

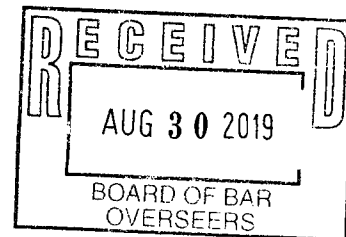
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August 30, 2019

June D. Risk
Legal Administrative Assistant
Board of Bar Overseers
99 High Street, 2nd floor
Boston, MA 02110



Re: Bar Counsel v. Kris C. Foster, Esq., Anne K. Kaczmarek, Esq., and
John C. Verner, Esq., BBO File Nos. C1-17-00248283, C1-17-00248284
and C1-18-00255238

Dear Ms. Risk:

Enclosed for filing in the above-captioned matter please find Anne Kaczmarek's
Response to the Petition for Discipline.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas R. Kiley".

Thomas R. Kiley

TRK/bap
Enclosure

cc: Stacey A.L. Best, Assistant Bar Counsel
George A. Berman, Esq.
Thomas Butters, Esq.

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



BAR COUNSEL,)
)
 Petitioner)
)
 v.)
)
 KRIS C. FOSTER, ESQ.,)
 ANNE K. KACZMAREK, ESQ., and)
 JOHN C. VERNER, ESQ.,)
)
 Respondents)

BBO File Nos. C1-17-00248283
C1-17-00248284
C1-18-00255238

RESPONSE TO THE PETITION FOR DISCIPLINE

The Respondent Anne K. Kaczmarek responds to the Petition for Discipline by setting forth the context of the petition using a regular font and then her responses, labelled "Answer" and printed in bold font.

PETITION FOR DISCIPLINE

On January 4, 2014, Sonja Farak, a chemist employed at a state laboratory in Amherst between August 2004 and January 18, 2013, 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 Class B controlled substance. Farak's misconduct had broad implications on pending cases involving Farak's drug analyses, cases where defendants had already been convicted based on Farak's analyses, and potentially on drug analyses conducted in the lab while Farak was working there (collectively, "Farak defendants").

The Attorney General's Office (AGO) prosecuted Farak between January 18, 2013, when the investigation was opened and January 4, 2014, when Farak pled guilty. During that period, the AGO was solely in possession of information obtained through its investigation and was responsible for providing potentially exculpatory information to the district attorneys who were prosecuting Farak defendants or opposing the efforts of Farak defendants to reopen cases that involved Farak drug analyses.

In November 2014, however, it was revealed in case in Hampshire County Superior Court that the AGO had failed to disclose to the several district attorneys' offices information related to the nature and extent of Farak's misconduct that was potentially exculpatory to Farak defendants. The undisclosed information tended to show that Farak had taken and used several types of narcotics from the state lab, that Farak had sought therapy for drug addiction and that Farak's misconduct had been going on for at least several years period to her arrest. The Farak defendants could have potentially used this information to demonstrate a likelihood that drug analyses done by Farak were not reliable evidence. They were therefore entitled to receive that information.

In 2017, after a six-day evidentiary hearing about the AGO's failure to produce the exculpatory information during 2013, the Hampden Superior Court (Carey, J.) determined that the exculpatory information had been wrongfully withheld and a fraud had been committed on the court. Judge Carey granted new trials and other relief to seven criminal defendants. *See Commonwealth v. Cotto*, Hampden Superior Court Dkt. No. 2007-770. In 2018, based on Carey's conclusions, the Supreme Judicial Court reversed the convictions of 11,000 defendants. *CPCS v. The Attorney General*, 480 Mass. 700 (2018).

This petition for discipline alleges that three assistant attorneys general (AAG) engaged in violations of the Massachusetts Rules of Professional Conduct by participating in the conduct that resulted in the AGO's failure to timely disclose exculpatory evidence in the AGO's possession.

ANSWER: No answer is required to the unnumbered "Overview" and it should be stricken. That said the "Overview" in the Petition for Discipline proceeds on two false premises, one factual and the other legal. Both are reflected in the second paragraph.

Factually, it is not true that the AGO was solely in possession of information obtained through its investigation between January 15, 2013 and January 4, 2014. The investigation was conducted in significant part by the Department of the State Police, an executive branch agency headed by its Colonel and under the direct supervision of the Secretary of Public Safety and indirectly, the Governor. That agency possessed information obtained through the investigation of Ms. Farak. So did Ms. Farak's lawyer, Elaine Pourinski, to whom all original evidence was timely provided.

Legally, the conclusory statement that the Attorney General's office was responsible for providing potentially exculpatory information to the district attorneys who were prosecuting "Farak defendants" or opposing the efforts of Farak defendants to re-open cases that involved Farak drug analysis ignores the fact that the responsibility for dissemination of such information resided with Attorney Byron Knight of the Governor's office following the revelations concerning the misconduct of D.P.H. chemist Anne Dookhan. It also ignores the fact that the Supreme Judicial Court had not adopted the provisions of the Model Rules currently contained in Rule 3.8(i)-(k) of the Massachusetts Rules of Professional Conduct.

The third and fourth paragraphs which follow contain characterizations and argument, not specific charges of alleged misconduct as required by Rule 3.14(b) of the Board of Bar Overseers Rules. The characterizations and argument contained in those paragraphs should be stricken as to Respondent Kaczmarek, as she was not a party in the proceedings referenced.

While the petition for discipline, as set forth in the fifth paragraph of the Overview, does allege that three assistant attorneys general engaged in violations of the Massachusetts Rules of Professional Conduct by participating in conduct involving the failure of their office to timely disclose exculpatory evidence in the possession of the office, the rule imposing such an obligation did not exist and the effort to shoehorn the conduct specifically covered by the later adopted rule into the preexisting rules should be summarily rejected.

Jurisdiction and Allegations Common to all Counts

1. This petition is brought pursuant to Rule 4:01, Section 8(3), of the Rules of the Supreme Judicial Court and Sections 3.13(a)(2) and 3.14 of the Rules of the Board of Bar Overseers.

ANSWER: Paragraph 1 contains only statements of law which require no answer.

To the extent it contains facts, those facts are DENIED, as this petition seeks to enforce rules that did not exist at the time of the conduct.

2. The respondent, Kris Foster, Esq., is an attorney duly admitted to the Bar of the Commonwealth on December 9, 2008.

ANSWER: ADMITTED, but for the date of Ms. Foster's admission to the bar. The Respondent lacks sufficient knowledge to admit or deny that date.

3. At all times relevant to the petition for discipline, Foster was an assistant attorney general (AAG) in the AGO. Foster was assigned to the Appeals Division at the AGO.

ANSWER: ADMITTED.

4. The respondent, Anne Kaczmarek, Esq., is an attorney duly admitted to the Bar of the Commonwealth on December 14, 1999.

ANSWER: ADMITTED.

5. At all times relevant to the petition for discipline, Kaczmarek was an AAG in the AGO. Kaczmarek was assigned to the Enterprise and Major Crimes Division (EMC) of the Criminal Bureau at the AGO.

ANSWER: ADMITTED.

6. The respondent; John Verner, Esq., is an attorney duly admitted to the Bar of the Commonwealth on June 14, 2000.

ANSWER: ADMITTED but for the date of Mr. Verner's admission to the bar. The Respondent lacks sufficient knowledge to admit or deny that date.

7. At all times relevant to the petition for discipline, Verner was the Chief of the Criminal Bureau within the AGO. As chief of the Criminal Bureau, Verner was responsible for the EMC

and the Appeals Division.

ANSWER: ADMITTED as to the first sentence. Respondent cannot respond to the second as the word “responsible” renders a succinct but fulsome answer impossible.

8. At all times relevant to the petition for discipline, Verner had supervisory responsibilities for the conduct of the respondents Foster and Kaczmarek.

ANSWER: ADMITTED, but by way of further answer, Respondent states that: (a) neither she nor Ms. Foster were generally direct reports to Mr. Verner; (b) both she and Ms. Foster were also subject to supervision by division chiefs who reported to Mr. Verner and to the supervision of others to whom Mr. Verner reported; and (c) both she and Ms. Foster were line attorneys who supervised no other Assistant Attorneys General. Responsibility for formulating and implementing procedures for dissemination of information to other law enforcement agencies other than the Attorney General’s office lies at the top of the supervisory chain, not the bottom.

