Board Of Bar Overseers
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COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

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

BRIEF OF RESPONDENT KRIS C. FOSTER, ESQ.

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Pursuant to BBO Rule § 3.50 (a), the respondent, Kris Foster, appeals from the findings and recommendations of the Special Hearing Officer ("SHO") set out in his Supplemental Report on Aggravating Factors, Mitigating Factors, and Recommended Sanctions ("Supp. Report") dated October 8, 2021. With two exceptions, Foster accepts the findings and recommendations in his Hearing Report dated July 9, 2021 ("Report"). The exceptions are: (1) the findings in the Report relating to the October 2, 2013 hearing (Report ¶¶ 303, 304); and (2) the recommendations concerning the September 16, 2013 letter Foster wrote to Judge Jeffrey Kinder (Report ¶ 378).

Bar counsel charged Foster with three instances of intentional misconduct that he claimed took place at a September 9, 2013 hearing before Judge Kinder, in a September 16, 2013 letter to Judge Kinder, and an October 2, 2013 hearing before Judge Kinder. Bar counsel charged violations of Mass. R. Prof. C. 3.3(a)(1) (false statement to a tribunal), 3.4(c) (unlawfully obstructing access to evidence), 3.4(c) (knowingly disobeying the rules of a tribunal), 4.1 (false statement of fact to a third person), and 8.4(c) (dishonesty, fraud, deceit). The charges were serious, but after a hearing lasting twenty-three days involving fifteen witnesses and 305 exhibits, bar counsel was unable to prove any of them. Instead, in his original Report, the SHO found that Foster had violated Mass. R. Prof. C. 1.1 (competence), 1.2(a) (failing to seek the lawful objectives of a client), and 1.3 (diligence). In one instance, he found that Foster's conduct was prejudicial to the administration of justice in violation of Rule 8.4(d) and reflected adversely on her fitness to practice law in violation of Rule 8.4(h). The case bar counsel charged involved serious intentional misconduct. The case bar counsel proved was essentially one of negligence, which should have resulted in a recommendation of no more than a public reprimand. In his Supplemental Report, however, the SHO has recommended that Foster be suspended for a year and a day. He bases this recommendation on uncharged misconduct. This was error.

The SHO's Findings of Fact, which Foster largely accepts, are entitled to substantial deference on appeal. The SHO's application of his findings to determine the appropriate sanction, however, is simply a recommendation. The Board is a better judge of its own precedent, and it is free to modify or reject the recommendation of the SHO, limited only by the need to state a reason for doing so.

In this case, the need for the Board to make an independent determination of how to apply its own precedent is obvious. The SHO explicitly failed to follow the clearly established procedure for analyzing the appropriate sanction. The determination of the appropriate sanctions is a two-step process. First, one determines the presumptive sanction for the proven violations. Second, one then applies appropriate mitigating and aggravating factors to the presumptive sanction. Here, the SHO made no effort to do the former, and he quite explicitly used inappropriate factors for the latter. The SHO announced that no precedent existed, although cases involving lack of competence and diligence by junior lawyers are scarcely unique. The SHO then proceeded to base the bulk of his recommendation on things that the Petition did not charge as violations and, that Foster had no notice were at issue. Ample Board precedent establishes that using "uncharged misconduct" as an aggravating factor has such due process implications that it ought to be done sparingly, if at all.

The Board is clearly better versed in its own precedent than is the SHO. The extensive findings provide it with a detailed basis for it to apply that precedent in a manner consistent with its prior rulings. According to its own Rules, the Board need give no deference to the recommendation of the SHO and, as the recommendation is clearly erroneous, the Board should not.

STATEMENT OF THE CASE

Bar counsel filed a Petition for Discipline ("Petition") on June 28, 2019. It was based on the failure of the Office of the Attorney General ("AGO") to turn over exculpatory evidence to criminal defendants being prosecuted by various District Attorneys' offices. The facts will be discussed in more detail below. Briefly, the charges involve the failure of the AGO to turn over so-called mental health worksheets of Sonja Farak in 2013. Farak was a chemist in the Amherst drug laboratory. The mental health worksheets showed that she had been using drugs that had been seized as evidence and that she had been testing. The Petition named three respondents: John Verner, then Chief of the Criminal Bureau of the AGO; Anne Kaczmarek, an attorney in the Economic and Major Crimes Division of the Criminal Bureau and the prosecutor of Sonja Farak; and Kris Foster, an attorney in the Appellate Division of the Criminal Bureau who had been employed by the AGO for six weeks before her involvement in the Farak matter.

