues that her misconduct was confined to a single case and is therefore distinguishable from other cases where the board has recommended and the court has imposed

²² A prosecutor who complied with her ethical obligations would have personally inspected the evidence at the MSP offices, would have recognized the significance of the mental health worksheets as well as other evidence, and would have directed that all such evidence be turned over to the district attorneys. She would not have stonewalled and would not have lied to others in her office and at the MSP.

multi-year sanctions. Of course, her misconduct was not limited to a single case. The misconduct affected thousands of criminal cases.

Lastly, Kaczmarek argues on appeal that the SHO improperly considered in aggravation the publicity and notoriety of the case. We may, and we have on several occasions, considered a matter's infamy as an aggravating factor. Matter of Nissenbaum, 34 Mass. Att'y Disc. R. 410 444-445 (2018); Matter of Ryan, 6 Mass. Att'y Disc. R. 275, 277 (1990). This case received wide-spread attention, including reports in legal publications and the general press as well as a documentary film series. As the Supreme Judicial Court recognized in Nissenbaum, extensive publicity about a particular case may affect the public perception of the bar. To assure the public of the bar's integrity, we may consider the exposure as an aggravating factor. After all, we have described the principal purpose of bar discipline not as punishment, but as "protection for the public and preservation of the integrity of the bar and public confidence in it." Matter of Holzberg, 12 Mass. Att'y Disc. R. 200, 204-205 (1996).

As bar counsel points out on appeal, the SHO did not explicitly find as aggravating that the multiple victims of Kaczmarek's malfeasance were vulnerable, a finding he explicitly made as to Foster. (Bar Counsel's Consolidated Brief on Appeal, p. 23). We agree with bar counsel that these factors should have been considered.

Kris Foster

We adopt the SHO's legal conclusions as to Foster.²³

On appeal, bar counsel challenges the SHO's finding that Foster's conduct was unintentional and therefore the legal conclusion that she did not violate Mass. R. Prof. C. 8.4(c)

²³ With one exception: the SHO concluded that Foster violated Rules 1.1, 1.2(a) and 1.3 when she wrote the letter to Judge Kinder on September 16, 2013. (HR ¶ 378). As bar counsel acknowledges in his brief, he did not charge Foster with violating those rules on that occasion. Solely with respect to SHO's legal conclusions as set forth in paragraph 376 of his report, we do not adopt his conclusions of law.

(conduct involving dishonesty, fraud, deceit, or misrepresentation). Bar counsel's argument rests on the SHO's finding that Foster used "intentionally vague" language in her September 16, 2013 letter to Judge Kinder when she wrote that, "After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed." The SHO explicitly declined to find that Foster engaged in intentional misconduct. There is a distinction (albeit a narrow one) between conduct sanctioned by Rule 8.4(c) (dishonesty, fraud, deceit or misrepresentation) and using language that is "intentionally vague." The former requires an affirmative act to mislead, to lie, to send the reader in pursuit of an untruth. The latter involves an effort to elide an issue, to avoid clarity. As bar counsel acknowledges (*See* Bar Counsel's Consolidated Brief on Appeal, pages 21-22), our cases require a showing of intentionality to sustain a violation of Rule 8.4(c). In the absence of an intention to mislead, bar counsel cannot prove a violation of the rule.

Moreover, we must defer to the SHO's factual findings, particularly, as here, where they rest on his assessment of Foster's credibility. B.B.O Rules, § 3.53; Matter of Balliro, 453 Mass. 75, 83-84, 25 Mass. Att'y Disc. R. 31, 45 (2009) (SHO or hearing committee is sole judge of credibility). The SHO acknowledged that Foster "dissemble[ed]" and "deliberately obscured who had allegedly reviewed Ballou's file, and she recklessly expanded the alleged review to include 'every document in [Ballou's] possession.'" (HR ¶ 378). However, he did not find that she intended to affirmatively deceive Judge Kinder into believing she personally had reviewed the entire file and had personally confirmed the production of all documents. She was "grossly incompetent" but not deceitful. Other than the language of the letter (which we already have addressed), bar counsel has adduced no evidence contradicting the factual finding and therefore the legal conclusion that Foster did not violate Rule 8.4(c). With apologies for the triple

negative, the SHO's finding of intentional vagueness is not inconsistent with his finding that Foster did not engage in intentional misconduct.²⁴

Foster has challenged the SHO's conclusion that she violated Rule 8.4(d) (conduct prejudicial to the administration of justice), arguing that her conduct falls short of that required under our case law. See Matter of Discipline of Two Attorneys, 421 Mass. 619 (1996). In the "Two Attorneys" case, the Supreme Judicial Court held that "conduct prejudicial to the administration of justice" requires proof by bar counsel of activities such as bribery, perjury, or misrepresentation to a court which "undermine the legitimacy of the judicial process." The court has recognized the necessity of defining guardrails to prevent arbitrary application. Id., at 628-629. However, and contrary to Foster's argument, Rule 8.4(d) (unlike Rule 8.4(c)) does not require proof of intentionality. Matter of Faro, 35 Mass. Att'y Disc. R. 122, 123 (2019) (unintentionally false statement of material fact to bankruptcy court violated Rule 8.4(d)); Matter of Serpa, 30 Mass. Att'y Disc. R. 358, 367 (2014) (violation of Rules 8.4(d) and (h) for filing unknowingly false affidavit and giving unknowingly false testimony in court); Matter of Acharya, 26 Mass. Att'y Disc. R. 4, 6 (2010). It encompasses reckless lawyering.

Foster's conduct falls within the rule. Most notably, she failed to review the documents that were the subject of the subpoena and motions to which she responded. This caused her to make incorrect statements in court on September 9, 2013 and in her letter of September 16, 2013 as well as in response to the Penate discovery motions, which she argued on October 2, 2013. She made frivolous arguments that the documents were protected by work product or the

²⁴ Bar counsel's argument rests on the premise that no one at the AGO had reviewed Ballou's file, so the statement implying that someone had done so was intentionally false. ("After reviewing Sergeant Ballou's file, every document already in his possession has already been produced"). This argument is correct as far as it goes. However, it omits the critical allegation and proof that Foster knew that no one at the AGO had reviewed the file and intended to mislead the judge about that fact. Indeed, the SHO found that Foster likely assumed that Kaczmarek had reviewed the file. (HR ¶ 202)..

unprotected documents already had been produced, assertions she would not have made if she had looked at the file. She also failed to prepare for motion practice in the Watt and Rodriguez cases. Because she had not reviewed the files, she did not know of the mental health worksheets or the 2005 and 2012 incidents involving Farak. Her complete lack of preparation led to Judge Kinder denying the criminal defendants' motions for discovery. As the SHO found, Foster's reckless misrepresentations (even if unintentional) played a material role in the judge's decision in the cases before him. (HR ¶ 321) ("I find that defense counsel could have used the undisclosed mental health worksheets to show that Farak was engaged in drug tampering and drug abuse in 2011 and perhaps could have used the light cocaine case to attempt to show that Farak's drug tampering and drug abuse had extended back many years before 2011"). If Foster had reviewed the files and adequately prepared Ballou for his testimony, she would have discovered the mental health worksheets. Instead, these key documents remained hidden in an evidence locker; the judge and defense counsel were left in the dark. Foster's misconduct was more than a simple "failure to review a file." True, that is where her conduct went off the rails. But it was much worse. For a period of weeks, she ignored her basic task as a lawyer. This led to two disastrous court appearances. She misled a judge. She misled counsel on the other side of the case. She was intransigent in her recalcitrance. The administration of justice was prejudiced.

Foster argues that the SHO failed to take into consideration as a mitigating factor her position as a subordinate attorney in the AGO.²⁵ For the reasons that follow, we disagree and adopt his legal conclusions.

At trial, Foster argued that her sanction should be reduced under Mass. R. Prof. C. 5.2(b) because she was a subordinate lawyer acting "in accordance with a supervisory lawyer's

²⁵ On appeal, Foster clarifies that she does not claim her subordinate position is entirely exculpatory of her professional responsibilities; only that it should be mitigating.

reasonable resolution of an arguable question of professional duty.” The SHO rejected the defense because he found the “resolution” was not “reasonable” and an “arguable question of professional duty” does not apply where the lawyer’s conduct plainly violated the rules. (HR footnote 30). Even a fledging lawyer would know her obligation to prepare for court and to not try to dissemble or misdirect a judge with intentionally vague language.

We agree. The rule does not apply to Foster’s conduct. Her dereliction of duty involved her failure to do the basic work of a lawyer responding to a subpoena: review the documents and interview the witnesses. This is not an “arguable question of professional duty.” Her supervisor’s statement to “not reinvent the wheel” and to copy sample motions cannot be interpreted as permission for incompetence.

On appeal, Foster conflates Rule 5.2(b) and the mitigating factor of her inexperience. In fact, the SHO considered in mitigation Foster’s inexperience in responding to subpoenas and her fewer than five years at the bar (SHR ¶ 13), the fact that Kaczmarek misled her as to what evidence had been disclosed to the district attorneys (SHR ¶ 14), and her superior’s review and approval of the September 16th letter SHR ¶ 15). The SHO properly considered these facts in mitigation.

Related to her position as a junior lawyer in the AGO, Foster makes much of the decision by bar counsel to not file petitions for discipline against others in the AGO and district attorneys’ office. The decision to bring disciplinary charges rests within the discretion of the Office of Bar Counsel. Charging decisions concerning other lawyers are irrelevant to the conduct of another. We further note that any perceived lack of supervision would not excuse Foster’s failure to do the basic work required of her.

Lastly, Foster challenges the SHO's decision to consider in aggravation as "uncharged misconduct" Foster's misrepresentations to Judge Kinder at the October 2, 2013 hearing and to Judge Carey at the December 2016 hearing.²⁶ We recently have articulated our discomfort with using uncharged behavior as an aggravating factor when bar counsel was in a position to raise the charge in the Petition for Discipline. Matter of Kelley, 37 Mass. Att'y Disc. R. ____ (2021). Doing so risks depriving respondents of notice and an ability to prepare to meet the allegations against them, in potential violation of their limited due process rights in bar discipline cases. Id.

In his Petition for Discipline, bar counsel did not allege that Foster had misrepresented facts to the two judges. Although bar counsel asserted that she failed to correct misstatements in her September 16, 2013 letter (Petition for Discipline ¶ 128), the facts asserted in her letter were different than her oral arguments in court. (HR ¶ 380) (noting distinction between misrepresentations at October 2 hearing and statements in September 16 letter). As the SHO found, Foster was not put on notice that her actions at the October hearing "would be subject to scrutiny." (HR ¶ 380, *citing* Matter of Abbott, 437 Mass. 384, 392, 18 Mass. Att'y Disc. R. 2, 12 (2002)). The Petition made no mention of Foster making any false statements to Judge Carey.

We agree with Foster that it was error for the SHO to consider her in-court statements in aggravation.²⁷ She had no notice that they would be in play. She was unable to prepare. It would not have been difficult for bar counsel to charge her with misconduct, because the facts

²⁶ The SHO found that Foster falsely told Judge Kinder on October 2, 2013 that she had spoken with Kaczmarek and Ballou and had personally reviewed their files. (SHR ¶ 26). She further misled the court when she told Judge Kinder that "there was no smoking gun," implying falsely that she had personal knowledge of the contents of the entire file. (HR ¶ 304 and SHR ¶¶ 26-28). Before Judge Carey, the SHO found, Foster falsely denied that she had worked closely with Assistant Attorney General Reardon on Farak matters and, to try to minimize her Farak-related activities, falsely claimed lack of memory about facts she clearly knew. (SHR ¶ 28). The SHO took into account as aggravating factors these misrepresentations as well as his view that Foster had lied in the bar discipline case. (SHR ¶ 29).

²⁷ Because we do so, we will not address Foster's factual argument that she did not lie to Judges Kinder and Carey. We note, however, that the SHO's findings should be provided considerable deference.

were known to him before he filed the Petition. Moreover, false statements in court and under oath carry potentially significant penalties. Matter of Goodman, 22 Mass. Att’y Disc. R. 352, 365 (2006) (presumptive sanction of one year for false statement to tribunal); Matter of Sousa, 25 Mass. Att’y Disc. R. 557, 566 (2009) (presumptive sanction of two years for false statement under oath to tribunal). The failure of notice was prejudicial.

John Verner

We adopt the SHO’s legal conclusions as to Verner. Neither party has challenged them.

On appeal, bar counsel challenges the SHO’s consideration as a mitigating factor Verner’s reliance on Kaczmarek’s September 10, 2013 email to him that the AGO had produced all documents to the district attorneys. (SHR ¶ 5). We agree. As bar counsel correctly points out in his brief, this finding is inconsistent with the SHO’s earlier finding that Verner unreasonably relied on Kaczmarek’s statement and failed to follow up appropriately and that in doing so he “did not comply with this supervisory duty to follow through and determine what was in Ballou’s file and whether it had been turned over.” (HR ¶ 244). We discussed the same issue in connection with Foster. Reliance on another’s deceit is not mitigating. It may provide a complete defense in very limited situations, but if the respondent had a duty to follow up (in other words, not accept the false statement at face value), the fact that he was deceived should not reduce the sanction. In addition, the Supreme Judicial Court has never recognized this defense (reliance on others) as a special mitigating factor.

The SHO erred in failing to consider several aggravating circumstances that apply to Verner. First, the SHO recognized Verner’s years of experience as a lawyer and prosecutor, Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att’y Disc. R. 199, 203 (1993), yet inexplicably did not consider them when imposing a sanction. Likewise, he failed to apply aggravating

factors to Verner that he applied to the other respondents. Most significant of these was the extent of the harm and the vulnerability of the victims. Similarly, he should have considered the notoriety of the case and the deleterious effect on the public's confidence in the criminal justice system.²⁸ He also should have considered Verner's self-servingly untruthful denial that he had read Ballou's February 14, 2013 email and the attachments as demonstrating lack of candor on an important factual matter.

We agree with the SHO that Verner's proffered letters of support attesting to his good character should not be considered in mitigation. (SHR ¶ 1-4). He failed to assert these facts as mitigation in his Answer to the Petition for Discipline, depriving bar counsel of a fair opportunity to address them. More substantively, the Supreme Judicial Court has repeatedly refused to account for "good works" as mitigating in bar discipline cases. Matter of Finneran, 455 Mass. 722, 735, 26 Mass. Att'y Disc. R. 177, 193 (2010) (long and distinguished public service career not mitigating); Matter of Kennedy, 428 Mass. 156, 159, 14 Mass. Att'y Disc. R. 383, 388 (1998) (community service, pro bono representation, and favorable community reputation not mitigating).

Recommendation

The purpose of bar discipline is to protect the public and maintain confidence in the integrity of the bar and the fairness and impartiality of the legal system. Matter of Curry, 450 Mass. 503, 520-521 (2008). Our cases aspire to achieve consistency in the sanctions imposed on attorneys who are found to have engaged in the same or similar conduct. Matter of Alter, 389 Mass. 153, 3 Mass. Att'y Disc. R. 3, 6-7 (1983). Each case must be decided on its own merits

²⁸ For reasons stated elsewhere in this opinion, we reject bar counsel's argument that Verner's (or any respondent's) position as a "minister of justice" is an appropriate aggravating factor. (Bar Counsel's Consolidated Brief on Appeal, p. 15).

and “every offending attorney must receive the disposition most appropriate in the circumstances.” Matter of Murray, 455 Mass. 872, 883, 26 Mass. Att’y Disc. R. 406, 418 (2010). This task is made more difficult in cases, such as this one, where there is no precedent. Thus, we also must be cognizant that our recommendation will be precedent-setting for future cases, including those that may not be as egregious. Matter of Stephen Foley, 439 Mass. 324, 19 Mass. Att’y Disc. R. 141, 158-159 (2003) (discipline must be “adequate to address the seriousness of the misconduct, to reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity”).

This matter is – literally – unprecedented. Rare is the case involving prosecutorial misconduct.²⁹ Rarer still is the case of prosecutorial misconduct on such a wide scale, impacting thousands of criminal defendants. The entire criminal justice system has suffered. This is due not simply to Sonja Farak’s evidence tampering. The injustice was exacerbated by the conduct of the three respondents before us. Their misconduct has undermined confidence in the judicial system. The misconduct has affected thousands of cases. Many criminal defendants were found guilty or pled guilty (or pled to sufficient facts for a guilty finding) based on the AGO concealing exculpatory evidence. Since at least some of the defendants may have been immigrants, there is a likelihood that many were deported before they were able to obtain a fair remedy. But the extent of the harm is worse than those cases. Because of the enormity of the prosecutorial misconduct, the SJC imposed the “strong medicine,” Bridgeman II, 476 Mass. at

²⁹ Scholars have noted a perception among the bar and the public that, “Prosecutors are too infrequently subjected to professional discipline ...” Monroe Freedman, Professional Discipline of Prosecutors: A Response to Professor Zacharias, 30 Hofstra L. Rev. 121, 122 (2001); *see also*, Bruce Green, Samuel Levine, Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis, 14 Ohio St. J. Crim. L. 143, 154 (2019) (noting “discrepancy between reported wrongdoing and reports of disciplinary punishment”).

322-323, of wholesale dismissal of thousands of cases. As a result, many defendants who may have posed a danger to their communities were released. The system failed.

We also note the unique role played by the AGO, a large office of experienced and skilled attorneys with immense recourses as well as enormous power and responsibility. That power was abused. The system broke down on many levels, involving intentional misconduct and recklessness. There were unfounded assumptions, miscommunications, incompetence, an attempt to minimize the scope of the scandal (even at the expense of the truth), and a supercilious attitude toward defense attorneys who were trying zealously to represent their clients.

Many of the circumstances that our case law treats as aggravating are present for all three respondents: vulnerable victims, widespread and profuse harm, and the publicity of the case. Overall, we must be cognizant of the impact of our recommendation on the public's perception of the bar.³⁰

Prosecutors are unique in that they have their own rule of professional conduct. Mass. R. Prof. C. 3.8. As comment [1] to the rule explains, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Prosecutors do not represent an ordinary party; they represent the sovereignty, whose obligation is to govern impartially. Berger v. United States, 295 U.S. 78, 88 (1935). The goal is not to win, but to see that justice is done. Id.; *see also* Commonwealth v. Ware, 471 Mass. 85, 95 (2015) ("The duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions"). Law enforcement at all levels has prodigious

³⁰ Bar counsel also takes issue with the failure of the SHO to consider the respondents' special duties as prosecutors to be an aggravating factor. (Id., p. 23-24). Neither the Supreme Judicial Court nor we have recognized a prosecutor's role as aggravating. Bar counsel's reference to Matter of Marshard, 34 Mass. Att'y Disc. R. 283, 298 (2018), does not support the argument. (Bar Counsel's Consolidated Brief on Appeal, p. 23). In Marshard, we noted the unique responsibility of a prosecutor to not infringe on the rights of represented litigants and witnesses. We did not intend to suggest, nor did we, that a respondent's position as a prosecutor should be considered an aggravating factor in all situations.

recourses: not only human resources, but technology, equipment, and public support. Law enforcement possesses huge power – including the ultimate authority to deprive a person of their liberty and to alter their lives. With this power comes great responsibility.

With these general principles in mind, we turn to the individual respondents.

Anne Kaczmarek

Kaczmarek bears the greatest responsibility. And she displayed the greatest culpability. As an experienced prosecutor and the “gatekeeper” of the Farak case, her misconduct played the central role. The SHO concluded that she violated numerous Rules of Professional Conduct. He found myriad aggravating factors.

Proposing a two-year suspension, the SHO looked to cases in other states, there being no helpful Massachusetts precedent in his view. Courts in New York and West Virginia imposed suspensions of two years and three years, respectively, against prosecutors who failed to disclose exculpatory material in a single case. (SHR pp. 22-24, *citing*, Matter of Kurtzrock, 138 N.Y.S. 3d 649, 192 A.D. 3d 197 (N.Y. App. Div. 2020); Lawyer Disc. Bd. v. Busch, 233 W. Va. 43, 754 S.E. 2d 729 (W. Va. 2014)). A Minnesota prosecutor stipulated to disbarment for failing to disclose police misconduct, among other things. Matter of Pertler, 948 N.W. 2d 146 (Minn. 2020).³¹ The SHO looked also to Massachusetts cases that did not involve prosecutors but which did involve intentional misconduct or deceit. Matter of Segal, 430 Mass. 359, 15 Mass. Att’y Disc. R. 544 (1999) (two-year suspension for multiple false statements on HUD-1 form); Matter of Oberhauser, 37 Mass. Att’y Disc. R. ____ 2021 (two-year suspension by stipulation for varied misconduct in two matters including intentional misconduct with mitigation); Matter of Harris-

³¹ Other, non-analogous cases are discussed at footnote 6 of the Supplemental Hearing Report.

Daley, 34 Mass. Att’y Disc. R. 177 (2018) (two-year suspension); Matter of Friery, 28 Mass. Att’y Disc. R. 337 (2020) (two-year suspension by stipulation for lying about credentials).

The cases in the prior paragraph are a floor, not a ceiling. The misconduct pales in comparison to Kaczmarek, both in scope and severity. She was not a passive participant; as the SHO found, she actively misled others in the AGO and the district attorneys as to what had been produced. (HR ¶ 117). From the beginning, her primary motivation appears to have been to contain the damage to a few cases and not allow “this to get more complicated than we thought.” As the SHO observed, she exhibited a “disregard for the rights of defendants . . .” (HR ¶ 56). In her role at the AGO, she was in a position to affect thousands of criminal defendants, a position she abused.

While the case is unprecedented, the above matters provide a roadmap. As discussed above, intentional misrepresentations typically receive a suspension of one year or two years. Here, the deceit was protracted; it was not a single occurrence. In addition, Kaczmarek acted incompetently and without diligence resulting in serious harm, for which the minimal sanction would be a public reprimand but which the court has sanctioned with a suspension where the misconduct was repeated. Matter of Kane, 13 Mass. Att’y Disc. R. 321, 328 (1997). Where the harm is “outrageous,” a longer suspension may be required. Kane, 13 Mass. Att’y Disc. R. at 329. She also impeded access to evidence and information. Most glaringly, she failed in her duties as a prosecutor to disclose exculpatory evidence. While there is no Massachusetts precedent, the cases the SHO and we cite from other jurisdictions indicate that a violation of Rule 3.8(d) alone would be punished by a multi-year suspension even if the violation were limited to a single case and even if it did not involve protracted fraud.

Added to these rules violations are the numerous and disturbing aggravating factors, including the quantum of harm, the vulnerability of the victims, the respondent's experience, her lack of candor and lack of remorse. We also must take into account the notoriety of the matter and the need to restore public confidence in the legal profession generally and the criminal justice system specifically.

We find persuasive bar counsel's reference to the so-called "Demoulas" cases: Matter of Curry, 450 Mass. 503, 24 Mass. Att'y Disc. R. 188 (2008); Matter of Crossen, 450 Mass. 533, 24 Mass. Att'y Disc. R. 126 (2008); and Matter of Donahue, 22 Mass. Att'y Disc. R. 193 (2006).

The respondents in those cases concocted a scheme to extort a Superior Court law clerk into divulging damaging information about the judge for whom he worked in an effort to overturn an adverse decision against their clients. The brazen plot involved illegal recordings, fake identities, and a phony job offer. For their role, Curry and Crossen were disbarred; Donahue, who was involved only in the planning, not the execution, stipulated to a three-year suspension. As the SJC observed, "[d]isbarment is the only sanction that will reassure the public that the kinds of nefarious conduct at issue here have no place in the attorney's repertoire or in our courts." Matter of Crossen, 450 Mass. at 581-582, 24 Mass. Att'y Disc. R. at 181. Although the facts of this case are different, the scope of the misconduct and resulting harm lead us to a similar disposition.

In light of the above, we recommend disbarment for Kaczmarek.

Kris Foster

The SHO recommended a suspension of one year and one day for Foster. On appeal, Foster seeks a public reprimand, while bar counsel supports the recommended suspension (while challenging the SHO's conclusion that Foster did not violate Rule 8.4(c)).

We agree with the SHO. We recommend a suspension of one year and one day. If the court reduces the sanction, we suggest that Foster be required to apply for reinstatement under the provisions of S.J.C. Rule 4:01, § 18.

As with the other respondents, we find little unequivocal precedent for Foster's misconduct. The closest case is Matter of Serpa, 30 Mass. Att'y Disc. R. 358 (2014). There, the court suspended an attorney for sixty days for making reckless misrepresentations to a court in violation of Mass. R. Prof. C. 8.4(d) and (h). The respondent in that case represented a criminal defendant, and his dereliction was limited to a single case. Added to the misrepresentations are the repeated and abject failures of competence and diligence. Foster failed to appreciate her responsibilities as an officer of the court. As discussed above in connection with respondent Kaczmarek, serial incompetence resulting in serious harm requires us to recommend a term suspension.

Aggravating factors also come into play. Foster displayed a lack of candor and a lack of remorse at the disciplinary hearing. She attempted to blame others for her own failures of diligence. Her victims were vulnerable and numerous. Her incompetence and lack of diligence has caused damage to the public's confidence in the bar and the criminal justice system. She should have appreciated the immense harm her incompetence and lack of diligence was likely to cause.

Foster incorrectly argues that the presumptive sanction for "unintentional misconduct" is an admonition or public reprimand. (Foster's Brief on Appeal, p. 12). As discussed above, under the parameters set forth in Mater of Kane, a suspension is warranted where the negligence is repeated and causes serious harm. We do not accept Foster's argument (page 18 of her brief) that her misconduct was limited to "a single set of facts and a single assignment: handling a

hearing on September 9, 2013 and then writing a letter to the judge concerning the hearing.” In addition to that simplified recitation, Foster recklessly testified falsely at the October 2, 2013 hearing. Even more confounding, Foster apparently learned nothing from her September 9, 2013 court appearance. Between then and October 2, she continued to bury her head in the sand. She had numerous opportunities over the span of more than one year to review the documents and inform herself of the issues. She never did so.

In addition, our decision in Kane guides us to consider the harm that was caused. While conceding the damage to the criminal justice system, Foster argues that her misconduct did not cause harm because she was misled by Kaczmarek’s September 10, 2013 email that all information had been disclosed to the district attorneys. (Foster’s Brief on Appeal, p. 20). This statement ignores the nature of Foster’s misconduct. Even if, as the SHO found, Kaczmarek misled Foster (and Verner), Foster had an independent duty of competence and diligence to review the file, prepare for the hearings, and prepare her witness (Ballou). Kaczmarek’s misconduct does not excuse Foster’s. If Foster had reviewed the file and asked the obvious questions, she would have seen the exculpatory evidence. She would have learned what had been disclosed. Her professional duty required her to learn for herself what had been disclosed and not rely on proclamations of others.

Along the same lines, we disagree with and do not adopt the SHO’s finding of two mitigating factors: (1) Foster was misled by Kaczmarek as to what documents had been disclosed and (2) her September 16th letter was reviewed by her supervisor. Neither fact falls into the category of a special mitigating factor recognized by the Supreme Judicial Court. Matter of Alter, 389 Mass. 153, 157, 3 Mass. Att’y Disc. R. 3, 7 (1983) (distinguishing typical from special mitigating factors); *See also* Board of Bar Overseers, Massachusetts Bar Discipline: History,

Practice and Procedure (BBO 2018) at pages 393-401 (discussing “special mitigating factors” recognized by Supreme Judicial Court). As we discussed in the prior paragraph, the misconduct of others does not excuse lawyers from their ethical duties.

In light of the above, the presumptive starting point for a suspension would fall in the range of 18-24 months.

We have considered the mitigating factor of Foster’s inexperience. At the time of Farak case, she had been a lawyer for fewer than five years with no substantive experience in criminal discovery. As discussed throughout this opinion, even the most junior lawyer should know to review a file and ask questions when assigned to a matter. As an appellate lawyer, Foster knew the importance of words. Her “intentionally vague” language in the September 16, 2013 letter is indicative of her failure to adhere to the requirements of her oath. Foster’s failure in this regard does not excuse her misconduct, nor does it minimize the harm. However, we are mindful of the position she occupied in the AGO and her lack of experience. Accordingly, we recommend a suspension of one year and one day.

John Verner

The SHO recommended a public reprimand for Verner. On appeal, bar counsel argues for a term suspension, while Verner would accept a public reprimand. For the following reasons, we agree with bar counsel that a three-month suspension is appropriate.

Two countervailing factors guide our analysis. On the one hand, Verner was not involved directly in the Farak case. As a supervisor, he relied on others, particularly Kaczmarek, an experienced prosecutor who had seemingly performed ethically in the Dookhan matter. The SHO found that Verner reasonably relied on Kaczmarek, who implied to him that all documents had been produced. The SHO found that Verner, unlike Kaczmarek, intended that all documents

be disclosed. He did not try to obstruct access. We are not at liberty to reject these findings. On the other hand, Farak was a singular case, involving thousands of defendants. It required a much more hands-on approach.

Verner violated two related Rules of Professional Conduct: Rule 1.3 (diligence) and Rule 5.1(b) (responsibilities of a supervising attorney). As discussed in connection with Foster and Kaczmarek, Matter of Kane guides us to impose a term suspension where the lack of diligence is protracted and where it causes serious harm. While Kane led the SHO to recommend a public reprimand, we conclude that a term suspension is appropriate. Verner's passive reliance on others in a major case was more than "run-of-the-mill" negligence. It was an abdication of his responsibility to ensure that his subordinates complied with the Rules of Professional Conduct.

The SHO's discussion, while noting Verner's lack of diligence, failed to account for the serious harm caused by his failure to diligently supervise in his capacity as Chief of the Criminal Bureau. Although related, Rule 5.1(b) establishes a separate responsibility. *See* ABA Formal Opinion Number 467, Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3 (ABA September 8, 2014). The ABA Standing Committee on Ethics and Professional Responsibility has opined that effective supervision requires that supervisors keep themselves informed of the status of pending cases, for example by requiring periodic written or oral reports and that they "participate in major decisions, e.g., granting immunity, deciding charges, identifying Brady material, ..." *Id.*, at 10. Managers and supervisors should create a "culture of compliance." *Id.*, at 11. Clearly there was no such culture in the AGO, at least when it came to the Farak case.

Added to this are significant aggravating factors: Verner's extensive experience as a lawyer, prosecutor, and supervisor; his lack of candor before the SHO in attempting to deflect

blame onto others; and the general factors we have recognized as to Kaczmarek and Foster: the number and vulnerability of the victims as well as the notoriety of the case and the need to restore public confidence.

The SHO properly rejected as mitigating Verner's purported good works and good reputation both on procedural and substantive grounds. However, we are troubled by his consideration of Verner's candor and remorse as expressed at the hearing. (SHR ¶ 10). We take the SHO at his word that he did not factor this view into his recommendation. We note that, while lack of candor and lack of remorse are aggravating (*see above*), the opposite is not true. We expect all lawyers to be candid in their testimony and in acknowledging their shortcomings.

We agree with our colleague in dissent that this is a case of first impression. There is no reported decision in Massachusetts involving a supervisor's failure to adequately manage subordinate prosecutors. Two reported cases relied on by our colleague, Matter of Goldberg, 23 Mass. Att'y Disc. R. 191 (2007), and Matter of Heartquist, 29 Mass. Att'y Disc. R. 332 (2013), involved the failure to supervise non-legal staff. In contrast, failure to supervise a subordinate attorney generally results in a private admonition or public reprimand, not a term suspension, Matter of Baron, 17 Mass. Att'y Disc. R. 62 (2001); Matter of Newton, 12 Mass. Att'y Disc. R. 348 (1996). Lawyer-supervisors should be entitled to rely on the integrity of the attorneys they supervise. Indeed, the reason government agencies, businesses and law firms employ junior attorneys is to allow the management-level attorneys to delegate. If a supervisor had to involve himself or herself in every detail of a subordinate's assignment, the work would grind to a halt. This case is a good example of that principle, since Kaczmarek had done her work ethically in the Dookhan matter.

In our view, the presumptive sanction for a supervisor's failure to comply with Rule 5.1(b) would be a public reprimand, as the SHO recommended. However, this case involves numerous and important aggravating factors. It required a more proactive approach from the supervisor. Verner failed to comply with his responsibilities to ensure that the AGO complied with its ethical and constitutional obligations. His failure caused catastrophic harm.

Accordingly, we recommend a suspension of three months.

