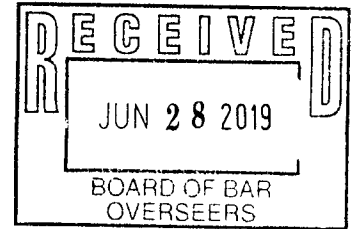


COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT



BAR COUNSEL,

Petitioner

vs.

KRIS C. FOSTER, ESQ.,

ANNE K. KACZMAREK, ESQ., and

JOHN C. VERNER, ESQ.,

Respondents

B.B.O. File Nos. C1-17-00248283

C1-17-00248284

C1-18-00255238

PETITION FOR DISCIPLINE

Overview

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 a 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 prior 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.

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.
2. The respondent, Kris Foster, Esq., is an attorney duly admitted to the Bar of the Commonwealth on December 9, 2008.
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.
4. The respondent, Anne Kaczmarek, Esq., is an attorney duly admitted to the Bar of the Commonwealth on December 14, 1999.
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.
6. The respondent, John Verner, Esq., is an attorney duly admitted to the Bar of the Commonwealth on June 14, 2000.

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

COUNT ONE

9. 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.
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.
12. The MSP's initial investigation focused on two cocaine samples that had been submitted to the Amherst lab for testing in late 2012.
13. On January 18, 2013, an employee of the Amherst lab found the two cocaine samples missing from the evidence locker.
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.
15. The investigation and any prosecution of Farak fell within the duties and responsibilities of the Criminal Bureau and EMC.
16. Verner assigned Kaczmarek the responsibility of overseeing the investigation and prosecution of Farak.
17. Verner and Kaczmarek were-co-counsel in the Farak investigation and prosecution.

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

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.
27. From and after February 14, 2013, Kaczmarek and Verner were aware that the mental health worksheets contained potentially exculpatory information for Farak defendants.
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.
29. Kaczmarek and Verner each approved and authorized Ballou to obtain additional information about Farak's potential tampering with the suspected Oxycodone pills.
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.

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.

32. Beginning in March 2013, Kaczmarek presented evidence against Farak to a state-wide grand jury.
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.
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.
35. By March 27, 2013, the AGO began receiving requests from the district attorneys for potentially exculpatory information.
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.
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.
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.
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).

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.
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.
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.
43. Between April 1, 2013 and June 26, 2013, the grand jury minutes and exhibits were prepared.
44. Kaczmarek and Verner each understood that the grand jury minutes and exhibits contained potentially exculpatory information for Farak defendants.
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.
46. On or about June 26, 2013, Kaczmarek drafted a cover letter she intended to accompany the grand jury minutes and exhibits.
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).

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

COUNT TWO

57. Paragraphs 2 through 8 and 10 through 52 are realleged 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.
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).
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.
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).
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.
63. Judge Kinder also assigned two lawyers, Luke Ryan and Jared Olanoff, to act as lead counsel for the Farak defendants.
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."
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.
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.

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.
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).
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).
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.
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."
72. Kaczmarek reviewed the Manson 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).

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

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).
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.
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).
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.

COUNT THREE

84. 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).
86. The Penate subpoenas were returnable on August 27, 2013.
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."

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.
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).
90. Ryan served the AGO with the Rodriguez discovery motion.
91. On or about August 30, 2013, Attorney Jared Olanoff served Ballou with a subpoena on behalf of a client, Jermaine Watt (Watt subpoena).
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...."
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.
94. Foster was also assigned the responsibility for opposing the Rodriguez discovery motion.
95. Foster failed to collect and review the files of Kaczmarek and Ballou.
96. Foster failed to question Ballou about what documents had already been produced to the district attorneys, and what had not been produced.
97. Foster failed to question Kaczmarek about what documents had not been produced to the district attorneys.
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.

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.
100. Kaczmarek received notice in due course of the Penate subpoena to Ballou, the Watt subpoena to Ballou, and the Rodriguez discovery motion.
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.
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.
103. On September 6, 2013, Foster filed a motion to quash the Watt subpoena to Ballou and a memorandum in support of the motion.
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.
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."
106. On or about September 9, 2013, Foster and Ballou appeared at the Hampden Superior Court hearing before Judge Kinder.
107. Foster failed to direct Ballou to bring his file as required by the subpoena.
108. Ballou did not bring his file to the hearing and did not produce the subpoenaed documents at the hearing.
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.”

