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**

SUPPLEMENTAL REPORT ON AGGRAVATING FACTORS, MITIGATING FACTORS, AND RECOMMENDED SANCTIONS

On July 9, 2021, I issued a Hearing Report in this matter. I also requested that the parties file briefs, by August 16, 2021, on aggravating and mitigating factors and on sanctions, given my findings. The parties filed their submissions on or about August 16, 2021. This Supplemental Report addresses the remaining issues that the parties have briefed, and it assumes familiarity with the July 9, 2021, Hearing Report.

AGGRAVATING AND MITIGATING FACTORS: A GENERAL OVERVIEW

The Board of Bar Overseers and Supreme Judicial Court have frequently addressed issues concerning aggravating and mitigating factors. Examples of aggravating factors are: a) uncharged misconduct proven during the hearing; b) harm; c) misconduct that affects a vulnerable third-party; d) lack of candor; e) lack of remorse; and f) lack of understanding or awareness of one's wrongdoing. There are other examples. See generally Matter of Zankowski, 487 Mass. 140, 153, 37 Mass. Att'y Disc. R. ___, __ (2021) (citing aggravating factors including experience; evasive testimony and lack of candor; failure to acknowledge nature, effects or implications of misconduct); Matter of Strauss, 479 Mass. 294, 302, 34 Mass. Att'y Disc. R. 522,

528 (2018) (multiple violations, concealment of misconduct); Matter of Crossen, 450 Mass. 533, 581, 24 Mass. Att'y Disc. R. 122, 180 (2008) (vulnerability of third parties); Matter of the Discipline of an Attorney, 448 Mass. 819, 825, n.6 (2007) (uncharged misconduct); Matter of Eisenhauer, 426 Mass. 448, 455, 14 Mass. Att'y Disc. R. 251, 261, cert. denied, 524 U.S. 919 (1998) (lack of candor, lack of remorse, and lack of awareness of wrongdoing).

A mitigating factor is one that is causally related to the misconduct and essentially excuses or explains away some of it. Typical mitigating circumstances, which do not lessen or otherwise impact an appropriate sanction, include a good reputation in the community and satisfactory record at the Bar; cooperation in the disciplinary proceeding; the pressures of practice; the absence of dishonesty; and the absence of harm. Matter of Alter, 389 Mass. 153, 157, 3 Mass. Att'y Disc. R. 3, 7-8 (1983). See generally Matter of Walckner, 34 Mass. Att'y Disc. R. 549, 557-558 (2018) (noting need for relationship between charged mitigating factors and charged misconduct and rejecting lawyer's argument that whistleblowing, though commendable, excuses professional misconduct or mitigates the sanction).

Mitigating factors do not generally include good or desirable conduct that the respondent may have engaged in, whether before, after, or even during the same time that the respondent engaged in the charged misconduct. This is at least in part because lawyers enjoy special status. As a result of their advanced education, training, and the conferral of a license that enables them to participate in, benefit from, and influence the justice system, much is expected of lawyers. They must zealously promote their clients' interests. They address judges and juries with authority. They make decisions that affect the lives and livelihoods of others. Lawyers are also frequently given opportunities to lead groups, committees, and boards, to write, to lecture, and to teach and train younger lawyers and aspiring lawyers.

Extraordinary efforts in these regards, and in charitable and civic work, are laudable, but are and should be a goal or component of law practice. See generally Preamble to Rules of Professional Conduct, ¶ 6 ("[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service."). Good conduct is not "mitigating" of the offense in the sense in which the Board of Bar Overseers and the Supreme Judicial Court have applied the term. "[S]ubstantial acts of community or public service neither excuse professional misconduct nor mitigate the appropriate sanction in the absence of any causal connection." Walckner, 34 Mass. Att'y Disc. R. at 558. See Matter of Corbett, 478 Mass. 1004, 1006, 33 Mass. Att'y Disc. R. 112, 115-116 (2017) (desirable results for clients not mitigating; good work is expected of attorneys); Matter of Finneran, 455 Mass. 722, 735, 26 Mass. Att'y Disc. R. 177, 193 (2010) (long and distinguished career in public service and many pro bono services not mitigating); Matter of Finn, 433 Mass. 418, 425, 17 Mass. Att'y Disc. R. 204, 213 (2001) (neither service to under-served community nor burden imposed on community by lawyer's suspension from practice are mitigating); Matter of Kennedy, 428 Mass. 156, 159, 14 Mass. Att'y Disc. R. 383, 388 (1998) (community service, pro bono representation, and favorable community reputation not mitigating).

Special mitigating factors, which *can* lessen a sanction, include inexperience in the practice area (Matter of an Attorney, supra, 448 Mass. at 834, 24 Mass. Att'y Disc. R. at 808; Matter of Kydd, 25 Mass. Att'y Disc. R. 341, 345 (2009)); restitution (Matter of Bryan, 411 Mass. 288, 292, 7 Mass. Att'y Disc. R. 24, 29 (1991)); and misconduct caused by a disability (Matter of Haese, 468 Mass. 1002, 1008, 30 Mass. Att'y Disc. R. 197, 207 (2014); Matter of Schoepfer, 426 Mass. 183, 188, 13 Mass. Att'y Disc. R. 679, 685 (1997)).

Findings of Fact as to John Verner

Mitigation

1. Verner has submitted, as Ex. A to his Memorandum on Sanctions, voluminous letters on his behalf from public officials in the Commonwealth, and private citizens as well, attesting to his good character and good works. He has also submitted, as Ex. C, a list of trainings and presentations he has done in the years 2004-2021.

2. While the materials will remain part of the record of the case, for whatever use the Board of Bar Overseers and the Supreme Judicial Court may wish to make of them, I have concluded that I should not take them into consideration in making any findings or in recommending an appropriate sanction.

3. The rules under which these proceedings are conducted provide that whenever a respondent wishes to raise matters in mitigation, he must do so in his Answer to the Petition for Discipline or they are deemed waived. BBO Rules, Sec. 3.15(f) ("Failure to include [in the answer] facts in mitigation constitutes a waiver of the right to present evidence of those facts."). See Matter of Patch, 466 Mass. 1016, 1018, 29 Mass. Att'y Disc. R. 523, 527 (2013) (failure to present evidence of psychological issues causing misconduct constitutes waiver).

4. Verner did not do this. This is no mere technicality, since, if these matters had been raised when they should have been, bar counsel would have at least had the opportunity to address the factual statements contained in the letters. Second, and more fundamentally, the fact that Verner may, at many points in his career, have acted, and is still acting, laudably, is not, as a matter of law, mitigating conduct. As I have stated above, the Supreme Judicial Court has repeatedly and quite recently declined to treat such conduct as mitigating. "The absence of prior discipline is to be expected, see Matter of Alter, . . . and community service, a favorable

reputation, and provision of pro bono services, while laudable, do not offset the effects of misconduct." Matter of Zankowski, 487 Mass. 140, 153, 37 Mass. Att'y Disc. R. __, __(2021). For these reasons, I decline to reopen the record to admit this material. See BBO Rules, Sec. 3.59 and 3.60.

5. I find mitigating that Verner relied on Kaczmarek's statement, on September 10, 2013, that the mental health worksheets had been turned over.

6. I do not agree that any adverse publicity which the respondents may have experienced is mitigating. The respondents chose to work for the AGO, an office which is constantly in the news and which does not shy away from conflict and limelight. Publicity comes with the job. That the publicity is not always good, and that as high-profile actors its agents might be subject to criticism, and even scorn or ridicule, is not a mitigating factor.

7. I recognize that there is language in disciplinary cases to the effect that adverse publicity might be mitigating. E.g., Matter of Griffith, 440 Mass. 500, 510, 20 Mass. Att'y Disc. R. 174, 189 (2003) ("[a]lthough it is a close point, some mitigation exists by reason of the publicity surrounding the published opinion of the Federal trial judge sanctioning the respondent . . . and the significant monetary fine paid by the respondent"); Matter of Gross, 435 Mass. 445, 451-452, 17 Mass. Att'y Disc. R. 271, 278 (2001) ("where an attorney has been subjected to a considerable period of public opprobrium while awaiting formal discipline, the delay will have already inflicted an unofficial sanction, and the formal sanction should take into account what the attorney has suffered while awaiting resolution of the charges").

8. I heard no credible evidence of public opprobrium while the respondents were awaiting formal discipline. I note that each respondent was gainfully employed as an attorney at all relevant times.

9. I find more compelling case law to the effect that "`[t]he question is not whether the respondent has been 'punished' enough. To make that the test would be to give undue weight to his private interests, whereas the true test must always be the public welfare.'" Matter of Nickerson, 422 Mass. 333, 337 (1996) (citation omitted). See Matter of Nissenbaum, 34 Mass. Att'y Disc. R. 410, 444-445 (2018) (citing approvingly committee's rejection of adverse publicity claim and its conclusion that the notoriety of the case should result in greater, not lesser, bar discipline). Cf. Matter of Bille, 21 Mass. Att'y Disc. R. 54, 60 (2005) (rejecting "general proposition that negative publicity accorded to an attorney's conduct is mitigating" and concluding that cases suggesting that it is mitigating "merely apply the general principle that 'every case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.'" (citation omitted).

10. While not mitigating, I specifically find that during the hearings, Verner demonstrated candor, remorse, and a recognition of and responsibility for his mistakes. Verner forthrightly acknowledged that the AGO's goal and policy of turning over all exculpatory evidence was not accomplished, and that he shared in the blame. He tried to remedy the AGO's lapses promptly, once he learned of them. See Hearing Report (HR), ¶¶ 340-343. Even if, under our jurisprudence this behavior is not mitigating, Verner's comportment and forthrightness before me are noteworthy and laudatory.

Aggravation

11. I have found that Verner is an experienced prosecutor and I recognize that the SJC has found experience to be an aggravating factor. Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993). However, consideration of this factor does not change my sanction recommendation.

12. I note further that there is no causal connection between Verner's lack of follow-up with Kaczmarek on whether she had turned over the mental health worksheets and the harm that ensued. This is because Kaczmarek's actions in not turning over the mental health worksheets, and her statement, by email on September 10, 2013, implying that they had been turned over (as a part of Ballou's file), were deliberate acts for which Verner bore no responsibility.

Findings as to Kris Foster

Mitigation

13. The Hearing Report addressed three factors concerning Foster that I find are mitigating. First, she had never handled a subpoena response before being asked to do so by her supervisor in the AGO. See HR, ¶ 162. I have already noted that Foster should not have been assigned to handle such important matters on a case of great significance to the Office and to the public. I find that she was inexperienced in this area, and that her inexperience relates directly and exclusively to her responses to the subpoenas.[1] This is a mitigating factor.[2]

14. Second, Foster was misled by Kaczmarek as to what had been disclosed to the DA's offices, and was also misled as to the nature of the evidence that had been found during the Farak investigation. See generally HR, ¶¶ 194-195, 232-233, 237-238, 293. I believe this mitigates her conduct in the sense that it is causally related to the misinformation she gave to Judge Kinder as to what had been produced.

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[1] As explained below, Foster's inexperience does not mitigate her conduct in her interactions with Judge Kinder. Foster needed no training to understand that she should not make baseless statements to a judge, either during an in-person hearing or in a letter.

[2] I recognize the existence of case law to the effect that a lawyer who has been practicing for five years, as Foster had, HR, ¶ 12, is not inexperienced. Matter of Surprenant, 27 Mass. Att'y Disc. R. 855, 864-865 (2011). I specifically find that Foster was inexperienced, however, in responding to subpoenas.

15. Third, I have credited Foster's account that before she sent it to Judge Kinder, she showed her superior the September 16, 2013, letter. See HR, ¶¶ 271- 272. Although the letter was intentionally vague, it had been reviewed and approved by her superior. I conclude that this review and approval mitigates, at least to some extent, her misconduct. She still knew, or should have known, that she should not write a dissembling letter to a judge.

Aggravation

16. "[T]ruthfulness and candor are the cornerstones upon which the legal profession is built." Matter of Walckner, supra, 34 Mass. Att'y Disc. R. at 557, n. 4. "[A] respondent's candor and trustworthiness both directly affect [her] capacity to practice law." Eisenhauer, supra, 426 Mass. at 456, 14 Mass. Att'y Disc. R. at 261. See Matter of Efron, 7 Mass. Att'y Disc. R. 89, 90 (1991) ("respondent's lack of forthrightness and truthfulness before the committee does not bode well for the respondent's ability to perform legal work in a professional manner.").

17. As detailed below, Foster made false statements before Judge Kinder, Judge Carey, and before me. Most seriously, I remain disturbed by Foster's conduct and statements at the October 2, 2013, hearing. See generally HR, ¶¶ 294-304, 380. Foster made baseless statements to Judge Kinder about evidence the Commonwealth was, in fact, holding, evidence to which the defendants and their counsel sought access.

18. Judges must rely on the factual representations made by the lawyers who appear before them. Judge Kinder's reliance on Foster's baseless statements about the evidence led him to deny motions for new trial. A full examination of all of the evidence in the Commonwealth's possession would have pointed him in many instances to an opposite conclusion, leading him to grant motions for new trial and in some cases to dismiss charges if Farak had been the testing chemist.

19. To support the conclusion I reach infra, that Foster's behavior before Judge Kinder constituted uncharged but intentional misconduct, I review in some detail the factual context.

20. Judge Kinder notified all parties in July of 2013 that through the hearings he scheduled, one of his goals was to determine the timing and scope of Farak's misconduct. Ex. 292; see HR, ¶ 193.

21. The September 9, 2013, hearing was the first such hearing. The October 2, 2013, hearing offered what, by analogy, was the "last clear chance" for the AGO to avoid the disastrous consequences that ensued. At both hearings, Foster was the face of the AGO.

22. Notably, at the October 2, 2013 hearing, Attorney Luke Ryan argued that he should be allowed to examine evidence seized during the search of Farak's work station, car, and tote bag. HR, ¶ 296. This was not a generalized request for "everything that is exculpatory," but a specific request that required scrutiny.

23. Specific requests for information require particular care. "[O]nce the Commonwealth has notice that the defendant seeks specific favorable information in its possession, it must examine the material and furnish that information to the defense if it is favorable. Commonwealth v. Daniels, 445 Mass. 392, 402 (2005). See also United States v. Agurs, 427 U.S. 97, 106 (1976), holding modified by United States v. Bagley, 473 U.S. 667 (1985) ("[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.").

24. Ryan cited the existence of the 2011 newspaper articles as a basis for his belief that his request was not "just a shot in the dark in terms of trying to move the date back . . . ." HR, ¶ 296; Ex. 143 at 13. Without having even looked at, much less analyzed, any of these

documents, Foster led Judge Kinder astray, arguing that to allow such an inspection would "open the floodgates to everyone." HR, ¶ 297.

25. Later in the hearing, when Judge Kinder mentioned the possibility of "an email exchange regarding the scope of the misconduct," Foster denied that the AGO was hiding some type of "exculpatory evidence." HR, ¶ 301. Again, as had been the case at the September 9, 2013 hearing, see generally HR, ¶¶ 211-213, she had not engaged in any review of internal correspondence. Had she done so, she would have known of the February 14, 2013, correspondence from Sergeant Ballou (Foster's client at the Kinder hearings) to Kaczmarek, attaching "FARAK Admissions." [3]

26. Foster falsely stated: "I have talked to Assistant Attorney General Kaczmarek. I talked to Sergeant Joe Ballou and both of them has [sic] said there's nothing – there's no smoking gun, as I think Attorney Ryan is looking for other than what's already been disclosed . . . ." See HR, ¶ 302. This baseless statement, concerning actions she had not taken and documents she had never reviewed, steered Judge Kinder away from his goal. See HR, ¶¶ 302-304.

27. Foster misrepresented that she had personal knowledge about the evidence when in fact she had failed to make any inquiry about it. See HR, ¶ 304. This is a type of fraud on the Court. "[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the

[3] While it is true that the AGO properly and successfully argued against disclosure of its internal communications, this protection did not shield from disclosure documents, such as the mental health worksheets, that were otherwise not privileged, but that were attached to internal communications. "Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney." Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 511 (D.N.H. 1996). Cf. Upjohn Co. v. U.S., 449 U.S. 383, 396 (client may not "`refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney'") (citation omitted), cited in Attorney General v. Facebook, 487 Mass. 109, 125 (2021); Commonwealth v. Goldman, 395 Mass. 495, 500, cert. denied, 474 U.S. 906 (1985) (noting that waiver may be found where client testifies as to content of a privileged conversation).

lawyer or in a statement in open court, may properly be made only when the lawyer *knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry*." (emphasis added by SJC). Matter of Diviacchi, 475 Mass. 1013, 1020, 32 Mass. Att'y Disc. R. 268, 280 (2016), quoting Mass. R. Prof. C. 3.3, comment 2. Had it been charged, this conduct would likely have violated Mass. R. Prof. C. 3.3(a) and 8.4(c).

28. I find that Foster made false and misleading statements under oath before Judge Carey. Some of these statements are set out in HR, ¶¶ 346-354. For ease of reference, she denied before Judge Carey that she had worked closely with Reardon in Farak-related issues; she stated she was "not sure" if she learned in November 2014 that her office possessed documents that had not been turned over; and she did not recall that after Ryan had inspected the evidence, he advised the office that he had found some things that had not been turned over. Ex. 164 (32, 36-38). She was disingenuous in what I find was her aim of trying to minimize her Farak-related activities, stating defiantly (and falsely) to Judge Carey: "I haven't reviewed any documents related to Sonja Farak ever." Id. at 41.

29. I also find aggravating Foster's numerous instances of dissembling, disingenuousness, and evasiveness during the hearings before me. As I wrote at HR, ¶¶ 14-17, in the resume she submitted to the AGO, and the information she gave when interviewed, Foster represented that she had had substantial trial court experience, and that she had second-seated homicides.

30. Foster tried to claim before me that she had *no* superior court experience. See, e.g., Foster's Amended Answer to Petition for Discipline, p. 13 ("During the relevant events at issue here, Ms. Foster made her first appearance in a contested Superior Court matter"); Tr. 14:236 (Foster).

31. Although her resumé indicated she had "draft[ed] and argu[ed] post-conviction motions in the superior court and district court," and although she spoke at her interview with the AGO about her "pretrial work [and] trials," when I asked Foster about these discrepancies, she refused to agree that she had "embellished" her record. Tr. 14:252-253 (Foster); Ex. 199 (KFVOBJ01934, 01937). Instead, she claimed disingenuously that "I must have had a different understanding of [the terms "drafting" and "arguing"] when I was writing this." Tr. 14:253 (Foster).

32. Foster showed pervasive dishonesty across three tribunals. This is deeply disturbing, and appropriately weighs heavily in aggravation.

33. Foster did not show remorse, and showed a lack of awareness of her wrongdoing. These are aggravating factors. Matter of Eisenhauer, supra, 426 Mass. at 456, 14 Mass. Att'y Disc. R. at 261.

34. "While a respondent is entitled to defend h[er]self, [s]he is not entitled to testify falsely." Matter of Ablitt, 486 Mass. 1011, 1019, 37 Mass. Att'y Disc. R. ___, ___ (2021).

35. Another aggravating factor as to Foster is that the "victims" -- criminal defendants either awaiting trial or who pleaded guilty or had been found guilty of drug offenses where the alleged drugs had been tested by Farak -- were vulnerable. If vulnerable third-parties are affected by a respondent's misconduct, this is an aggravating factor. See Matter of Crossen, supra, 450 Mass. at 581, 24 Mass. Att'y Disc. R. at 180; Matter of Greene, 477 Mass. 1019, 1022, 33 Mass. Att'y Disc. R. 163, 167 (2017).

36. Next, Foster's conduct undermined confidence in the public's perception of the fairness of the criminal justice system in Massachusetts. I accept bar counsel's description of the harm that the Farak matter, and its aftermath, caused to the criminal justice system, and to the

public's confidence in the system. See generally Commonwealth v. Claudio, 484 Mass. 203, 210 (2020) (Court notes that "[i]n [Commonwealth v.] Scott, [467 Mass. 336, 352 (2014)], we recognized that Dookhan's misconduct 'cast a shadow over the entire criminal justice system.' In comparison, the government misconduct committed by Farak and members of the Attorney General's office cast a shadow even longer and darker.").

37. To the extent that Foster argues that she has been punished enough, or "publicly reprimanded in the media," see Foster's Sanction Recommendation, p. 11, I reject that claim for the reasons stated above.

Findings as to Anne Kaczmarek

Mitigation

38. I do not find any mitigating factors as to Kaczmarek.

39. I do not agree that any opprobrium Kaczmarek may have experienced as the result of publicity is mitigating. See Kaczmarek's Sanctions Memorandum, p. 18.

Aggravation.

40. I find several aggravating factors as to Kaczmarek.

41. Kaczmarek was an experienced attorney; this is a factor in aggravation. Luongo, supra.

42. Kaczmarek displayed no remorse, admitted no wrongdoing, and showed no appreciation for her role in what occurred. These are aggravating factors. Eisenhauer, supra.

43. Kaczmarek was not candid before me. Notwithstanding the fact that I gave her every opportunity during the hearings to explain her actions, I heard only vague, dissembling testimony. See Zankowski, supra.

44. Kaczmarek committed multiple disciplinary violations. This has long been held to be a factor in aggravation. Matter of Saab, 406 Mass. 315, 326, 6 Mass. Att'y Disc. R. 278, 289-290 (1989).

45. Kaczmarek's emails and conduct during the Farak investigation demonstrated a disturbing attitude toward defense counsel, who were simply trying to do their job in defending their clients' rights. These attorneys were appropriately following up when the evidence they had seen (2011 newspaper articles, for example) suggested to them that Farak's misconduct had begun years earlier than the Commonwealth was acknowledging, and well before the date the Court found, based on incomplete evidence. An improper motive is a factor in aggravation. See Matter of Finneran, 455 Mass. at 736, 26 Mass. Att'y Disc. R. at 194. Kaczmarek's attitude toward defense counsel was corrosive and may have poisoned Foster's attitude in her dealings, both in writing and during hearings, with defense counsel. See, e.g., Tr. 14:46-47 (Foster) (Ryan's "reputation preceded him" and she had been "cautioned . . . to put [her] communications in writing with him.").

46. Kaczmarek misled Verner, Foster, and other colleagues in her office about what had been disclosed to the DAO's. I find this particularly disturbing, since professional colleagues must be able to rely on each other for accurate information.

47. Kaczmarek adopted a passive attitude toward the central question of the extent of Farak's misconduct. Her attitude did not change, even when she knew that Judge Kinder had scheduled hearings to determine, among other things, the scope of Farak's misconduct. As was true of the lawyer in Matter of Foley, 439 Mass. 324, 339, 19 Mass. Att'y Disc. R. 141, 158 (2003), this behavior hews towards "calculated corruption" rather than misconduct "in the heat of proceedings . . . without the planning, the premeditation, and [manipulation] . . . ."

48. Finally, Kaczmarek's conduct caused significant harm. I find that there is a direct causal connection between her intentional misconduct, and the harm that ensued.

RECOMMENDED SANCTIONS

"The purpose of the disciplinary rules and accompanying proceedings is to protect the public and maintain its confidence in the integrity of the bar and the fairness and impartiality of our legal system." Matter of Curry, 450 Mass. 503, 520–21, 24 Mass. Att'y Disc. R. 188, 211 (2008) "Without the public's trust that lawyers and judges act in good faith and strictly within the bounds of our laws and professional norms, the rule of law has little practical force." Curry, 450 Mass. at 521, 24 Mass. Att'y Disc. R. at 211-212. The primary factor for consideration when imposing discipline is "the effect upon, and perception of, the public and the bar." Matter of Concemi, 422 Mass. 326, 329, 12 Mass. Att'y Disc. R. 64, 68 (1996) (internal quotation marks and citation omitted).

The Supreme Judicial Court's bar discipline cases seek to achieve uniformity in the sanctions imposed on attorneys who are found to have engaged in the same or similar misconduct. Disciplinary action against an attorney should not be markedly disparate from discipline in comparable cases. Matter of Alter, supra, 389 Mass. at 156, 3 Mass. Att'y Disc. R. at 6-7. Each case is to be decided on its own merits, "and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Murray, 455 Mass. 872, 883, 26 Mass. Att'y Disc. R. 406, 418 (2010). Where there is no obvious precedent, the Court "must establish independently a sanction adequate to address the seriousness of the misconduct, to reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity." Matter of Foley, supra, 439 Mass. at 339, 19 Mass. Att'y Disc. R. at

158-159. See also Matter of Hurley, 418 Mass. 649, 655 (1994), cert. denied, 514 U.S. 1036 (1995) (the BBO and the Court "need not endeavor to find perfectly analogous cases, nor must [they] concern [themselves] with anything less than marked disparity in the sanctions imposed.").

All parties agree that Massachusetts provides no precedent for determining appropriate sanctions in a case of this type.[4] The cases produce a spectrum. On one side, the lightest sanction, a private admonition, is generally reserved for technical, inadvertent, isolated mistakes that nonetheless violate the rules. On the other hand, the harshest sanction, disbarment, is reserved for those who, as the Supreme Judicial Court observed in a 2005 case, have demonstrated themselves "utterly unfit to practice law." Matter of Cobb, 445 Mass. 452, 480, 21 Mass. Att'y Disc. R. 93, 126 (2005).

I do not find any of the respondents here to be entitled to, or deserving of, the sanctions at the far ends of the spectrum. Their conduct, no matter how troublesome at some levels, should be viewed in the context that they were all public servants working in the stressful criminal justice system. The Supreme Judicial Court's Steering Committee on Lawyer Well-Being's Report to the Justices, submitted on July 15, 2019, reported as follows:

> Many public sector lawyers, particularly prosecutors, cited the sheer volume of cases - many of them very serious - as a major source of stress. Agency counsel often handle complex cases involving issues of first impression. For both prosecutors and agency counsel, stress also results from the public attention that many of their cases attract -- more so than most cases in the private sector.

Report at 9. Nonetheless, it goes without saying that "[t]he most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the

[4] Bar counsel has requested suspensions for a year and a day for Verner and Foster, and disbarment for Kaczmarek. Bar Counsel's Brief on Aggravation, Mitigation and Sanctions, pp. 16, 20, 24.

community relies. The public expects the lawyer to be honest and to abide by the law." Matter of Hilson, 448 Mass. 603, 618, 23 Mass. Att'y Disc. R. 269, 288 (2007) (citation and internal quotation marks omitted).

John Verner

Citing my observation at HR, ¶ 148 that "[t]he failure to disclose potentially exculpatory evidence happened on Verner's watch," bar counsel seeks a suspension of a year and a day. Bar Counsel's Brief, p. 20. Verner argues for a public reprimand. Verner's Memorandum, pp. 9-10.

I conclude that a public reprimand is appropriate for Verner's misconduct. Verner was found to have violated two disciplinary rules: 1.3 (diligence) and 5.1(b) (lawyer supervising another lawyer shall make reasonable efforts to ensure that supervised lawyer's conduct conforms to Rules). While significant harm ensued, I found above that Verner did not cause this harm.

Matter of Kane, 13 Mass. Att'y Disc. R. 321 (1997) is the starting point for my analysis. Kane established guidelines for neglect, teaching that a public reprimand is generally appropriate "where a lawyer has failed to act with reasonable diligence . . . and the lawyer's misconduct causes serious injury or potentially serious injury to a client or others." Kane, 13 Mass. Att'y Disc. R. at 327. Even though I do not find Verner responsible for the spectacular harm that ensued, which I found came about due to Kaczmarek's intentional conduct and Foster's incompetence, lack of diligence and misrepresentations to Judge Kinder, Verner's failure adequately to supervise Kaczmarek certainly created the possibility of harm. Under Kane, this level of misconduct warrants a public reprimand. See also Matter of Kenney, 37 Mass. Att'y Disc. R. __ (2021) (stipulation to public reprimand for varied misconduct over the course of several years, including intentional violations); Matter of Coleman, 35 Mass. Att'y Disc. R. 71

(2019) (stipulation to public reprimand for failure to handle claim with competence and diligence; unauthorized disclosure of confidential information; and false statements to client to conceal misconduct); Matter of Goldberg, 34 Mass. Att'y Disc. R. 135 (2018) (public reprimand for varied misconduct in four matters, including lack of diligence and failure to supervise lawyers and non-legal staff).

Cases imposing public reprimands capture a wide range of misconduct, including intentional acts. Review of Verner's conduct and the case law persuades me that nothing less than a public reprimand would be an appropriate recommendation. Nor would anything greater.

Kris Foster

Foster proposes an admonition for her misconduct, ignoring in her papers the significant dishonesty I found in the Hearing Report and, remarkably, describing her actions as "isolated, non-intentional misconduct that did not cause any actual or potential injury." Foster's Sanction Recommendation, pp. 1, 11. I recommend a year and a day suspension and if that is reduced, I strongly recommend a reinstatement hearing.

"The court system depends on the integrity of attorneys who appear before it." Matter of Moran, 479 Mass. 1016, 1023, 34 Mass. Att'y Disc. R. 376, 388 (2018) (fifteen-month suspension for intentional misrepresentation to probate court, with other misconduct and aggravating factors). "As an officer of the court, an attorney is a 'key component of a system of justice,' . . . and is bound to uphold the integrity of that system by being truthful to the court and opposing counsel." Matter of Neitlich, 413 Mass. 416, 423, 8 Mass. Att'y Disc. R. 168, 177 (1992) (one-year suspension for lawyer who actively misrepresented to judge, in post-divorce proceeding, the terms of his client's pending real estate transaction) (citation omitted).

While I did not find that Foster violated any disciplinary rules charging intentional misconduct, I did find a pattern of significant incompetence and lack of diligence, and I found repeated misrepresentations. See HR, ¶¶ 372, 376, 378, 380, and see above, ¶¶ 20-25. Perhaps more serious, I found numerous aggravating factors, many wholly antithetical to effective law practice, including uncharged intentional misconduct (dishonesty before Judge Kinder) and false testimony under oath before Judge Carey. In Foster's sworn testimony before me, I was struck by her pervasive lack of candor and truthfulness, and her lack of remorse . I also found that her conduct caused significant harm.

Matter of Kane provides that "[s]uspension is generally appropriate for misconduct involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of neglect, and the lawyer's misconduct causes serious injury or potentially serious injury . . .." Kane, 13 Mass. Att'y Disc. R. at 328. The Board in Kane went on to recognize that it would not "hesitate to impose or recommend more severe sanctions in an appropriate case, such as . . . where the character of the harm to a client is particularly outrageous." Id. at 329.

Had fraud on the Court been charged as to the uncharged misconduct I have found was proven as to Foster, the presumptive sanction would have been a one-year suspension. See Matter of McCarthy, 416 Mass. 423, 9 Mass. Att'y Disc. R. 225 (1993) (one-year suspension for eliciting false testimony and offering false documents in hearing before rent control board, and failing to correct the record when given the opportunity to do so); Matter of Neitlich, supra. Cf. Matter of Balliro, 453 Mass. 75, 86-87, 25 Mass. Att'y Disc. R. 35, 48-49 (2009) (collecting false statement/lying under oath cases).

Discounting the presumptive sanction to reflect that bar counsel did not specifically charge Foster with fraudulent conduct at the October 2 hearing, and adding into the mix the

pattern of incompetence and lack of diligence Foster displayed, the significant and far-reaching harm to the public and the insult to the legal system she caused, and the numerous and serious aggravating factors I have found, I conclude that a year and a day suspension is appropriate. Cf. Matter of Zak, 476 Mass. 1034, 1038-1039, 1041, 33 Mass. Att'y Disc. R. 522, 529, 533 (2017) (while single violation of one of charged rules might result in admonition, public reprimand or term suspension, cumulative effect of many violations spanning years, with aggravating factors, justifies disbarment); Matter of Crossen, supra, 450 Mass. at 574, 24 Mass. Att'y Disc. R. at 172-173 ("[c]umulative and wide-ranging misconduct may warrant the sanction of disbarment, even if the individual instances of unethical conduct would not warrant so severe a sanction").

I have reviewed other cases where a year and a day suspension was imposed, including those at Bar Counsel's Brief, pp, 26-27, and do not consider the misconduct there, though different from Foster's, any worse than hers. See Matter of Hoffman, 35 Mass. Att'y Disc. R. 276 (2019) (year and a day suspension, by stipulation, for misconduct including lack of competence and diligence in three matters, two of which included making false statements to clients); Matter of Nissenbaum, supra, 34 Mass. Att'y Disc. R. at 461-462, Matter of Veara, 34 Mass. Att'y Disc. R. 545 (2018) (year and a day suspension for Veara for charging excessive fees, making false statements to tribunal and failing to correct colleague Nissenbaum's misstatements).

Anne Kaczmarek

I found in the Hearing Report that Kaczmarek violated numerous disciplinary rules, and that some of her misconduct was intentional, including multiple Rule 3.4(c) violations and an 8.4(c) violation. E.g., HR, ¶¶ 134, 359, 360, 365, 366, 373, 374. I have also found significant aggravating factors, among them great harm to the third-party defendants, the system of justice

and the public at large. In her papers, Kaczmarek recognizes that a suspension would be appropriate, and asks for a suspension of less than a year, and/or for a suspended or retroactive suspension. Kaczmarek's Sanctions Memorandum, p. 19. Having reviewed the prosecutorial misconduct cases from other jurisdictions, as well as our own cases imposing term suspensions for varied misconduct, and having in mind the aggravating factors I have found, I conclude that a two-year suspension, not retroactive or suspended, would be appropriate. If this is reduced below a year and a day, I also recommend a reinstatement hearing.

There are not many Massachusetts bar discipline cases against prosecutors. See Matter of Dunne, 36 Mass. Att'y Disc. R. 143 (2020) (reciprocal discipline; one-year suspension for prosecutor's misrepresentation to Court and opposing counsel that she was not in possession of tape recording of defendant's recorded conversations with his son, in violation of rules 3.3, 4.1 and 8.4(d)); Matter of Marshard, 34 Mass. Att'y Disc. R. 283 (2018) (one-month suspension for prosecutor's meeting with a represented witness without the witness's attorney, in violation of rules 4.2 and 8.4(d), aggravated by experience, lack of understanding of ethical obligations, lack of candor and misrepresentations to a judge).

Bar counsel requests disbarment for Kaczmarek; in support of this request, he has cited and attached to his papers the 2007 Amended Findings of Fact, Conclusions of Law and Order of Discipline of the North Carolina Disciplinary Hearing Commission (DHC) in North Carolina State Bar v. Nifong, the "Duke Lacrosse case." That matter involved a prosecutor who directed the prosecution of Duke students for rape and deliberately withheld key evidence, including DNA evidence, that was plainly exculpatory. At the same time, the prosecutor held press

conferences about the case that were prejudicial and disparaged the defendants. The DHC disbarred Nifong. I do not find that precedent applicable or even useful.[5]

Legal research has uncovered some useful analogous cases. In Matter of Pertler, 948 N.W.2d 146 (MN 2020), a prosecutor stipulated to disbarment for, among other misconduct, failing to disclose information about police misconduct "to those who needed the information," resulting in dismissals of nineteen pending criminal cases and the retroactive dismissal and expungement of eight cases that had resulted in conviction. The decision is cursory, but review of the parties' Stipulation and underlying Petition for Disciplinary Action reflects, among other things, that Pertler received information that a police officer had committed misconduct; discovery obligations mandated disclosure of this information in cases in which the officer was a material witness; Pertler's office had no Brady policy; and Pertler did not disclose what he had learned even after his colleague, who had received a defense request for information related to the police officer, asked him directly for Brady information in connection with a felony case he was prosecuting. The colleague eventually learned of the officer's misconduct and shared his findings with others in the office, resulting in the above-described dismissals.

Also helpful is Matter of Kurtzrock, 138 N.Y.S. 3d 649, 192 A.D. 3d 197 (N.Y. App. Div. 2020). In that case, the prosecutor in charge of a murder prosecution was found to have failed to turn over exculpatory evidence. The Court's opinion asserted that in response to a Brady request, Kurtzrock "did not review the documents contained in the homicide squad's investigative file [, instead, following] his 'ordinary[ ]' practice of relying on the police

[5] Among other reasons, Nifong lied brazenly and repeatedly to reporters; misstated and lied about the evidence; inflamed the public by insinuating a racist motive and comparing the alleged rape to a quadruple homicide and cross burnings; ignored evidence that negated the guilt of the defendants; submitted, to counsel for the defendants, a report he influenced which he knew omitted critical test results; served and filed intentionally false discovery responses; lied in Court; did not produce discovery, as ordered; and made false statements to the Grievance Committee of the North Carolina State Bar.

detectives to alert him to 'exculpatory material or something that would be important for [him] to know,' including Brady material." 138 N.Y.S. 3d at 655. Kurtzrock "did not actively ask to see the homicide squad's investigative folders." Id. He admitted that he had violated his Brady obligations. 138 N.Y.S.3d at 659. Although he "understood that there was a high probability of the existence of Brady-type materials," he "blinded" himself to them "by not conducting a Brady review or analysis [and he] consciously delegated his duties under Brady to [a detective], whom he expected to alert him to exculpatory information." 138 N.Y.S.32d at 662. There was also other charged misconduct, as well as the aggravating factor that the misconduct occurred in Kurtzrock's capacity as a prosecutor, and mitigating circumstances that would not constitute mitigation under our precedents in Massachusetts. The Court imposed a suspension of two years.

I also found useful Lawyer Disc. Bd. v. Busch, 233 W. Va. 43, 754 S.E.2d 729 (W. VA 2014), where the Court imposed a three-year suspension for misconduct in two cases, including violation of rules 3.3, 3.4, 3.8, 8.4(c) & (h). The prosecutor was found to have violated Rule 3.8 by failing to make timely disclosures of exculpatory evidence. Busch, 233 W. Va. at 53. He violated 3.4 by ignoring requests by a defense attorney for discovery in one case, and by obstructing the defense attorney's access to evidence in another. Id. He violated rules 8.4(c) and (d) when he made false representations of fact to the court and opposing counsel and in court documents. Id. His statements "falsely stated that the contents of the evidence were not germane to the issues before the circuit court when he had not viewed the evidence in question." Id. at 53. In support of its sanctions, the Court wrote: "[E]thical violations by a lawyer holding a public

office are viewed as more egregious because of the betrayal of the public trust attached to that office." Busch, 233 W. Va. at 56.[6]

I have cited above case law to the effect that I need not strive to find "perfectly analogous cases," but must urge a sanction not markedly different from one given to others similarly situated. I am mindful that I am to consider a totality of the evidence approach, as articulated in Zak and Crossen. I have reviewed other cases where the Court has imposed a two-year suspension, and find the conduct at issue there, while different, certainly no worse than Kaczmarek's. E.g., Matter of Segal, 430 Mass. 359, 15 Mass. Att'y Disc. R. 544 (1999) (two-year suspension for repeatedly making false statements and material omissions to a bank in HUD-1 forms); Matter of Oberhauser, 37 Mass. Att'y Disc. R. __ (2021) (two-year suspension by stipulation for varied misconduct in two matters, including intentional misconduct, with mitigation (emotional and physical abuse) and aggravation (prior public reprimand and two admonitions)); Matter of Harris-Daley, 34 Mass. Att'y Disc. R. 177 (2018) (two-year suspension by stipulation for varied misconduct in a civil case, including dishonest actions); Matter of Friery, 28 Mass. Att'y Disc. R. 337 (2012) (two-year suspension by stipulation for lawyer's long-term misrepresentation of her credentials; no indication of harm).

[6] Other instructive out-of-state cases include: Matter of Hudson, 105 N.E.3d 1089, 1094 (Ind. 2018) (eighteen-month suspension, with reinstatement hearing, for prosecuting a charge known to lack probable cause and for failure to turn over exculpatory evidence); In the Matter of: Brenda Kay Quade, 2015 WL 6872659 (Ill.Atty.Reg.Disp.Com.) (reprimand for prosecutor's unintentional 3.8(d) violation, with substantial mitigation and no prejudice); Matter of Howes, 52 A.3d 1, 17-18 (D.C. App. 2012) (prosecutor disbarred for misusing witness vouchers and for failing to disclose voucher payments to defense counsel and Court; Court notes that lawyer's "role as a prosecutor heightens the need for deterrence and the potential for harm to the public as a result of his misconduct" and "cannot ignore the broad-reaching repercussions of respondent's prosecutorial misconduct, jeopardize[ing] the convictions of multiple, notorious defendants, [resulting in significant reductions to their sentences] and caus[ing] [the Office of Professional Responsibility] and the criminal justice system to spend extensive time and resources investigating his misconduct. . . .") (internal quotation marks omitted).

In light of these precedents and guiding principles, I recommend a two-year suspension, without a stay, for Kaczmarek, and a reinstatement hearing even if her suspension is shortened.

Conclusion

Mindful of my several obligations, among them fairness to the respondents, the protection of the public and the bar, the integrity of the legal and bar discipline systems, and the critical importance of a fair and effective criminal justice system, I respectfully recommend the sanctions described above. I strongly urge that Foster and Kaczmarek, even if their sanctions are reduced below a year and a day, not be permitted to resume law practice without a reinstatement hearing, at which each will have the burden to prove moral fitness.

Dated: October 8, 2021

Respectfully submitted,

Alan D. Rose

Alan D. Rose, Special Hearing Officer