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

BAR COUNSEL, Petitioner	)	
v.	)	BBO File Nos. C1-17-00248283 C1-17-00248284 C1-17-00255238
KRIS C. FOSTER, ESQ., ANNE K. KACZMAREK, ESQ., and JOHN C. VERNER, ESQ. Respondents	)	

RESPONDENT KRIS C. FOSTER'S SANCTION RECOMMENDATION

Based on the Findings in the Hearing Report, the presumptive sanction for the unintentional violations found as to Kris Foster is an admonition.[1] The ABA Standards for Imposing Lawyer Sanctions (2d ed. 2019) ("ABA Standards") specifically deal with the presumptive sanction for public officials who have violated an ethical rule in the performance of their duties, most frequently prosecutors who have failed to disclose exculpatory evidence. See ABA Standards §§ 5.2-5.24.[2] The ABA Standards, repeatedly cited by the SJC as authoritative, explicitly provide that the presumptive sanction for an intentional violation of the Rules is a suspension or disbarment (ABA Standards §§ 5.21 and 5.22) and that the presumptive sanction for a negligent violation is either a public reprimand (ABA Standards § 5.23) or a private

[1] At the request of the Special Hearing Officer, Foster has submitted this memorandum setting out the appropriate sanction should the findings in the Hearing Report be adopted in full. It is not a waiver of Foster's position that the findings warrant the application of Mass. R. Prof. C. 5.2 to her conduct where, if accepted, would make any discipline inappropriate. It is similarly not a waiver of Foster's position that in the absence of evidence of the relevant standard of care, various ultimate findings as to the reasonableness of Foster's reliance on the honesty and competence of her supervisors and colleagues were unsupported by the evidence. These are legal issues which will be pursued at a later time.

[2] The relevant portions of the ABA Standards are attached for the convenience of the SHO.

admonition (ABA Standards § 5.24), depending on the injury actually caused by the breach or the potential for injury which could have been reasonably anticipated at the time of the conduct.

In this case, there was no finding of intentional conduct by Kris Foster, which puts this in the realm of an admonition or a reprimand, depending on injury. The only finding connecting Foster's conduct to any consequence is the finding that better preparation on her part "might have prevented much of the ensuing confusion." (Hearing Report ¶ 372).[3] This finding falls far short of the "more probable than not" standard to establish causation. As a result, the presumptive sanction is an admonition.

I. THE PRESUMPTIVE SANCTION IS AN ADMONITION

Given the unique circumstances of this case, counsel is not aware of any comparable cases in Massachusetts that can provide helpful precedent. Massachusetts Bar Discipline: History, Practice, and Procedure (2018) notes that "professional discipline of a lawyer serving as a prosecutor in Massachusetts has been rare." Id. at 367. The few cases that exist deal almost exclusively with improper closing argument. See id. at 372. In such a circumstance, it is reasonable to refer to the ABA Standards for guidance. The ABA Standards have been cited favorably and relied on by the BBO and the Court. See Matter of Palmer, 413 Mass. 33, 37 (1992) (noting the Court's prior approval of the ABA Standards); Matter of Grella, 438 Mass. 47, 52 n.10 (2002) ("The ABA Standards are to like accord."); Matter of Dawkins, 412 Mass. 90, 97 (1992) (citing ABA Standards); Matter of Griffith, 440 Mass. 500, 509 (2003) ("It is of significance that our decision to impose a suspension finds support in the recommendations of the ABA Standards for Imposing Lawyer Sanctions"); Matter of Kerlinsky, 406 Mass. 67, 76 (1989) (noting and applying ABA Standards). It is significant that in at least one case in which

[3] References to the Hearing Report are indicated by (¶___).

the Court has departed from the ABA Standards, it has done so because the presumptive discipline recommended by the ABA Standards was too severe. Matter of Neitlich, 413 Mass 416, 423-24 (1992).

A. Structure Of The ABA Standards

The most relevant section of the ABA Standards is § 5.2, which deals with "public officials who engage in conduct that is prejudicial to the administration of justice . . . ." The ABA Standards specifically apply to prosecutors in the context of exculpatory evidence. ABA Standards at 233-35, 303-305. Even though Foster was not acting as a prosecutor, her role in responding to subpoenas and motions seeking exculpatory evidence is sufficiently close so that § 5.2 should control. That section draws two critical distinctions in determining the appropriate sanction. First, it distinguishes between intentional conduct and negligent conduct. Second, it distinguishes between cases in which there is injury or potential injury and cases in which there is little or no injury or potential injury. Cases involving intentional conduct presumptively call for disbarment or suspension. See § 5.21 (disbarment for misuse of position with intent to obtain benefit for oneself or with intent to cause harm to a party or the legal process); § 5.22 (suspension for knowingly failing to follow proper procedures).

Cases involving negligent conduct presumptively call for a reprimand or an admonition. Whether conduct merits a reprimand or admonition depends on the presence of injury or potential injury. Section 5.23 reads:

> Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules and causes injury or potential injury to a party or to the integrity of the legal process.

Section 5.24 reads:

> Admonition is generally appropriate when a lawyer in an official or governmental position engages in an isolated instance of negligence in not following proper procedures or rules and causes little or no actual or potential injury to a party or to the integrity of the legal process.

As will be shown, Foster's conduct warrants an admonition.

B. The Findings Explicitly Rejected the Charge of Intentional Conduct

The most significant factor affecting the appropriate sanction for Foster is that she was not found to have engaged in any intentional or willful misconduct. She did not intentionally provide false or misleading information to anyone, nor did she intentionally withhold evidence. She was found to have been negligent in handling the subpoenas, and to have unreasonably relied on statements of her superiors and colleagues. (¶¶ 278, 305, 318, 372, 378). The ABA Standards defines "negligence" as "the failure of a lawyer to heed a substantial risk that circumstances exist or that will result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." ABA Standards at xxi. This definition describes Foster's conduct, and the SHO specifically rejected Bar Counsel's contentions that Foster acted knowingly. (¶¶ 377-380). In the absence of any finding of intentional misconduct by Foster, the presumptive sanction is an admonition or a reprimand, depending on injury.

It should be noted that the ABA Standards assume that a violation of the Rules by a public official would, almost by definition, affect "the integrity of the legal process." That element is specifically cited in each of §§ 5.22, 5.23, and 5.24 and is factored into the presumptive sanction. It is expected that the Bar Counsel will seize upon this issue as a key element in his recommendation. But the impact on the "integrity of the legal process" is already factored into the presumptive sanction. It is not an independent aggravating factor, and it is not a reason to depart from the presumptive sanction.

C. The Causal Link Between Foster's Conduct and Any Injury Was Not Proven Beyond a Mere Possibility, Which is an Inadequate Basis for Satisfying Bar Counsel's Burden of Proof.

In §§ 5.23 and 5.24, the ABA Standards distinguish between "injury" and "potential injury." "Injury" means "harm to a client, the public, the legal system, or the profession which results from the lawyer's misconduct …" ABA Standards at xxi. "Potential injury" is defined as "harm to a client, the public, the legal system, or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." Id. Here, the evidence, and therefore the findings as to Foster, did not establish either injury or potential injury.

1. Actual Injury.

The injury at issue in this case arises from the failure to produce exculpatory evidence, in particular the mental health worksheets, to the Farak Defendants. Given Foster's junior position in the AGO and the intentional concealment by Kaczmarek, there is no evidence, and certainly no finding, that any further questioning or effort on Foster's part would have produced a different result. There was no causal link between anything Foster did or failed to do and the result. The sole finding regarding any injury that Foster's conduct caused is in Paragraph 372, and this finding is limited to the proposition that Foster's conduct "might" have caused confusion. Even assuming confusion is injury, the finding that Foster's conduct "might" have caused confusion falls well below the "more probable than not" standard required to establish the essential element of causation. See Girardi v. Gabriel, 38 Mass. App. Ct. 553, 560 (1996) ("The mere possibility that the defendant's negligence caused harm is not sufficient to take the issue to the injury."), citing Marcus v. Griggs, Inc., 334 Mass. 139, 143 (1956); McCann v. Davis, Malm

& D'Agostine, 423 Mass. 558, 560 (1996) (no causation where plaintiff's expert testified "it was unclear what proper and vigorous representation would have achieved for the plaintiff.").

The SHO determined that "Foster should have asked more questions and should have asked to see the documents that had been turned over to the DAOs." (¶ 197). But Bar Counsel presented no evidence as to what those questions should have been, to whom they should have been addressed, or what the answers likely would have been. This lack of evidence is not an oversight on Bar Counsel's part. The evidence was not presented because it does not exist. Further questions to Kaczmarek almost certainly would have generated only further misrepresentations. (¶¶ 202, 203, 291). Indeed, ADA Bossé did pose "additional questions" to Kaczmarek in September 2013, and with the information he got from her he represented to the Farak Defendants that there was nothing further to produce. (¶ 188). Additional questions to Verner would have elicited only his good faith, if erroneous, belief that the mental health worksheets had been produced. (¶ 146). Likewise, further questioning of Sgt. Ballou likely would have elicited the same information he provided under oath, i.e. that "everything in my case file has been turned over." (¶ 217). Under these circumstances, the only conclusion one could reach is that a different result is speculative, that the SHO's finding that further inquiry "might" have prevented confusion is the only finding that can be supported by the evidence, and that this finding is insufficient to establish causation.

2. Potential Injury.

The existence of potential injury fares no better. Under the ABA Standards, there are two components to potential injury: (1) the harm must be "reasonably foreseeable at the time of the lawyer's misconduct," and (2) "but for some intervening factor or event, [the harm] probably

would have resulted from the lawyer's misconduct." ABA Standard at xxi. The evidence does not establish either of these components.

First, with respect to foreseeability, what was not foreseeable to Foster was that the mental health worksheets would be withheld, not as a result of error on her part, but because Kaczmarek was engaged in intentional misconduct. Generally, the intentional misconduct of a third party is not reasonably foreseeable. See Commonwealth v. Carlson, 447 Mass. 79, 84 (2006). The SHO implicitly applied this concept in finding that Verner was entitled to rely on Kaczmarek's representations. (¶ 146). Kaczmarek's intentional concealment and intentional misrepresentations were not reasonably foreseeable by Verner, and they were likewise not reasonably foreseeable by Foster. There is nothing in the record to suggest that either Foster or Verner should have suspected Kaczmarek's actual and intentional concealment.

Equally unforeseeable by Foster was the failure of her supervisor Ravitz. He had a duty to assign Foster work she was competent to do and to supervise her performance of work as to which she had no experience. Although Ravitz was not charged, the findings show that he violated his obligations under Mass. R. Prof. C. 5.1 to supervise Foster. Foster was entitled to assume that Ravitz would comply with his obligations under Rule 5.1.

Second, with respect to the existence of an "intervening factor or event," this case is precisely the opposite of what the ABA Standards envision, which is an intervening factor that prevents actual injury. In other words, the lawyer gets lucky because some intervening event prevents harm that would otherwise have occurred. Here, it was an intervening factor -- Kaczmarek's intentional concealment and misrepresentations -- that caused the injury. But for Kaczmarek's intentional misconduct, the mental health worksheets would have been produced in the ordinary course.

The Hearing Report reflects Bar Counsel's failure of proof on the issue of actual or potential injury caused by Foster's conduct.

D. Foster Engaged In An Isolated Instance Of Negligence.

The findings against Foster arise out of a single nucleus of fact centering on her assignment to respond to subpoenas. The findings encompass her preparation for responding to the subpoenas, a hearing regarding the subpoenas, and a letter she wrote after that hearing. The SHO found that her response to the subpoenas was negligent, but the negligence all related to a single subpoena response. This is not a course of conduct that involved multiple matters over an extended time period. It involved one consolidated matter over about one month in August and September 2013. There was no charge, and certainly no finding, that she ever did anything like this before or after the events at issue. Compare In re Gould, 253 A.D.2d 233, 237, 686 N.Y.S.2d 759, 761 (1999) (three instances of failures to communicate is not a "pattern of neglect") and In re Reardon, 759 A.2d 568, 576 (Del. 2000) (two cases of misconduct did not establish a "pattern" of neglect) with Matter of Zak, 476 Mass. 1034, 1038 (2017) ("repeated and multiple ethical violations in connection with a loan modification and mortgage foreclosure cases over a number of years" warranted enhanced sanctions).

II. MITIGATION

Foster was a newly hired Assistant Attorney General who was the third choice for a high-profile assignment for which she had no experience and for which she was given no meaningful instruction or supervision. See (¶ 162). Crediting the testimony of Foster over that of Ravitz, the SHO found that Foster gave the critical letter to her supervisor for review who approved it without comment. (¶ 272). Whether Foster's interactions with her supervisors is a complete defense under Mass. R. Prof. C. 5.2 is a legal issue to be pursued later. Her

inexperience, however, is a mitigating factor, particularly where, as here, the inexperienced lawyer seeks the advice of a more experienced colleague.

Foster had been practicing law for less than five years when the events at issue took place. (¶ 18). Although she had substantial appellate experience, she had no experience in responding to subpoenas. (¶ 162). She had been at the AGO for about a month when she was assigned to handle the subpoenas. Inexperience is a recognized mitigating factor. Matter of the Discipline of an Attorney, 448 Mass. 819, 834 (2007). "This factor typically carries the most weight when an inexperienced subordinate lawyer is carrying out the directives of a senior lawyer." Massachusetts Bar Discipline at 394. This describes Foster's role in this matter.

Foster had been told that everything had been turned over. (¶ 237). The SHO found that "while Foster should have asked more questions of Kaczmarek, she relied on statements of Kaczmarek and others in the AGO whom she believed knew what had been turned over to the DAOs." (¶ 202). She prepared drafts for review and asked for guidance from Ravitz and Reardon. (¶¶ 190-193). Although Reardon edited Foster's drafts, "neither Ravitz nor Reardon had told her to review Ballou's file but that, instead she was told not to 'reinvent the wheel' and was to copy wholesale from the sample motions she had been given." (¶ 202). Ravitz reviewed and approved her letter to Judge Kinder, including the "misguided phrasing" regarding the review of Ballou's file. (¶¶ 268 & 278). Although the SHO found that Foster's reliance on Kaczmarek was unreasonable, he specifically found, and the evidence overwhelmingly supports, that "Ravitz and Reardon should have provided more guidance and direction to Foster, knowing Foster had not previously responded to a subpoena." (¶ 203).

There is a clear and close connection between Foster's inexperience and her handling of the subpoenas. Her superiors gave her an assignment and then failed to give her proper support

and guidance. She accepts responsibility for her shortcomings, but, as has been found, she did not act intentionally. Had she had more experience, there is still no guarantee that the outcome would have been different. As the SHO noted, she might have avoided the ensuing confusion, but it is not all obvious that the mental health worksheets would have been produced given Kaczmarek's intentional concealment. Her lack of experience, while not an exonerating factor, is a substantial mitigating factor.

Finally, an important factor in determining the proper level of discipline is its effect on other members of the bar. See Matter of Curry, 450 Mass. 503, 530, (2008); Matter of Concemi, 422 Mass. 326, 329 (1996). Inexperienced lawyers become experienced lawyers only by attempting new things. When inexperienced lawyers are assured by a supervisor that they are ready for a new task and that they will be properly supervised in its performance, they should be encouraged to proceed, not threatened with discipline should be supervisor's assurances prove illusory.

Competence cases almost always involve lawyers who are in a position to control their own workload. There is usually a financial incentive to take on matters outside of their areas of expertise or to take on too many matters. Conduct of this sort must be deterred. The situation of a subordinate lawyer working in a government agency or a firm is very different. Subordinate lawyers are assigned work and must rely on their supervisors to determine what assignments are appropriate for their level of experience, how many cases they can reasonably handle, and to give them appropriate supervision. Assigning a new task to a subordinate lawyer without appropriate supervision is a violation of the supervisors' obligations under Rule 5.1, and it is the supervisor who should be sanctioned and deterred. Telling a subordinate lawyer she can accept a

supervisor's assignment of a first deposition or a first trial only at the risk of professional discipline promotes timidity, not competence.

III. CONCLUSION

The conduct of various senior attorneys at the AGO harmed many people, one of whom was Kris Foster. Putting aside the intentional misconduct of Kaczmarek, Foster was assigned work for which she had no experience as to which she received no supervision from a superior who twice, under oath, misrepresented his role in the matter. The misrepresentations of this supervisor were adopted by Judge Carey at the express urging of another Assistant Attorney General who was purporting to represent Foster, but who was actually working against her interests. Foster complained Ravitz and the AGO threw her "under the bus." Extending that metaphor, AAG Kim West then drove the bus over her. As a result, Foster has already been publicly reprimanded in the media for actions the SHO expressly found she did not commit. Further piling on is neither appropriate nor warranted. Foster engaged in isolated, non-intentional misconduct that did not cause any actual or potential injury. Under these circumstances, there is no basis to depart from the presumptive sanctions of an admonition.

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CERTIFICATE OF SERVICE

I, Allen N. David, hereby certify that on this 16th day of August served the above document via email to:

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