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.
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.
112. Between September 10 and 18, 2013, Foster failed to comply with Judge Kinder’s order to personally review Ballou’s file.
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.
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.”
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.
116. On or about September 17, 2013, Ryan filed a motion to inspect physical evidence seized in the Farak investigation on behalf of Penate.

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).
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.
119. Ryan caused the Penate motions to be served on the AGO and the MSP, among other agencies.
120. The AGO received the Penate motions in due course. Foster was assigned to oppose the Penate motions on behalf of the AGO.
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).
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.
123. The Penate motions to compel discovery and inspect the evidence were scheduled for hearing on October 2, 2013.
124. On or about October 2, 2013, Foster filed an opposition to Penate's motions to compel discovery and to inspect the evidence.
125. Foster opposed Penate's motion to compel discovery based on the work product doctrine.
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.
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.
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.

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."
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).
131. Foster received Kinder's order in due course.
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.
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.
134. Before October 22, 2013 Verner reviewed a draft of the Motion for Clarification.

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

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.
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.
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.
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.
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.
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.
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.

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).
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).
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).
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).
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).
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, Verner violated Mass. R. Prof. C. 1.1, 1.3, 3.4(a) and 8.4(d).
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).

Disciplinary Rules

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

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.

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.

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.

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;

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;

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;

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.

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.

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.

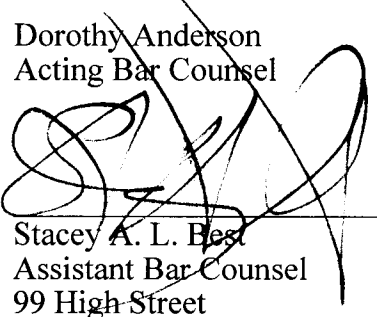
WHEREFORE, the Bar Counsel requests that the Board of Bar Overseers:

- 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.

RESPECTFULLY SUBMITTED

Dorothy Anderson
Acting Bar Counsel

By

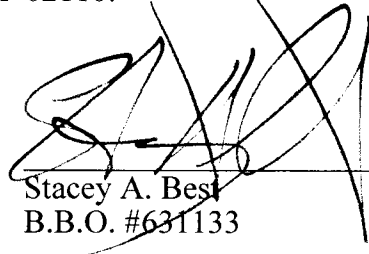


Stacey A. L. Best
Assistant Bar Counsel
99 High Street
Boston, MA 02110
(617) 728-8750

Date: June 28, 2019

Certificate of Service

I hereby certify that I have this day served the foregoing petition for discipline by mailing copies by certified mail return receipt requested and first class mail postage prepaid to counsel for the respondent, Thomas Robert Kiley, Esq., Cosgrove Eisenberg & Kiley, PC, One International Place, Suite 1820, Boston, MA 02110.

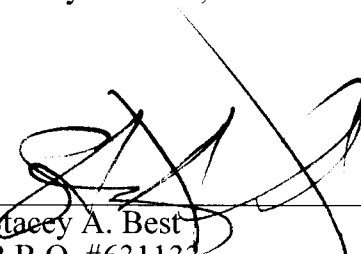


Stacey A. Best
B.B.O. #631133

June 28, 2019

Certificate of Service

I hereby certify that I have this day served the foregoing petition for discipline by mailing copies by certified mail return receipt requested and first class mail postage prepaid to John C. Verner, Esq., Suffolk County District Attorney's Office, 1 Bullfinch Place, Boston, MA 02114.

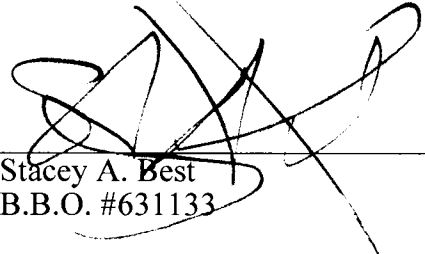


Stacey A. Best
B.B.O. #631133

June 28, 2019

Certificate of Service

I hereby certify that I have this day served the foregoing petition for discipline by mailing copies by certified mail return receipt requested and first class mail postage prepaid to counsel for the respondent George A. Berman, Esq., Peabody & Arnold LLP, Federal Reserve Plaza, 600 Atlantic Avenue, Boston, MA 02210-2261.



Stacey A. Best
B.B.O. #631133

June 28, 2019