A hearing was held before the SHO over twenty-three days from September to December 2020. Fifteen witnesses testified, and 305 exhibits were introduced. The post-hearing proceedings were bifurcated. The parties submitted requests for findings and rulings in January 2021 limited to whether there were violations of the Rules. The SHO issued his Report on July 9, 2021. In August 2021, the parties submitted recommendations for sanctions based on the SHO's findings. The SHO issued a Supplemental Report on October 8, 2021. He recommended that John Verner receive a public reprimand; that Anne Kaczmarek, who the SHO found had deliberately withheld the mental health worksheets and who misrepresented to John Verner and Kris Foster that they had been produced, be suspended for two years; and that Kris Foster, who the SHO found had acted negligently, be suspended for a year and a day. This appeal followed.

STATEMENT OF FACTS

The Petition for Discipline is in three Counts. Counts I and II are against John Verner and Anne Kaczmarek and span the period from January 8, 2013 to August 22, 2013. Count III is against Verner, Kaczmarek, and Foster and covers the period from August 22, 2013 to October 2, 2013. The periods covered by the three Counts and the Respondents against whom they are brought provide a logical basis for the organization of the facts.

A. January 2013 to August 22, 2013 (Counts I and II)

Sonja Farak was a chemist in the Amherst Laboratory from 2004 to 2013 (Report ¶ 19). In January 2013, she came under suspicion for tampering with drug samples that had been seized as evidence (Report ¶¶ 23-25). After a short investigation, she was arrested on January 19, 2013 (Report ¶ 42). Among the items Sgt. Joseph Ballou of the Massachusetts State Police seized from Farak's car pursuant to a search warrant were so-called mental health worksheets in which Farak made notes of her drug use at the lab (Report ¶¶ 61-63). Sgt. Ballou emailed the mental health worksheets to Anne Kaczmarek on February 14, 2013 (Report ¶ 64). John Verner had appointed Kaczmarek to prosecute Farak (Report ¶ 26). Kaczmarek printed the attachment to the email and put the documents in a manila folder labeled "mental health worksheets." (Report ¶ 71). John Verner received a copy of Sgt. Ballou's email, and the SHO found that he opened the attachment and reviewed the mental health worksheets (Report ¶ 72). The mental health worksheets were inculpatory to Farak and exculpatory to the criminal defendants whose samples she had tested. Properly interpreted, they showed that Farak's evidence-tampering and drug use went back further than originally thought (Report ¶ 67).

Kaczmarek drafted a prosecution memo in March 2013 in which she noted that the mental health worksheets could possibly be privileged (Report ¶¶ 79, 82). Verner noted on the prosecution

memo that the mental health worksheets had not been turned over to the DAs' offices (Report ¶ 84). Kaczmarek had chosen not to use them as evidence at the grand jury in seeking an indictment of Farak because she was concerned that they might be privileged and unduly prejudicial (Report ¶ 81). Although thousands of pages of Farak-related documents were turned over to the DAs' offices for production to criminal defendants, the mental health worksheets were not turned over until November 2014. The SHO found that it was Kaczmarek's responsibility to turn over Farak-related discovery to the DAs (Report ¶ 116). He further found that "Kaczmarek not only failed to do this; she actively misled others in the AGO as to what had been produced to the DAOs." (Report ¶ 117). One of the people she actively misled was Kris Foster (Supp. Report ¶ 14).

B. August 22, 2013 to October 2, 2013 (Count III)

The events recounted above do not involve Kris Foster. They all occurred before she joined the AGO in July 2013 (Report ¶ 18). She was not involved in the prosecution of Sonja Farak or the decision to withhold or produce the mental health worksheets. Indeed, she had not even heard that term before September 10, 2013 (Report ¶¶ 174, 220). Her involvement began on August 23, 2013 when Randall Ravitz, her supervisor and the head of the Appellate Division, told her that she would be responding to subpoenas to Sgt. Ballou and Anne Kaczmarek issued by Luke Ryan in a case called Commonwealth v. Penate (Report ¶¶ 158, 162). Foster was not Ravitz's first choice for the assignment. She was his third choice. Two other people had declined the assignment, and he did not want to do it himself. The SHO noted that "[g]iven the nature of the Farak prosecution, and the subpoenas' importance both to the Farak case and to the Farak defendants' cases, someone with significant experience with subpoenas should have been assigned." (Report ¶ 162). A few days later, Ravitz assigned Foster to handle a Rule 30 motion to compel discovery in a case called Commonwealth v. Rodriquez (Report ¶¶ 166-168). Finally, on August 30, 2013, Ravitz assigned

her to handle subpoenas issued in a case called Commonwealth v. Watt (Report ