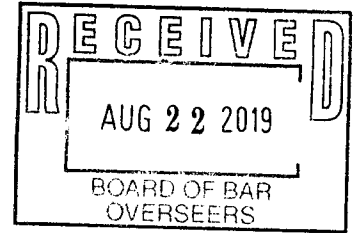


COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT



BAR COUNSEL,)
Petitioner)
v.)
KRIS C. FOSTER, ESQ.,)
Respondent)

BBO File No. C1-17-00248283

BAR COUNSEL,)
Petitioner)
v.)
ANNE K. KACZMAREK, ESQ. and)
JOHN C. VERNER, ESQ)
Respondent)

BBO File Nos. C1-17-00248284
C1-17-00255238

RESPONDENT KRIS C. FOSTER'S ANSWER TO PETITION FOR DISCIPLINE

Overview

Respondent Kris C. Foster (“Ms. Foster”) is a party only to Count III of the Petition, a count which exclusively deals with events occurring between August 27, 2013 and October 23, 2013. As of August 23, Ms. Foster had been an Assistant Attorney General (“AAG”) for less than two months. The relevant events include both the first contested Superior Court appearance and the first motion to quash a subpoena of her career. At no time in her career, either before or since, has Ms. Foster ever been a prosecutor of any criminal case nor has she ever had responsibility for a Brady disclosure. Each of the actions of Ms. Foster alleged in the Petition were undertaken at the direction of her supervisors and accurately reported to them.

As to Ms. Foster, the Petition is a profoundly misleading document. Bar Counsel has known at least since the filing of Ms. Foster's initial response that Ms. Foster was a subordinate lawyer and that, pursuant to Mass. R. Prof. Conduct 5.2, she asserted that she was entitled to follow the reasonable instructions of her supervisors without violating any disciplinary rule. Bar Counsel explored the issue extensively at Ms. Foster's sworn interview. Notwithstanding this knowledge of the actual issues, Bar Counsel nonetheless filed a Petition which goes on for 155 paragraphs, but contains no paragraphs concerning Ms. Foster's status as a subordinate lawyer. The petition cites 10 different disciplinary rules but somehow fails to mention Rule 5.2(b). The result is a Petition which forces the Respondent herself to plead the relevant facts.

Ms. Foster responds to the allegations in Bar Counsel's Petition for Discipline ("Petition") as follows:

Jurisdiction and Allegations Common to all Counts

1. No response is required because Paragraph 1 states the authority under which the Petition is filed.
2. Admitted.
3. Admitted.
4. No response is required because Paragraph 4 is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without sufficient information to admit or deny the allegations in Paragraph 4.
5. No response is required because Paragraph 5 is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without sufficient information to admit or deny the allegations in Paragraph 5.
6. No response is required because Paragraph 6 is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without sufficient information to admit or deny the allegations in Paragraph 6.
7. No response is required because Paragraph 7 is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without sufficient information to admit or deny the allegations in Paragraph 7.

8. Admitted.

COUNT ONE

9. Ms. Foster restates and incorporates herein her responses to Paragraphs 2 through 8.

10-56. Ms. Foster is not a party to Count One. It exclusively involves events which occurred prior to her joining the Attorney General's Office ("AGO") and in which Ms. Foster did not participate. Accordingly, Ms. Foster need not respond to any of the allegations in Count One. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

COUNT TWO

57. Ms. Foster restates and incorporates herein her responses to Paragraphs 2 through 56.

58-83. Ms. Foster is not a party to Count Two. It exclusively involves events which occurred prior to her joining the Attorney General's Office and in which she did not participate. Accordingly, Ms. Foster need not respond to any of the allegations in Count Two. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

COUNT THREE

84. Ms. Foster restates and incorporates herein her responses to Paragraphs 2 through 83.

85. Admitted.

86. Admitted.

87. In answering Paragraph 87, Ms. Foster states that such subpoenas speak for themselves.

88. Ms. Foster is without sufficient information to admit or deny the allegations in Paragraph 88.

89. In answering Paragraph 89, Ms. Foster states that such discovery motion speaks for itself.

90. Admitted.

91. Ms. Foster admits that a subpoena was served but is without sufficient information to admit or deny the date upon which the subpoena was served.

92. In answering Paragraph 92, Ms. Foster states that such subpoena speaks for itself.

93. Admitted.

94. Ms. Foster admits that she was assigned the task of opposing the Rodriguez discovery motion but denies Paragraph 94 to the extent that it suggests she was solely responsible for all aspects of the handling of that matter. Ms. Foster acted under the supervision of her superiors.

95. In answering Paragraph 95, Ms. Foster admits that she did not personally review Kaczmarek and Ballou's files but denies Paragraph 95 to the extent it suggests that she was required by the standard of care to so review. Further answering, Ms. Foster states that she was at all relevant times a subordinate lawyer following the reasonable instructions of her supervisors.

96. Denied. Further answering, Ms. Foster was informed by Ballou, who so testified under oath, that his file had been produced and Ms. Foster believed it to be true. Ms. Foster was reasonably instructed by her supervisors that she could rely upon that representation.

97. Denied. Further answering, Ms. Foster was informed by Kaczmarek that all relevant and appropriate materials had been produced and Ms. Foster reasonably believed that representation to be true. Ms. Foster was reasonably instructed by her supervisors that she could rely upon that representation.

98. In answering Paragraph 98, Ms. Foster admits that she did not personally review Kaczmarek and Ballou's files but denies Paragraph 98 to the extent that it suggests that she was required by the standard of care to so review. Further answering, Ms. Foster reasonably relied on representations by Kaczmarek and Ballou.

99. Denied.

100. No response to Paragraph 100 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

101. No response to Paragraph 101 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

102. No response to Paragraph 102 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

103. Admitted.

104. In answering Paragraph 104, Ms. Foster states that her memorandum speaks for itself. Further answering, the memorandum had been reviewed and approved by Ms. Foster's supervisors prior to its filing.

105. In answering Paragraph 105, Ms. Foster states that her memorandum speaks for itself. Further answering, the memorandum had been reviewed and approved by Ms. Foster's supervisors prior to its filing.

106. Admitted.

107. In answering Paragraph 107, Ms. Foster admits that she did not direct Ballou to bring his file to the hearing but denies Paragraph 107 to the extent that it suggests that she was required to do so. Ms. Foster reasonably understood, based on conversations with Attorney Olanoff who issued the subpoena, that he was not seeking the production of documents at the hearing. Ms. Foster's actions were directed and approved by her supervisors.

108. Admitted.

109. In answering Paragraph 109, Ms. Foster states that the transcript of the September 9, 2013 hearing before Judge Kinder speaks for itself. The quoted excerpt does not fairly reflect Judge Kinder's instructions.

110. Denied.

111. Admitted.

112. Denied. Paragraph 112 incorrectly characterizes Judge Kinder's instructions.

113. Denied. Further answering, following the September 9, 2013 hearing, Ms. Foster was informed by her supervisors that Ballou's entire file had been produced and in turn reasonably relied on those representations.

114. Denied. Further answering, the allegations in Paragraph 114 intentionally and misleadingly omit the first sentence Ms. Foster's September 16, 2013 letter. The omitted first sentence clarifies that that Order was understood to be directed at the Attorney General's Office generally, not Ms. Foster personally. The selective quotation of the letter is misleading and inappropriate.

115. Denied. Further answering, the letter dated September 16, 2013 was not misleading nor was anyone actually misled by it.

116. Admitted.

117. Admitted.

118. In answering Paragraph 118, Foster states that Attorney Ryan's motion to compel speaks for itself.

119. Admitted.

120. Admitted.

121. Ms. Foster is without sufficient information to admit or deny the allegations in Paragraph 121.

122. Ms. Foster is without sufficient information to admit or deny the allegations in Paragraph 122.

123. Admitted.

124. Admitted.

125. In answering Paragraph 125, Ms. Foster states that her opposition to the motion to compel speaks for itself.

126. In answering Paragraph 126, Ms. Foster states that her opposition to the motion to compel speaks for itself.

127. Admitted.

128. Denied. Further answering, Ms. Foster reasonably relied on the representations by Kaczmarek and Ballou that the entire file had been produced.

129. In answering Paragraph 129, Ms. Foster states that the Order entered on October 2, 2013 speaks for itself.

130. In answering Paragraph 130, Ms. Foster is without sufficient information to admit or deny what compliance with said Order would have required and denies Paragraph 130 to the extent that it suggests that she was aware that those materials existed or that she had a duty to personally examine the files notwithstanding the representations by Kaczmarek and Ballou.

131. Admitted.

132. Admitted.

133. In answering Paragraph 133, Ms. Foster states that the draft motion for clarification speaks for itself. Further answering, Ms. Foster states that the extent of exclusions is conjectural and is therefore unable to admit or deny what, if any, communications would have been excluded.

134. Admitted.

135. No response to Paragraph 135 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

136. No response to Paragraph 136 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

137. No response to Paragraph 137 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

138. In answering Paragraph 138, Ms. Foster states that the motion for clarification speaks for itself.

139. In answering Paragraph 139, Ms. Foster states that October 23, 2013 Order speaks for itself.

140. Admitted.

141. Admitted.

142. Admitted.

143. No response to Paragraph 143 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

144. No response to Paragraph 144 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

145. In answering Paragraph 145, Ms. Foster admits that Judge Carey held a six-day hearing. Further answering, Ms. Foster states that the pleadings speak for themselves as to the assertions of each defendant.

146. In answering Paragraph 146, Ms. Foster admits that Judge Carey entered an Order on July 26, 2017 but states that his findings are inadmissible in this action and that their inclusion in the Petition is inappropriate. Ms. Foster was not a party to the Penate proceeding; had no right to counsel; had no right to present evidence on her own behalf; and had no right to appeal a clearly erroneous finding.

147. In answering Paragraph 147, Ms. Foster states that the Massachusetts Supreme Judicial Court's opinion speaks for itself.

148. Denied.

149. No response to Paragraph 149 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

150. Denied.

151. Denied.

152. Denied.

153. No response to Paragraph 153 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

154. No response to Paragraph 154 is required because it is not directed at Ms. Foster. To the extent some response is required, Ms. Foster is without any information or belief as to accuracy of such allegations.

Disciplinary Rules

155. No response is required because of Rules 1.1, 1.2, 1.3, 3.3, 3.4, 3.8, 4.1, 5.1, 5.3, and 8.4 speaks for themselves. Respondent further states that the Disciplinary Rule which governs her conduct is Mass. R. Prof. C. 5.2(b).

SUPPLEMENTAL ALLEGATIONS

Overview

The Petition intentionally omits the key facts and relevant disciplinary rule applicable to Ms. Foster. Bar Counsel apparently does so in an effort to evade her burden of proof under Rule 5.2 and to convert its exculpatory “safe harbor” provision into a mere affirmative defense. Accordingly, Supplemental Allegations are needed to present the key issues which Bar Counsel must prove. These additional allegations do not state an affirmative defense or matter in mitigation, they establish the absence of any violation at all.

Additional Allegations

1. Ms. Foster joined the Attorney General’s Office in July 2013 as a “line AAG.”
2. As a line AAG, Ms. Foster had very little professional discretion in how she handled her caseload or to what matters she was assigned by her superiors.
3. Virtually all draft motions and papers were required to be reviewed, edited, and approved by Ms. Foster’s supervisors prior to the submission thereof.
4. Ms. Foster’s supervisors at the Attorney General’s Office included Randall Ravitz and John Verner, among others.

5. In August 2013, Ms. Foster's supervisors assigned her the task of representing Kaczmarek and Ballou in connection with the Penate subpoenas, at which time she had been an AAG for less than two months. At that time, Ms. Foster had never before drafted a motion to quash.
6. In August 2013, Ms. Foster's supervisors also assigned her the task of opposing a discovery motion served by Attorney Luke Ryan, at which time she had been an AAG for less than two months. At that time, Ms. Foster had never before appeared in Superior Court other than as an assistant to a more senior lawyer.
7. In August 2013, Ms. Foster's supervisors instructed her to file a motion to quash the Penate subpoenas. Ms. Foster's supervisors provided her with several sample motions to quash, upon which she was instructed to base her draft motion.
8. Among the standard language in the template provided by Ms. Foster's superiors was language seeking to quash a subpoena for "information concerning the health or medical or psychological treatment of individuals." Ms. Foster was directed to maintain the language of the sample as closely as possible, which she did in drafting the motion to quash.
9. Ms. Foster's superiors reviewed her draft motion to quash, provided edits, and ultimately directed her to serve and file the motion.
10. Prior to the hearing on the motion to quash, Ms. Foster's supervisors directed her to call Attorney Olanoff to discuss the scope of the subpoena, more particularly whether Attorney Olanoff was then-currently seeking documents or testimony only from Ballou. Attorney Olanoff informed Ms. Foster that he sought Ballou's testimony only and not the contents of the file at that time.