COUNT ONE

9. Paragraphs 2 through 8 are realleged and incorporated by reference.

ANSWER: The answers to paragraphs 2 through 8 are realleged and incorporated by reference.

10. Between August 2004 and January 18, 2013, Sonja Farak was employed as a chemist at a laboratory located at the University of Massachusetts in Amherst (Amherst lab). As a chemist; Farak was responsible for chemically analyzing suspected controlled substances submitted by law enforcement agencies. Farak's additional responsibilities included issuing drug analysis

certificates, testifying in criminal proceedings regarding her analyses, and maintaining and repairing equipment.

ANSWER: ADMITTED as to the first two sentences and so much of the third as alleges that Ms. Farak's additional responsibilities included issuing drug analyses certificates and testifying in criminal proceedings regarding her analysis. The Respondent lacks sufficient knowledge to admit or deny that maintaining and repairing equipment was Ms. Farak's responsibility and calls upon Petitioner to prove that fact if relevant.

11. On or about January 18, 2013, the Massachusetts State Police (MSP) began investigating Farak for potential criminal misconduct in tampering with and mishandling drug samples that had been submitted for analysis.

ANSWER: ADMITTED.

12. The MSP's initial investigation focused on two cocaine samples that had been submitted to the Amherst lab for testing in late 2012.

ANSWER: ADMITTED as to the fact that these samples were the first to be discovered missing from the evidence locker by lab personnel.

13. On January 18, 2013, an employee of the Amherst lab found the two cocaine samples missing from the evidence locker.

ANSWER: ADMITTED.

14. On January 18, 2013, the MSP contacted the AGO regarding its criminal investigation of Farak. The AGO agreed to undertake the investigation and potential prosecution of Farak.

ANSWER: DENIED. By way of further answer, the Respondent avers that (a) the AGO was initially contacted by the Northwestern District Attorney's Office and

agreed to make inquiries, and (b) the MSP was already involved due to its oversight of the Amherst drug lab.

15. The investigation and any prosecution of Farak fell within the duties and responsibilities of the Criminal Bureau and EMC.

ANSWER: ADMITTED to so much of this paragraph as alleges that the investigation and prosecution of Farak was assigned to the Criminal Bureau and EMC, but the Criminal Bureau and EMC, unlike other units in the office of the Attorney General, have no statutory duties or areas of responsibility and pursuant to G.L. c. 12, the prosecutorial function is a function of both the Attorney General and the several District Attorneys and their assistants.

16. Verner assigned Kaczmarek the responsibility of overseeing the investigation and prosecution of Farak.

ANSWER: Respondent ADMITS she was assigned to the prosecution of Ms. Farak, but DENIES that the responsibility of oversight was assigned to her. By way of further answer, the Respondent states that pursuant to G.L. c. 22C, investigations conducted by the department of the state police are under the direction of the Colonel who heads the department.

17. Verner and Kaczmarek were-co-counsel in the Farak investigation and prosecution.

ANSWER: ADMITTED.

18. On January 19, 2013, Farak was arrested by the MSP on charges of tampering with two missing cocaine samples that had been submitted to the lab for testing in late 2012. Farak was also charged with possession of cocaine and possession of heroin.

ANSWER: ADMITTED.

19. From and after January 18, 2013, the MSP investigation into Farak's criminal misconduct was under the direction and control of the AGO. From and after January 18, 2013, evidence seized by the MSP related to the Farak investigation was in the sole possession, custody and control of the AGO.

ANSWER: ADMITTED in so far as it alleges that once the decision to prosecute was made, the AGO provided direction to investigators. DENIED as to the second.

20. The respondents understood that defendants with pending cases and who had been convicted on the basis of Farak's drug analyses would be entitled to receive from the district attorneys' offices information and documents that they could use to negate their guilt (hereinafter "potentially exculpatory information") obtained by the MSP and the AGO in the investigation and prosecution of Farak.

ANSWER: DENIED.

21. Criminal defendants with pending cases and who had been convicted based on Farak's drug analyses or analyses conducted in the labs while Farak was working there are hereinafter referred to collectively as "Farak defendants."

ANSWER: Paragraph 21 alleges no facts and requires no answer. Respondent uses the label "Farak defendants" where appropriate.

22. On January 19, 2013, pursuant to a warrant, the MSP searched Farak's vehicle and seized several items of evidence.

ANSWER: ADMITTED.

23. Between January 19, 2013 and January 23, 2013, MSP officers examined the items seized from Farak's vehicle. The MSP officers discovered in Farak's vehicle, among other items, news

articles dating back to 2011 regarding public officials who had been convicted of drug offenses and manila envelopes with case numbers written on them dating back to 2008.

ANSWER: ADMITTED.

24. During the search of Farak's vehicle, the MSP officers also discovered eight pages of forms and papers containing hand-written notes that tended to show Farak had been seeking therapy for drug addiction and struggling unsuccessfully to resist using drugs at work (the "mental health worksheets"). A notation in the upper left corner of one of the mental health worksheets said "homework 11-16-11."

ANSWER: ADMITTED, except for the implication that the Respondent recognized or should have recognized any "tendency" of specific documents labeled in the petition as "mental health worksheets" during or shortly after the search of Ms. Farak's vehicle .

25. Between January 19, 2013 and February 14, 2013, a MSP sergeant and the case officer, Joseph Ballou, discussed the mental health worksheets with Verner and Kaczmarek.

ANSWER: Respondent ADMITS so much of paragraph 25 as alleges that at some point between January 19 and February 14, 2013, she discussed the documents labeled by the petition as "mental health worksheets" with Joseph Ballou, who was a state police sergeant who became the case officer in what became the prosecution of Ms. Farak.

26. On February 14, 2013, Ballou sent Kaczmarek and Verner by email some of the mental health worksheets and some of the news articles discovered in Farak's vehicle. The subject line of the email read, "FARAK Admissions." Kaczmarek and Verner each received and opened the

email and attachments from Ballou in the normal course.

ANSWER: ADMITTED, in so far as it pertains to Respondent Kaczmarek.

Respondent lacks knowledge sufficient to admit or deny whether Mr. Verner received and opened the referenced emails and attachments in due course.

27. From and after February 14, 2013, Kaczmarek and Verner were aware that the mental health worksheets contained potentially exculpatory information for Farak defendants.

ANSWER: DENIED.

28. Between January 19, 2013 and January 23, 2013, Ballou informed Kaczmarek and Verner that he had received information that Farak had potentially tampered with a sample of suspected Oxycodone pills in a Hampden County case.

ANSWER: ADMITTED, in so far as it pertains to Respondent Kaczmarek.

29. Kaczmarek and Verner each approved and authorized Ballou to obtain additional information about Farak's potential tampering with the suspected Oxycodone pills.

ANSWER: ADMITTED, in so far as it pertains to Respondent Kaczmarek.

30. Ballou reported back to Kaczmarek and Verner the following information by no later than January 28, 2013:

(a) Farak had been the testing chemist in a March 2012 case involving suspected Oxycodone pills in which the officer who submitted the pills asserted that after testing he received back pills that were different in number and appearance than the pills he submitted to the lab (2012 Oxycodone case);

(b) Farak had been the testing chemist in a 2005 suspected cocaine case in which she certified that the sample was cocaine, but after testing, the sample contained four grams less than the officer had documented when he submitted it for testing to the lab (2005 missing

cocaine case). This information reported by Ballou to Kaczmarek and Verner suggested that Farak's evidence tampering might have been going on for many years prior to late 2012. It also suggested that in addition to cocaine, Farak was abusing other drugs. Kaczmarek and Verner were aware that this information was potentially exculpatory for Farak defendants.

ANSWER: ADMITTED, (but for the last two sentences) in so far as it pertains to Respondent Kaczmarek. The last two sentences are DENIED.

31. On or about January 24, 2013-, Kaczmarek learned that on or about January 22, 2013, Farak had submitted to a urinalysis that confirmed the presence of cocaine in Farak's system, and that Farak had admitted to a probation officer that she had ingested cocaine on January 18, 2013. On or about January 24, 2013, Kaczmarek reported this information to Verner. Kaczmarek and Verner were aware that this information was potentially exculpatory for Farak defendants.

ANSWER: ADMITTED, (but for the last sentence) in so far as it pertains to Respondent Kaczmarek. The last sentence is DENIED.

32. Beginning in March 2013, Kaczmarek presented evidence against Farak to a state-wide grand jury.

ANSWER: ADMITTED.

33. On or before March 27, 2013, Kaczmarek sought Verner's advice about whether to include the mental health worksheets in her presentation to the grand jury. Verner advised Kaczmarek not to include Farak's mental health worksheets in her grand jury presentation.

ANSWER: ADMITTED in so far as it alleges that Respondent sought counsel from Mr. Verner, along with others in the office of the Attorney General. By way of further answer, the Respondent states that in this response to paragraph 33, as in the response to the preceding paragraphs 27-32, she does not mean to intimate that

Mr. Verner was the sole or even lead decision maker for the office of the Attorney General.

34. On or about March 27, 2013, Kaczmarek submitted a prosecution memorandum seeking approval from the Executive Bureau of the AGO to indict Farak for four counts of evidence tampering, four counts of larceny of a controlled substance from a dispensary and two counts of unlawful possession of a Class B controlled substance. These indictments related to samples that Farak had allegedly stolen in late 2012. Members of the Executive Bureau approved the case against Farak for indictment.

ANSWER: ADMITTED. By way of further answer, the Respondent states that (a) she submitted the referenced prosecution memorandum to Mr. Verner, (b) she had no interaction with members of the Executive Branch with respect to its content and (c) the memorandum was not returned to her.

35. By March 27, 2013, the AGO began receiving requests from the district attorneys for potentially exculpatory information.

ANSWER: The Respondent DENIES that she received any requests from a district attorney for information that was potentially exculpatory as to Ms. Farak and lacks specific knowledge to admit or deny the date by which others in the office of the Attorney General may have received requests for information that was potentially exculpatory as to the "Farak defendants." Respondent ADMITS that such requests were received by the Office of the Attorney General at some point.

36. Kaczmarek and Verner each understood that the AGO had an obligation to provide all potentially exculpatory information to the district attorneys because the district attorneys had an obligation to provide that potentially exculpatory information to Farak defendants.

ANSWER: DENIED. By way of further answer, the Respondent states that (a) her ethical obligation was to provide exculpatory evidence to Ms. Farak's counsel and that she fully complied with that obligation; (b) her initial expectation, which she believes Mr. Verner shared, was that providing information to district attorneys would be handled in the same manner as it had been with respect to cases involving Anne Dookhan; and (c) interactions between the district attorneys and the Attorney General occurred at a level well above that of a line attorney.

37. On or about March 27, 2013, Kaczmarek and Verner communicated concerning the language of a letter to be sent to the district attorneys with documents related to and obtained in the course of the Farak investigation.

ANSWER: ADMITTED.

38. Kaczmarek and Verner planned to send the letter with the Farak-related documents to the district attorneys to fulfill their obligation to provide all potentially exculpatory information to the district attorneys.

ANSWER: DENIED.

39. The letter approved by Kaczmarek and Verner for distribution to the district attorneys did not reference the mental health worksheets, information concerning the 2012 Oxycodone case, the 2005 missing cocaine case, or Farak's urinalysis and admission to use of cocaine (as described in paragraphs 24, 30 and 31 above).

ANSWER: DENIED, as the Respondent did not "approve" a letter for distribution to the district attorneys. By way of further answer, the Respondent states that the referenced letter speaks for itself and that it reflects a conclusion consistent with

Rule 3.8(a) of the Rules of Professional Conduct that the AGO could not bring and prove cases based on the referenced materials. Respondent further answers that Farak's failed urinalysis was the subject of a motion to revoke bail that was argued in open court and that the information pertaining to the 2012 Oxycodone case was provided to the appropriate District Attorney's office.

40. Verner signed the letter and sent it to the district attorneys with the documents listed therein. Kaczmarek and Verner did not send the mental health worksheets, and information concerning the 2012 Oxycodone case, the 2005 missing cocaine case, or Farak's urinalysis and admission to use of cocaine (as described in paragraphs 24, 30, and 31 above) to the district attorneys with the letter.

ANSWER: DENIED, as the Respondent did not send a letter to the district attorneys. By way of further answer, the Respondent states that the referenced letter speaks for itself. Respondent further answers that Farak's failed urinalysis was the subject of a motion to revoke bail that was argued in open court and that the information pertaining to the 2012 Oxycodone case was provided to the appropriate District Attorney's office.

41. On April 1, 2013, a state-wide grand jury indicted Farak for four counts of tampering with evidence, two counts of unlawful possession of Class B controlled substance, and four counts of theft of a controlled substance from a dispensary.

ANSWER: ADMITTED.

42. On April 5, 2013, Ballou disclosed to Kaczmarek that he had found a piece of paper in a logbook from October 2012 he concluded belonged to Farak. The paper had hand-written notations tending to show that Farak had kept records of her thefts (theft records). Records of

Farak's thefts were potentially exculpatory information for Farak defendants. Kaczmarek knew or should have known this was potentially exculpatory information for Farak defendants.

ANSWER: ADMITTED as to the first two sentences, except for the assertion as to the “tendency” of notations. Denied as to the third and fourth sentences.

43. Between April 1, 2013 and June 26, 2013, the grand jury minutes and exhibits were prepared.

ANSWER: ADMITTED.

44. Kaczmarek and Verner each understood that the grand jury minutes and exhibits contained potentially exculpatory information for Farak defendants.

ANSWER: ADMITTED as to the Respondent’s own understanding.

45. On or about June 26, 2013, Verner directed Kaczmarek to send the grand jury minutes and exhibits to the district attorneys pursuant to the AGO's ongoing obligation to provide the district attorneys with potentially exculpatory information.

ANSWER: ADMITTED in so far as Mr. Verner’s direction but DENIED as to the assertion there was an ongoing obligation to provide exculpatory information to the district attorneys. By way of further answer, the Respondent asserts that Rule 3.8(i)-(k) of the Massachusetts Rules of Professional Conduct had not been adopted before June 26, 2013 and, although she did not then know it, the policymakers within the Attorney General’s office did not support their adoption.

46. On or about June 26, 2013, Kaczmarek drafted a cover letter she intended to accompany the grand jury minutes and exhibits.

ANSWER: ADMITTED.

47. The letter Kaczmarek prepared or caused to be prepared contained an itemized list of

documents to be included with the letter and did not reference information concerning the Mental health worksheets, the 2012 Oxycodone case, the 2005 missing cocaine case, Farak's urinalysis and admission to use of cocaine, or the theft records (as described in paragraphs 24, 30, 31 and 42 above).

ANSWER: ADMITTED. By way of further answer, the Respondent's draft cover letter speaks for itself.

48. Kaczmarek forwarded the draft June 26, 2013 letter addressed to the district attorneys to Verner for his review and approval.

ANSWER: ADMITTED.

49. Verner reviewed the letter and approved it. Verner did not direct Kaczmarek to include all the potentially exculpatory information in the AGO's files or direct Kaczmarek to include information known to him that was potentially exculpatory for the Farak defendants, including the mental health worksheets. Verner directed Kaczmarek to sign and send the letter.

ANSWER: ADMITTED.

50. Kaczmarek signed and caused the letter to be sent in her name to the district attorneys' offices. Kaczmarek did not include with the letter to the district attorneys all the potentially exculpatory Farak-related information known to her.

ANSWER: ADMITTED. By way of further answer, the Respondent states that her sole ethical obligation with respect to "potentially exculpatory Farak-related information known to her" was to provide it to Ms. Farak's counsel and she fulfilled that obligation.

51. After sending the two letters to the district attorneys, Kaczmarek and Verner did not

disclose to the district attorneys all potentially exculpatory Farak-related information known to them.

ANSWER: ADMITTED, in so far as it pertains to Respondent Kaczmarek. By way of further answer, the Respondent states that her sole ethical obligation with respect to “potentially exculpatory Farak-related information known to her” was to provide it to Ms. Farak’s counsel and she fulfilled that obligation.

52. Verner first disclosed the mental health worksheets and other exculpatory information to the district attorneys on or about November 14, 2014, as described below.

ANSWER: The Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 52 and calls upon Petitioner to prove them if relevant.

53. By failing to disclose to the district attorneys potentially exculpatory information known to her, Kaczmarek violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d) and 8.4(d).

ANSWER: DENIED. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

54. By failing to disclose to the district attorneys potentially exculpatory information known to him, Verner violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a) 3.4(c), 3.8(d) and 8.4(d).

ANSWER: DENIED. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional

authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

55. By failing to ensure that Kaczmarek disclosed to the district attorneys potentially exculpatory information that was known to the AGO, Verner violated Mass. R. Prof. C. 1.1, 1.3 and 5.1(b)

ANSWER: Paragraph 55 pertains only to Respondent Verner and requires no answer by Respondent Kaczmarek. To the extent an answer is required of her, Respondent DENIES that the referenced rules were violated. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

56. By failing to take remedial action when he was aware that Kaczmarek had not disclosed to the district attorneys potentially exculpatory information, Verner violated Mass. R. Prof. C. 5.1(c)(2) and is responsible for Kaczmarek's violations of Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d) and 8.4(d).

ANSWER: ANSWER: Paragraph 56 pertains only to Respondent Verner and requires no answer by Respondent Kaczmarek. To the extent an answer is required

of her, Respondent DENIES that the referenced rules were violated. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

COUNT TWO

57. Paragraphs 2 through 8 and 10 through 52 are realleged and incorporated by reference.

ANSWER: Respondent's answers to paragraphs 2 through 52 are reasserted and incorporated by reference.

58. Between August 2013 and October 2013, multiple Farak defendants filed motions for post-conviction relief and motions for discovery related to their conviction matters.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 58 and calls upon Petitioner to prove them if relevant.

59. Between August 2013 and December 2013, Rolando Penate filed pretrial discovery motions seeking from the AGO inter- and intra- office correspondence pertaining to the scope of Farak's evidence tampering and any and all evidence suggesting that a third person may have been aware of Farak's evidence tampering at the Amherst laboratory (Penate discovery requests).

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 59 and calls upon Petitioner to prove them if relevant.

60. Between August 2013 and December 2013, multiple Farak defendants and Penate served subpoenas on the AGO, MSP and the Department of Public Health (DPH) in connection with their matters.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 60 and calls upon Petitioner to prove them if relevant.

61. In August 2013, Judge Jeffrey Kinder, an associate justice of the Superior Court in Hampden County, consolidated several Farak-related matters for a hearing on September 9, 2013 (Kinder hearing).

ANSWER: ADMITTED.

62. On about August 16, 2013, Judge Kinder assigned the first assistant district attorney of Hampden County, Frank Flannery, to represent the Commonwealth in the Kinder hearing.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 62 and calls upon Petitioner to prove them if relevant.

63. Judge Kinder also assigned two lawyers, Luke Ryan and Jared Olanoff, to act as lead counsel for the Farak defendants.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 63 and calls upon Petitioner to prove them if

relevant.

64. On or about August 16, 2013, Flannery informed Kaczmarek of the Kinder hearing, his role, and that the purpose of the hearing was "to define the scope, to the extent possible, of Farak's misconduct."

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 64 and calls upon Petitioner to prove them if relevant. Respondent ADMITS communicating with Flannery during 2013 but has no memory of the contents of the communications.

65. Flannery also informed Kaczmarek that he expected some of the investigators and chemists involved in her investigation of Farak would be called to testify in the Kinder hearing.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 65 and calls upon Petitioner to prove them if relevant. Respondent ADMITS communicating with Flannery during 2013 but has no memory of the contents of the communications.

66. Between August 21, 2013 and September 3, 2013, Ballou informed Kaczmarek that Flannery required his testimony at the Kinder hearing and that Flannery wanted to arrange for defense counsel to view Ballou's file.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 66 and calls upon Petitioner to prove them if relevant.

67. Between August 16, 2013 and September 4, 2013, Kaczmarek informed Verner of the Kinder hearing, its scope, that Ballou would likely be called to testify at the Kinder hearing, and that Flannery wanted to allow defense counsel to view Ballou's file.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 67 and calls upon Petitioner to prove them if relevant. Respondent ADMITS communicating by email with Mr. Verner in 2013 to the effect that Sergeant Ballou would merely be a fact witness and probably should simply attend the hearing.

68. Between August 16, 2013 and September 9, 2013, Kaczmarek failed to disclose, and failed to direct Ballou to disclose to Flannery, the mental health worksheets, the information concerning the 2012 Oxycodone case, the 2005 missing cocaine case, Farak's urinalysis and admission to use of cocaine, and the theft records (as described in paragraphs 24, 30, 31 and 42 above).

ANSWER: DENIED. By way of further answer, Respondent states that Farak's failed urinalysis was the subject of a motion to revoke bail that was argued in open court and that the information pertaining to the 2012 Oxycodone case was provided to the appropriate District Attorney's office.

69. Between August 21, 2013 and September 9, 2013, Verner failed to ensure that Ballou had been directed to disclose to Flannery all the potentially exculpatory information in the AGO and failed to direct Ballou to disclose to Flannery all the potentially exculpatory information known to him including the mental health worksheets, the information concerning the 2012 Oxycodone case and the 2005 missing cocaine case, Farak's urinalysis and admission to use of cocaine (as described in paragraphs 24, 30, and 31 above).

ANSWER: Paragraph 69 deals only with Respondent Verner and requires no answer from Respondent Kaczmarek. To the extent an answer is required of her, paragraph 69 is DENIED.

70. On or about September 4, 2013, John Bosse, an assistant district attorney from Berkshire County District Attorney's Office, provided Kaczmarek with a discovery motion filed by a criminal defendant, Stephen Manson, whose drug certificate Farak had signed in 2010.

ANSWER: ADMITTED.

71. The motion requested from the Berkshire County District Attorney's Office, in relevant part, "documents found in Ms. Farak's car dated 2010 or earlier, and/or that are exculpatory ... because they indicate Ms. Farak may have been tampering with evidence prior to 2013."

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 71 as she received but did not review the motion. By way of further answer, Respondent states the motion speaks for itself.

72. Kaczmarek reviewed the Manson motion.

ANSWER: DENIED, as Respondent received but did not review the motion.

73. After reviewing the Manson motion, Kaczmarek represented to Bosse that the AGO had already provided the documents in its possession requested by the motion to the Berkshire County District Attorney's Office. Kaczmarek's statement to Bosse was materially false and intentionally misleading. Kaczmarek knowingly failed to disclose the mental health worksheets, the information concerning the 2012 Oxycodone case, the 2005 missing cocaine case, Farak's urinalysis and admission to use of cocaine, and the theft records (as described in paragraphs 24, 30, 31 and 42 above).

ANSWER: DENIED, as Respondent did not review the Manson motion and Respondent made no representations as to the evidence sought in it. By way of

further answer, Respondent invited ADA Bosse to the Attorney General's office in Boston to review her file.

74. On or about September 30, 2013, Sean Farrell, an attorney for the MSP, sent Ballou and Kaczmarek an email asking that they each provide information they possessed responsive to the Penate discovery requests for inter- and intra- office correspondence pertaining to the scope of Farak's evidence tampering and any and all evidence suggesting that a third person may have been aware of Farak's evidence tampering at the Amherst laboratory, among other things.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 74 and calls upon Petitioner to prove them if relevant. By way of further answer, Respondent states (a) that the referenced email, whatever its date, speaks for itself, (b) that the communications between the Attorney General's office and Attorney Farrell involved neither Respondent Kaczmarek nor the Enterprise and Major Crimes Division to which she was assigned.

75. Ballou responded to Farrell by email with a copy to Kaczmarek that his "entire investigative file ha[d] been turned over" and that he had "no indication... that a third party was aware of [Farak's] evidence tampering."

ANSWER: Paragraph 75 pertains only to what Sergeant Ballou did and requires no answer from Respondent. By way of further answer, Respondent states that the referenced email speaks for itself.

76. Ballou's statements that he had turned over his entire investigative file and that he had no indication that a third party was aware of Farak's misconduct were materially misleading. Ballou

did not explain that he had only turned over his investigative file to the AGO and the mental health worksheets showed that Farak had disclosed her misconduct to her therapist.

ANSWER: Paragraph 76 pertains only to what Sergeant Ballou did and requires no answer from Respondent. By way of further answer, Respondent states that the referenced email, whatever its date, speaks for itself. Respondent DENIES any intimation that she concluded that Sergeant Ballou's statements were materially misleading.

77. Kaczmarek received Ballou's response to Farrell in due course and failed to correct or clarify Ballou's statements.

ANSWER: Respondent DENIES any intimation in paragraph 77 that she concluded Sergeant Ballou's statements were materially misleading and/or that she knowingly failed to correct or clarify statements she thought misleading.

78. Kaczmarek responded to Farrell, in relevant part, "Everything other than [police reports] and [drug certificates] is a NO from us." Kaczmarek falsely implied that the AGO had no information responsive to the Penate requests in its files. Kaczmarek failed to disclose that she, Verner, Ballou and others had exchanged correspondence pertaining to the scope of Farak's evidence tampering. Kaczmarek also failed to disclose that she, Verner, and Ballou had the mental health worksheets that tended to show Farak had disclosed her struggles with drug addiction to her therapist. Kaczmarek's statement to Farrell was materially misleading.

ANSWER: ADMITTED as to the first sentence. DENIED as to sentences two, three, and four.

79. By knowingly failing to disclose to Flannery, Bosse, and Farrell potentially exculpatory information known to her in response to requests from Flannery, Bosse and Farrell, and by

knowingly making materially misleading statements to Bosse and Farrell, Kaczmarek

violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 4.1(a), 8.4(a), 8.4(c), 8.4(d), and 8.4(h).

ANSWER: DENIED. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

80. By failing to direct Ballou to provide Flannery with potentially exculpatory information known to her, Kaczmarek violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d) 5.3(b), 8.4(a), 8.4(d) and 8.4(h).

ANSWER: DENIED. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

81. By failing to take remedial action when she was aware that Ballou had not disclosed to Flannery potentially exculpatory information, Kaczmarek violated Mass. R. Prof. C. 5.3(c)(2) and is responsible for what would be Ballou's violations of Mass. R. Prof. C. 1.1, 1.3, 3.4(a),

3.4(c), 3.8(d), 8.4(d) and 8.4(h), if he had been a lawyer.

ANSWER: DENIED. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

82. By failing to ensure that Ballou had been directed to disclose to Flannery potentially exculpatory information in Ballou's files, Verner violated Mass. R. Prof. C. 1.1, 1.3, 5.3(b), 8.4(d).

ANSWER: Paragraph 82 applies to Respondent Verner and requires no answer from Respondent. To the extent an answer is required, the allegations in Paragraph 82 are DENIED. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

83. By failing to take remedial action when he was aware that Ballou had not disclosed to Flannery potentially exculpatory information, Verner violated Mass. R. Prof. C. 5.3(c)(2) and is

responsible for what would be Ballou's violations of Mass. R. Prof. C. 1.1, 1.3, 3.4(a), 3.4(c), 3.8(d), 8.4(d) and 8.4(h), if he had been a lawyer.

ANSWER: Paragraph 83 applies to Respondent Verner and requires no answer from Respondent. To the extent an answer is required, the allegations in Paragraph 83 are DENIED. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

COUNT THREE

84. Paragraphs 2 through 8, 10 through 52 and 58 through 78 are realleged and incorporated by reference.

ANSWER: Respondent's answers to Paragraphs 2 through 8, 10 through 52 and 58 through 78 are realleged and incorporated by reference.

85. On about August 22, 2013, Attorney Luke Ryan served Kaczmarek and Ballou with subpoenas on behalf of Rolando Penate (Penate subpoenas).

ANSWER: ADMITTED insofar as Paragraph 85 pertains to the Respondent. Respondent lacks sufficient knowledge to admit or deny the timing related

allegations concerning Sergeant Ballou and calls upon the Petitioner to prove them if relevant.

86. The Penate subpoenas were returnable on August 27, 2013.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 86 and calls upon Petitioner to prove them if relevant.

87. The Penate subpoenas, in relevant part, directed Kaczmarek and Ballou to appear, testify and produce "copies of any and all inter-office correspondence pertaining to the scope of evidence tampering and/or deficiencies at the Amherst Drug Laboratory from January 18, 2013, to the present"; "any and all evidence suggesting a third party may have been aware of Sonja Farak's evidence tampering"; and "copies of the news accounts with handwritten notes recovered by the Massachusetts State Police during a search of Ms. Farak's car."

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations concerning the content of the referenced subpoena, which speaks for itself.

88. As of August 22, 2013, Ballou's and Kaczmarek's files contained information and documents responsive to the Penate subpoenas, including emails between Ballou, Kaczmarek, Verner and others and the mental health worksheets.

ANSWER: Respondent ADMITS that her file contained information and documents responsive to the referenced subpoenas but has no access to her file and cannot attest to its contents.

89. By no later than August 29, 2013, Ryan filed a discovery motion pursuant to Mass. R.

Crim. P. 30(c)(4) on behalf of Rafael Rodriguez requesting, among other items, inter- and intra-office correspondence pertaining to the scope of Farak's evidence tampering; copies of any and all correspondence from January 18, 2013 to present, to and/or from district attorneys' offices in the four western counties pertaining to the scope of evidence tampering at the Amherst laboratory; and any and all evidence suggesting a third person may have been aware of Farak's evidence tampering prior to Farak's arrest (Rodriguez discovery motion).

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations concerning the content of the discovery motion, which speaks for itself.

90. Ryan served the AGO with the Rodriguez discovery motion.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 90 and calls upon Petitioner to prove them if relevant.

91. On or about August 30, 2013, Attorney Jared Olanoff served Ballou with a subpoena on behalf of a client, Jermaine Watt (Watt subpoena).

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 91 and calls upon Petitioner to prove them if relevant to her.

92. The Watt subpoena directed Ballou to appear at Court on September 9, 2013 and bring with him "a copy of all documents and photographs pertaining to the [Farak] investigation"

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 92 and calls upon Petitioner to prove them if relevant. By way of further answer Respondent states that the referenced subpoena speaks for itself.

93. In late August 2013 or early September 2013, AAG Kris Foster was assigned the task of

representing Kaczmarek and Ballou in responding to the Penate subpoenas and representing Ballou in responding to the Watt subpoena.

ANSWER: ADMITTED.

94. Foster was also assigned the responsibility for opposing the Rodriguez discovery motion.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 94 and calls upon Petitioner to prove them if relevant.

95. Foster failed to collect and review the files of Kaczmarek and Ballou.

ANSWER: Paragraph 95 relates solely to Respondent Foster and requires no response from Respondent. To the extent an answer is required, Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 95 and calls upon Petitioner to prove them if relevant.

96. Foster failed to question Ballou about what documents had already been produced to the district attorneys, and what had not been produced.

ANSWER: Paragraph 96 relates solely to Respondent Foster and requires no response from Respondent. To the extent an answer is required, Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 96 and calls upon Petitioner to prove them if relevant.

97. Foster failed to question Kaczmarek about what documents had not been produced to the district attorneys.

ANSWER: ADMITTED, but for the implication that Ms. Foster was required to question the Respondent about the documents produced.

98. Foster failed to take steps to personally review the files to determine what documents existed in the AGO and MSP files including any electronic communications of Kaczmarek and Ballou that were responsive to the subpoenas and motion.

ANSWER: Paragraph 98 relates solely to Respondent Foster and requires no response from Respondent. To the extent an answer is required, Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 98 and calls upon Petitioner to prove them if relevant.

99. Foster failed to handle the response to the subpoenas and the discovery motion with the diligence, knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ANSWER: Paragraph 99 relates solely to Respondent Foster and requires no response from Respondent. To the extent an answer is required, Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 99 and calls upon Petitioner to prove them if relevant.

100. Kaczmarek received notice in due course of the Penate subpoena to Ballou, the Watt subpoena to Ballou, and the Rodriguez discovery motion.

ANSWER: ADMITTED as to Penate subpoena to Ballou. Respondent lacks sufficient knowledge to admit or deny allegations regarding the Watt subpoena and Rodrigues discovery motion, and calls upon Petitioner to prove them if relevant.

101. By no later than September 4, 2013, Kaczmarek was aware that Foster was responsible for responding to the Penate and Watt subpoenas and opposing the Rodriguez discovery motion.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing

related allegations regarding the Penate subpoenas and lacks sufficient knowledge to admit or deny any and all allegations regarding the Watt subpoena and the Rodriguez discovery motion, and calls upon Petitioner to prove them if relevant.

102. After receiving notice of the subpoenas and discovery motion, Kaczmarek knowingly failed to review her file for documents responsive to the Penate subpoena and provide any responsive documents to Foster. Kaczmarek also knowingly failed to direct Ballou to review his files and provide Foster with documents responsive to the Penate and Watt subpoenas and the Rodriguez discovery motion.

ANSWER: DENIED as Respondent was not responsible for responding to the Penate subpoena.

103. On September 6, 2013, Foster filed a motion to quash the Watt subpoena to Ballou and a memorandum in support of the motion.

ANSWER: Paragraph 103 pertains only to Respondent Foster and requires no answer from Respondent. To the extent an answer is required, Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 103 and calls upon Petitioner to prove them if relevant. By way of further answer, Respondent Foster's motion speaks for itself.

104. Foster's memorandum concerning the Watt subpoena argued, among other things, that the AGO had not waived any privileges and the subpoena for "all documents and photographs" was unreasonable and irrelevant given the narrow scope of the evidentiary hearing.

ANSWER: Paragraph 104 relates only to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks

sufficient knowledge to admit or deny the allegations in paragraph 104 and calls upon Petitioner to prove them if relevant. By way of further answer the Respondent states the referenced document speaks for itself.

105. Foster also alternatively sought to protect categories of information including "information concerning the health or medical psychological treatment of individuals" and "legal work product and emails responsive to the subpoena, but not already in the case files specifically listed therein."

ANSWER: Paragraph 105 relates only to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 105 and calls upon Petitioner to prove them if relevant. By way of further answer the Respondent states the referenced document speaks for itself.

106. On or about September 9, 2013, Foster and Ballou appeared at the Hampden Superior Court hearing before Judge Kinder.

ANSWER: Paragraph 106 relates only to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 106 and calls upon Petitioner to prove them if relevant.

107. Foster failed to direct Ballou to bring his file as required by the subpoena.

ANSWER: Paragraph 107 relates only to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 107 and calls

upon Petitioner to prove them if relevant.

108. Ballou did not bring his file to the hearing and did not produce the subpoenaed documents at the hearing.

ANSWER: DENIED as to the first clause alleging Ballou did not bring his file to the hearing and ADMITTED as to the second clause alleging the documents were not produced.

109. At the conclusion of the hearing on September 9, 2013, Judge Kinder in open court ordered Foster to secure Ballou's file and produce by September 18, 2013 "for [Judge Kinder's] *in camera* review, those documents that [Foster] fe[lt] should not be disclosed with some indication somewhere in the body of the pleading why it is [Foster] fe[lt] those documents should not be disclosed."

ANSWER: ADMITTED.

110. Foster understood that Judge Kinder wanted her to personally review Ballou's file and make representations to him concerning the alleged confidential or privileged documents in Ballou's file that the AGO did not wish to produce based on her personal knowledge of Ballou's file.

ANSWER: Paragraph 110 relates solely to Ms. Foster's understanding and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 110 and calls upon Petitioner to prove them if relevant.

111. On September 10, 2013, Foster reported to Verner, Kaczmarek and others at the AGO

that Judge Kinder had directed the AGO to review Ballou's file by September 18, 2013, and produce any documents the AGO considered privileged or otherwise not-subject to discovery *in camera* for the judge's review.

ANSWER: DENIED as to the characterization of "reporting" and timing.

Respondent ADMITS learning that Judge Kinder had directed the AGO to review Ballou's file by September 18, 2013, and produce any documents the AGO considered privileged or otherwise not-subject to discovery *in camera* for the judge's review.

112. Between September 10 and 18, 2013, Foster failed to comply with Judge Kinder's order to personally review Ballou's file.

ANSWER: Paragraph 112 relates solely to Ms. Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 112 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek.

113. Foster failed to call upon anyone at the AGO to produce any previously undisclosed documents, and to identify any documents that had not yet been disclosed by the AGO because they were considered confidential or privileged.

ANSWER: Paragraph 113 relates solely to Ms. Foster and requires no answer from Respondent. To the extent an answer is required, Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 113 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek.

114. By a letter dated September 16, 2013, Foster responded to Judge Kinder, in

relevant part, as follows: "After reviewing the 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."

ANSWER: Paragraph 114 relates solely to Ms. Foster and requires no answer from Respondent. To the extent an answer is required, Respondent lacks sufficient knowledge to admit or deny the timing allegations in paragraph 114 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek. By way of further answer Respondent states that the referenced letter speaks for itself.

115. Foster intentionally falsely implied in her September 16, 2013, letter to Judge Kinder that she had reviewed Ballou's file and confirmed that every document had already been disclosed.

ANSWER: Paragraph 115 relates solely to Ms. Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 115 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek.

116. On or about September 17, 2013, Ryan filed a motion to inspect physical evidence seized in the Farak investigation on behalf of Penate.

ANSWER: ADMITTED.

117. On or about September 17, 2013, Ryan filed a motion on behalf of Penate to compel production of documents pursuant to Mass. R. Crim. Pro. 17(a)(2) (motion to compel discovery).

ANSWER: ADMITTED.

118. Ryan by his motion to compel discovery sought, among other items, copies of inter- and intra-office correspondence from January 18, 2013 to the present pertaining to the scope of evidence tampering and/or deficiencies at the Amherst laboratory.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 118 and calls upon Petitioner to prove them if relevant. By way of further answer, the referenced motions speak for themselves.

119. Ryan caused the Penate motions to be served on the AGO and the MSP, among other agencies.

ANSWER: ADMITTED.

120. The AGO received the Penate motions in due course. Foster was assigned to oppose the Penate motions on behalf of the AGO.

ANSWER: ADMITTED.

121. As of September 17, 2013, Ballou's and Kaczmarek's files contained information and documents responsive to the Penate motions, including emails between Ballou, Kaczmarek, Verner and others, and the mental health worksheets, the information concerning the 2012 Oxycodone case and the 2005 missing cocaine case, Farak's urinalysis and admission to use of cocaine, and the theft records (as described in paragraphs 24, 30, 31 and 42 above).

ANSWER: Respondent ADMITS so much of paragraph 121 as alleges that her file contained information and documents responsive to the referenced subpoenas but has no access to her file and cannot attest to its contents. Respondent further answers that Farak's failed urinalysis was the subject of a motion to revoke bail that

was argued in open court and that the information pertaining to the 2012 Oxycodone case was provided to the appropriate District Attorney's office.

122. The MSP received the Penate motions in due course. Attorney Sean Farrell was assigned to oppose the Penate motions on behalf of the MSP.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 122 and calls upon Petitioner to prove them if relevant.

123. The Penate motions to compel discovery and inspect the evidence were scheduled for hearing on October 2, 2013.

ANSWER: ADMITTED.

124. On or about October 2, 2013, Foster filed an opposition to Penate's motions to compel discovery and to inspect the evidence.

ANSWER: Paragraph 124 relates solely to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 124 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek.

125. Foster opposed Penate's motion to compel discovery based on the work product doctrine.

ANSWER: Paragraph 125 relates solely to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 125 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek.

126. Foster opposed Penate's motion to inspect the evidence seized in the Farak investigation on the grounds that the evidence was irrelevant to Penate's case.

ANSWER: Paragraph 126 relates solely to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 126 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek.

127. On October 2, 2013, Judge Kinder heard oral arguments on Penate's motions to inspect physical evidence and to compel discovery from the AGO.

ANSWER: ADMITTED.

128. On October 2, 2013, Foster appeared before Judge Kinder on behalf of the AGO. During oral argument before the Court, Foster failed to correct and, instead, ratified the misleading statement made in her letter to the Court dated September 16, 2013 falsely implying that she had reviewed Ballou's file and the AGO had turned over his entire file.

ANSWER: Paragraph 128 relates solely to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 128 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek.

129. On October 2, 2013, Judge Kinder entered the following order, in relevant part, on Penate's motion to compel discovery: "After hearing and consideration of the pleadings the motion is ALLOWED only insofar as it seeks production of ... any correspondence directly related to drug use or evidence tampering by Sonja Farak."

ANSWER: ADMITTED.

130. Compliance with this order would have required the AGO to produce emails related to Farak's mental health worksheets, the 2005 missing cocaine, the May 2012 Oxycodone cases, Farak's urinalysis and admission to ingesting cocaine as well as Farak's theft records (as described in paragraphs 24, 30, 31 and 42 above).

ANSWER: Paragraph 130 requires no answer from Respondent as she was not charged with responding to it and the referenced order speaks for itself. To the extent an answer is required, Respondent further answers that Farak's failed urinalysis was the subject of a motion to revoke bail that was argued in open court and that the information pertaining to the 2012 Oxycodone case was provided to the appropriate District Attorney's office.

131. Foster received Kinder's order in due course.

ANSWER: Paragraph 131 relates solely to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 131 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek.

132. Between October 2, 2013 and October 22, 2013, Verner authorized and directed the appeals unit to file a motion for clarification of Judge Kinder's Penate order dated October 2, 2013.

ANSWER: Paragraph 132 requires no response from Respondent as Respondent Verner is alleged to have authorized and directed action by a unit to which she was not assigned. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny related allegations in paragraph 132 and calls upon

Petitioner to prove them if relevant to Ms. Kaczmarek.

133. Before October 22, 2013, Foster drafted a motion for clarification. The draft motion contained the following arguments:

(1) That Penate had not made a *prima facie* showing that he was entitled to privileged communications;

(2) That correspondence should not include protected communications including work product or correspondence related to an ongoing investigation;

These arguments, if successful would exclude email communications between Ballou, Kaczmarek, Verner and others related to the mental health worksheets, the 2012 Oxycodone pills case, the 2005 missing cocaine case, Farak's urinalysis and admission to Berkshire probation and Farak's theft records as described in paragraphs 24, 30, 31 and 42 above.

ANSWER: Paragraph 133 relates solely to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 133 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek. By way of further answer Respondent states that the referenced draft motion speaks for itself.

134. Before October 22, 2013 Verner reviewed a draft of the Motion for Clarification.

ANSWER: Paragraph 134 relates solely to Respondent Verner and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 134 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek. By way of further answer Respondent states that the referenced draft motion speaks for itself.

135. After Verner reviewed the draft Motion for Clarification, he failed to ensure that the

potentially exculpatory information known to him and the information in the AGO files had been disclosed to the district attorneys.

ANSWER: Paragraph 135 relates solely to Respondent Verner and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 135 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek. By way of further answer Respondent states that the referenced draft motion speaks for itself.

136. On or before October 22, 2013 Kaczmarek received a copy of the Motion for Clarification and read it in due course.

ANSWER: Respondent may have received the Motion for Clarification but Respondent lacks sufficient knowledge to admit or deny that she reviewed the Motion for Clarification in paragraph 136 and calls upon Petitioner to prove it if relevant.

137. After Kaczmarek reviewed the draft Motion for Clarification, she failed to ensure that all potentially exculpatory information known to her had been turned over to the district attorneys.

ANSWER: DENIED.

138. On or about October 22, 2013, Foster filed a Motion for Clarification of Order for Production Dated October 2, 2013 in the Penate case. Foster also asked the Court to define "correspondence" as excluding the following:

... privileged information, including but not limited to work product, information regarding an ongoing criminal investigation and prosecution, communications made by citizens to secure the enforcement of law, grand jury material, Criminal Offender Record Information, information that

could lead to identity theft or similar conduct, and information concerning the health or medical or psychological treatment of individuals other than what has already been ordered to be produced.

ANSWER: Paragraph 138 relates solely to Respondent Foster and requires no answer from Respondent. To the extent an answer is required Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 138 and calls upon Petitioner to prove them if relevant to Ms. Kaczmarek. By way of further answer Respondent states that the referenced draft motion speaks for itself.

139. On October 23, 2013, Judge Kinder clarified his October 2, 2013, order, in relevant part, as follows: "It was my intention to order... any correspondence which reflects that state employees were aware of 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."

ANSWER: ADMITTED.

140. At the conclusion of the hearings on Penate's motions and the consolidated hearing on other Farak defendants' motions, Judge Kinder denied discovery requests and other forms of relief to Rolando Penate, Shamar Pratt, Eric Cotto, Jermaine Watt, Hector Vargas, Jose Vargas, Jose Garcias, Omar Harris, Deon Charles and Rafael Rodriguez.

ANSWER: ADMITTED.

141. On January 4, 2014, 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 Class B controlled substance.

ANSWER: ADMITTED.

142. On or about July 24, 2014, the AGO assented to a motion to inspect physical evidence seized in the Farak investigation filed by Ryan on behalf of Wayne Burston in Hampshire Superior Court.

ANSWER: ADMITTED.

143. On October 30, 2014, Ryan viewed the Farak investigation evidence in the possession of the AGO and learned that the AGO had withheld exculpatory evidence about the scope of Farak's misconduct.

ANSWER: Respondent lacks sufficient knowledge to admit or deny when Ryan reviewed the evidence and calls upon Petitioner to prove that fact if relevant.

Respondent DENIES the intimation in paragraph 143 that she withheld exculpatory evidence.

144. On November 13, 2014, the AGO turned over to the district attorneys, who gave the Farak defendants, 289 pages of documentary evidence not previously turned over. This documentary evidence included seven pages of mental health worksheets and other papers supporting a strong inference that Farak's misconduct began before 2012. October 30, 2014 was the first time that any Farak defendant gained access to the mental health worksheets and other potentially exculpatory information known to Kaczmarek and Verner that had been in the possession of the MSP since January 2013.

ANSWER: Respondent lacks sufficient knowledge to admit or deny the timing related allegations in paragraph 144 and calls upon Petitioner to prove them if

relevant. Respondent lacks sufficient knowledge to admit or deny the allegations in the first and third sentences of paragraph 144 and calls upon Petitioner to prove them if relevant to her. Respondent ADMITS the allegation in the second sentence. By way of further answer to the third sentence, the Respondent states she disclosed the “mental health records” and all other evidence to Farak’s attorney and has no knowledge whether that evidence was shared with any Farak defendant.

145. In December 2016, Judge Richard Carey, an associate justice in the Hampden Superior Court, held a six-day evidentiary hearing on motions for new trial filed on behalf of eight (8) defendants who asserted that the government's egregious misconduct of failing to turn over exculpatory information had violated their rights to due process.

ANSWER: ADMITTED. By way of further answer the Respondent states that she was not a party in the referenced proceedings.

146. On July 26, 2017, Judge Carey granted relief to seven (7) of the defendants concluding that the respondents Kaczmarek and Foster had committed a fraud upon the court.

ANSWER: Paragraph 146 should be stricken. Judge Carey’s conclusion is prejudicial hearsay and has no place in a petition for discipline.

147. On May 8, 2018, the Supreme Judicial Court ordered relief for additional "Farak Defendants." Due to the conduct of the AGO, the Court determined that, in addition to cases that had already been dismissed, that Farak Defendants were entitled to dismissal and relief from (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. As a result, 11,000 convictions were vacated.

ANSWER: ADMITTED as to the first sentence. The remainder of paragraph 147 should be stricken. Respondent Kaczmarek was not a party in the proceeding before the Supreme Judicial Court, its holding has no binding effect on her and its determination is hearsay and has no place in a petition for discipline.

148. By failing to handle the response to the Watt subpoena and the Rodriguez and Penate motions with the diligence, knowledge, skill, thoroughness and preparation reasonably necessary for the representation, including failing review the AGO file and to prepare Ballou to testify and direct him to bring his file to the hearing, Foster violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 3.4(a), 3.4(c), 8.4(a), 8.4(d) and 8.4(h).

ANSWER: Paragraph 148 requires no answer from Respondent Kaczmarek as it alleges violations of rules only by Respondent Foster.

149. By failing to undertake a review of her file and produce documents responsive to the subpoenas and discovery motions, and to alert Foster to the existence of undisclosed documents, Kaczmarek violated Mass. R. Prof. C. 1.1, 1.3, and 3.4(c).

ANSWER: DENIED. By Way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

150. By failing to comply with Judge Kinder's order to personally review Ballou's file, and by failing to ensure that Ballou's file had been reviewed, Foster violated Mass. R. Prof. C. 1.1,

1.2(a), 1.3, 3.4(a), 3.4(c), 8.4(d) and 8.4(h).

ANSWER: Paragraph 150 requires no answer from Respondent Kaczmarek as it alleges violations of rules only by Respondent Foster. To the extent an answer is required, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

151. By knowingly making materially misleading statements to the Court in a letter on September 16, 2013, Foster violated Mass. R: Prof. C. 3.3(a)(1), 4.1(a), 8.4(c), 8.4(d) and 8.4(h). Alternatively, Foster made her misleading statements with reckless disregard for their truth in violation of Mass. R. Prof. C. 8.4(c), (d) and (h).