Conclusion

The Farak case caused unprecedented pain to many, not only the defendants who were wrongfully convicted, many of whom are from communities of color. Thousands of defendants lost time with families and friends while wrongfully incarcerated. Their lives were forever altered. Many of the defendants in the Farak cases were immigrants. Due to their convictions, they likely were deported before the misconduct came to light.

The scandal weakened public confidence in our criminal justice system. Defendants who were guilty of crimes had their convictions overturned and many were released from custody. We are concerned about the public's cynicism toward the criminal justice system that this massive failure likely has caused. The monetary costs were enormous.

The three respondents before us are not accountable for Sonja Farak's misdeeds. But they are responsible for the role they played in attempting to cover it up. As public officials, they were uniquely situated and obligated to do the public's business. They failed to do so, with staggering consequences.

Accordingly, we recommend as follows:

- 1) The Supreme Judicial Court disbar Anne Kaczmarek;

- 2) The Supreme Judicial Court suspend Kris Foster for one year and one day. If the Court imposes a shorter suspension, we recommend that Foster be required to apply for reinstatement pursuant to S.J.C. Rule 4:01, § 18; and
- 3) The Supreme Judicial Court suspend John Verner for three months.

Frank E. Hill, III

Frank E. Hill, III
Secretary

Dated: June 30, 2022

DISSENT: VERNER

I write separately to express my disagreement with the recommended sanction for respondent Verner. In my view, a 3-month suspension is unduly lenient. Given his role at the AGO and the huge significance of the case, I would recommend the same suspension proposed for Verner as for respondent Foster: one year and one day. Other than the recommended sanction, I agree with the majority. I also agree with the majority that this is a case of first impression. The decision in this case will be precedent-setting.

I arrive at this conclusion for several reasons. First, the facts found by the SHO make abundantly clear that Verner was intimately involved in the case, if not on a day-to-day basis, at least in a supervisory function. He self-servingly down-played his role. Even if he were not intimately involved and even if he relied on Kaczmarek's false statements (and I will accept the SHO's findings on these points), the Farak scandal was that unique case that required a more active supervisor. He knew or should have known of its significance and potential reach. As the SHO found, the case was of high importance in the AGO and in the community. I also note the

SHO's finding that, given the significance and complexity of the case, a lawyer with more experience than Foster should have been assigned to handle the subpoenas. (HR ¶ 162). Since a more experienced lawyer was not assigned, Verner's role and obligation as supervisor required more oversight and accountability. The failure to assign appropriate personnel falls directly on Verner in his role as supervisor.

There are few cases arising out of a lawyer's failure to fulfill his obligations of supervision. In general, the sanction depends on the severity of the underlying conduct. Thus, in Matter of Goldberg, 23 Mass. Att'y Disc. R. 191 (2007), a lawyer was suspended for a year and a day (as well as a two-year probationary period) for failing to supervise a non-legal employee who embezzled client funds. *See also* Matter of Heartquist, 29 Mass. Att'y Disc. R. 332 (2013) (suspension of six months and one day where respondent's employee embezzled client funds). This case is at least as serious as those involving theft of client funds. Indeed, the majority has recommended disbarment for Kaczmarek. In light of the severity of the harm caused by his dereliction of duties, I cannot support a sanction of less than one year and one day. It is difficult to think of a failure of supervision with more serious repercussions.

I also disagree with the majority that Verner's sanction should be lighter because the persons he failed to supervise were lawyers, in contrast to non-lawyer staff. Courts in other states have suspended managing lawyers for failing adequately to supervise associates. Matter of Phillips, 244 P.3d 549 (Ariz. 2010) (six-month suspension for lawyer who failed to supervise legal and non-legal staff, including subordinate lawyer who himself committed multiple rules violations); Att'y Grievance Comm' vs. Kimmel, 955A.2d 269 (Md. 2008) (violations of ethical rules requiring adequate supervision warranted ninety-day suspension for failing to supervise firm associate practicing in another state).

In addition, the SHO mentioned several times Verner’s demeanor at the hearing and his expressions of remorse. I accept those findings, as we must, as I accept the SHO’s disclaimer that he took them into account in fashioning a sanction recommendation. (SHR ¶ 10). “Good conduct” and expressions of remorse should be the norm. They provide no weight as special mitigating factors. On the opposite side, the SHO failed to account for numerous aggravating circumstances.

Lastly, I am guided by the principle that similar misconduct should lead to similar penalties. Obviously, respondent Foster was the junior person on the case, while Verner was the senior supervisor. Their professional obligations were different. However, both failed to fulfill their ethical and professional responsibilities ... with catastrophic results. It would be unfair to punish the junior lawyer more harshly than the senior lawyer. If Verner had adequately supervised his subordinates, I am confident the exculpatory documents would have been produced in a timely manner.

Rita B. Allen

Rita B. Allen