11. Ms. Foster's supervisors instructed her that all relevant material in Ballou's file had previously been produced. Ms. Foster's supervisors did not instruct her that she was required to personally review Ballou's file, nor did they inform her where the file was located or provide her with access to it.
12. Based on the directives and representations of her superiors, along with Ballou's sworn testimony, at the motion to quash hearing on September 9, 2013, Ms. Foster represented her understanding that the entire file had been produced. Ms. Foster reasonably believed her representations to be true.
13. On or around September 16, 2013, following the motion to quash hearing, Ms. Foster accurately reported to her supervisors what had occurred and requested further instructions as to how to proceed. Ms. Foster's superiors instructed her that based on their review the entire file had already been produced.
14. On or around September 16, 2013, Ms. Foster's supervisors directed her to write a letter to Judge Kinder informing him, in response to the Order, that all the contents of the file had been turned over.
15. Given the representations by Ballou under oath that the entire file had been turned over, coupled with the assurances and direction of her superiors, Ms. Foster wrote a letter dated September 16, 2013 that the entire file had been turned over. Based upon the information proved by her supervisors and superiors, Ms. Foster reasonably believed this representation to be true.
16. Ms. Foster never became aware of the actual location of the file and never had access to it. At no time did she have any information as to the contents of the file inconsistent with the representations of her clients and supervisors.

17. At all relevant times, Ms. Foster was a subordinate lawyer who acted at the direction of her supervisors.
18. At all relevant times, Ms. Foster's actions were approved and ratified by her supervisors.
19. Ms. Foster has never seen the subject mental health worksheets and at all relevant times was unaware of their contents or potential significance.
20. Ms. Foster at all times reasonably believed that all representations she made to the Court were true and accurate.
21. Ms. Foster at all times was following the reasonable instructions of her supervisors as to arguable questions of professional duty.

Disciplinary Rules

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

MITIGATING FACTORS

Respondent hereby incorporates and realleges Supplemental Allegations 1-21.

Inexperience is recognized as a mitigating factor. *See Mass. Bar Discipline: History, Practice, and Procedure* at 394 nn. 31-32 (highlighting inexperience of lawyer as a mitigating factor). At all relevant times, Ms. Foster was among the most junior attorneys in the Attorney General's Office. As of August 23, 2013, Ms. Foster had been an AAG for less than two months. During the relevant events at issue here Ms. Foster made her first appearance in a contested Superior Court matter, and filed her first ever motion to quash (which she drafted based on a sample provided by her supervisor and which she submitted to her supervisor for approval). As a result of her inexperience, Ms. Foster was entitled to rely—and, indeed, was understandably required to rely—on her superiors.

Inexperience is a mitigating factor. It is separate and distinguishable from subordinate lawyer status, which is an exculpatory factor.

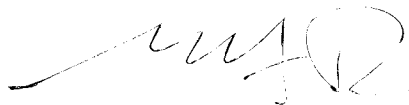
WHEREFORE, the Respondent respectfully requests that the Board of Bar Overseers:

- a. Consider and hear the matter set forth herein.
- b. Determine that Ms. Foster was at all times a subordinate lawyer reasonably following the instructions of her supervisors.
- c. Determine that no discipline is appropriate and dismiss this matter.

Respectfully submitted,

Kris C. Foster, Esq.

By her attorneys,



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DATED: August 22, 2019

CERTIFICATE OF SERVICE

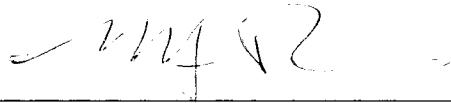
I, George A. Berman, hereby certify that on this 22nd day of August, 2019, I served the above document by First Class Mail, postage prepaid, to:

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