ANSWER: Paragraph 151 requires no answer from Respondent Kaczmarek as it alleges violations of rules only by Respondent Foster. To the extent an answer is required, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

152. By knowingly failing to correct the false statements of fact previously made to the Court in her September 16, 2013 letter on or after her appearance in Court on October 2, 2013, Foster violated Mass. R. Prof. C. 3.3(a)(1), 8.4(c), 8.4(d) and 8.4(h).

ANSWER: Paragraph 152 requires no answer from Respondent Kaczmarek as it alleges violations of rules only by Respondent Foster. To the extent an answer is required, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

153. By failing after reviewing the Motion to Clarify to ensure that potentially exculpatory information within the AGO's files had been disclosed to the district attorneys' offices including Hampden County, Veiner violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a) and 8.4(d).

ANSWER: Paragraph 153 requires no answer from Respondent Kaczmarek as it alleges violations of rules only by Respondent Verner. To the extent an answer is required, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allocations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

154. By failing after reviewing the Motion to Clarify to ensure that potentially exculpatory

information known to her that could be useful to Penate had been disclosed to the district attorneys' offices including Hampden County, Kaczmarek violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a) and 8.4(d).

ANSWER: DENIED. By way of further response, the Respondent states (a) that the cited rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, and (b) allegations of responsibility between lawyers in different offices in a discovery matter pending before a tribunal are beyond the scope of the cited Rules.

Disciplinary Rules

155. The Disciplinary Rules applicable to the respondents' conduct provide as follows:

ANSWER: DENIED. The list of items within the Massachusetts Rules of Professional Conduct applicable to Respondent Kaczmarek's professional conduct set forth in the Petition is both under and over inclusive. Respondent first addresses the over-inclusiveness by addressing the rules set forth in the order they are presented in the Petition and then turning to the under-inclusiveness by setting forth additional provisions within Supreme Judicial Court Rule 3.07 relevant to the charges against Respondent Kaczmarek.

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

ANSWER: M.R.P.C. 1.1 is inapposite, as Respondent Kaczmarek appeared for the Commonwealth only in connection with the grand jury proceedings leading to Sonja Farak's indictment and the judicial proceedings concerning the prosecution of Ms. Farak. Respondent was competent to handle those matters and handled them competently.

RULE 1.2 SCOPE OF REPRESENTATION

(a) A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

ANSWER: M.R.P.C. 1.2 is inapposite, as Respondent Kaczmarek is not charged with violating Rule 1.2. Moreover, Comment [2] to the Rule which provides guidance for practicing in compliance with Rule 1.2 reflects the view that in dealing with persons (here the Farak defendants) other than the client (here the

Commonwealth) Ms. Kaczmarek would normally defer to the view of the client. The client had provided a vehicle for the provision of potentially exculpatory evidence to the Dookhan defendants on which the Respondent could appropriately rely.

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law.

ANSWER: M.R.P.C. 1.3 is inapposite, as Respondent Kaczmarek appeared for the Commonwealth only in connection with the grand jury proceedings leading to Sonja Farak's indictment and the judicial proceedings concerning the prosecution of Ms. Farak. Respondent handled those matters diligently and within the bounds of the law. With respect to the communication of potentially exculpatory evidence from one prosecutor's office to another, the bounds put in place by M.R.C/P. 3.8(i) on April 1, 2016 did not exist at the time of Ms. Kaczmarek's alleged violation and were not otherwise established by statute, regulation, policy or case law.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

ANSWER: M.R.P.C. 3.3 is inapposite, as Respondent Kaczmarek is not charged with violating the Rule. Moreover, Comment [1] to the Rule, which provides guidance as to its scope, states unequivocally that it applies “to the conduct of a lawyer who is representing a client in the proceedings of a tribunal”. Ms. Kaczmarek represented nobody in the proceedings before Judges Kinder and Carey.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

ANSWER: M.R.P.C. Rule 3.4(a) is inapposite because Respondent Kaczmarek did nothing to obstruct Ms. Farak's access to evidence. On the contrary, she provided all material having potential evidentiary value to Ms. Farak's counsel, in compliance with the Massachusetts Rules of Professional Conduct. Moreover, as Comment [1] to the Rule posits, the adversary system contemplates that evidence in a case is to be marshalled competitively by the contending parties. The Farak defendants were not parties to the prosecution of Ms. Farak.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

ANSWER: M.R.P.C. Rule 3.4(d) is inapposite because the Petition does not and could not allege that Ms. Kaczmarek failed to make timely disclosure to the defense in the Farak prosecution. Rule 3.8(i) adopted by the Supreme Judicial Court effective on April 1, 2016, deals with disclosures to counsel for third parties who may have been convicted of an offense they did not commit. It was not in effect at the time of Ms. Kaczmarek's conduct. Moreover the Attorney General's Office – but not Ms. Kaczmarek -- submitted comments to the Rules Committee seeking to alter the proposed rule. Doing so was well within the Attorney General's role as the Commonwealth's chief law officer.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person;

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS AND SUPERVISORY

LAWYERS

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ANSWER: M.R.P.C. 5.1(b) and (c) are inapposite because the Petition does not charge Respondent with violating either rule. Ms. Kaczmarek was a line attorney in the Attorney General's office with no managerial or supervisory responsibilities.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer: reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional

obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ANSWER: M.R.P.C. 5.3(b) and (c) are inapplicable because Sergeant Ballou was employed by the Massachusetts State Police, a department within the Executive Branch of state government other than the Attorney General's office. Sergeant Ballou was under the direct supervision of a higher ranking state police officer, Robert Irwin, not Ms. Kazcmarek. The rules were not violated because Ms. Kazcmarek's "oversight" of Sergeant Ballou was limited to his actions concerning his role as case agent in the Farak prosecution itself and there are no allegations of misconduct in connection with it.

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

ANSWER: The catchall provisions of M.R.P.C. Rule 8.4 cannot be constitutionally applied in this case.

WHEREFORE, the Bar Counsel requests that the Board of Bar Overseers:

- a. Consider and hear the matter set forth herein.
- b. Determine that discipline of the said Kris Foster, Esq. Anne Kaczmarek Esq. and John Verner, Esq., is required.
- c. File an Information concerning these matters with the Supreme Judicial Court.

ANSWER: The Petition's prayer for relief requires no answer. Respondent Kaczmarek's prayer for relief appears at the end of this document.

By way of further answer concerning the list of rules set forth in the Petition, Respondent avers the list is under-inclusive because it fails to include Rule 5.2(b) and other indicia of the scope of the Rules as applied to the Attorney General's office. Specifically:

Rule 5.2(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.

Rule 3:07 PREAMBLE AND SCOPE

Scope

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily on understanding and voluntary compliance, secondarily on reinforcement by peer and public opinion, and, finally, when necessary, on enforcement through disciplinary proceedings. The Rules do not, however, form a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[4] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General, and Federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth.

The indicia also include comment [9] to Rule 1.13

Rule 1.13 Organization as Client

Comment

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such

lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [4]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

And comment [3A] to Rule 3.8

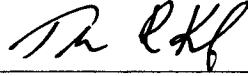
Rule 3.8 Special Responsibilities of a Prosecutor
Comment

[3A] The obligations imposed on a prosecutor by the rules of professional conduct are not co-extensive with the obligations imposed by 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. The obligations imposed under paragraph (d) exist independently of any request for the information. However, regardless of an individual's right to disclosure of exculpatory or mitigating information in criminal proceedings, a prosecutor violates paragraph (d) only if the information required to be disclosed is known to the prosecutor as tending to be exculpatory or mitigating.

WHEREFORE, Respondent Anne Kaczmarek requests that the Board of Bar Overseers:

- (a) Order that paragraphs 146 and all but the first sentence of 147 as well as the "Overview" of the petition be stricken;**
- (b) Dismiss the Proceeding because it seeks to discipline Ms. Kaczmarek for violating Rules of Professional Conduct that did not exist at the time of her conduct and for the conduct of others within the Office of The Attorney General who were not under her supervision or management.**

ANNE K. KACZMAREK,
By her attorney,



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CERTIFICATE OF SERVICE

I, Thomas R. Kiley, hereby certify that on this 30th day of August, 2019, I served the above document by email and First Class Mail, postage prepaid, to:

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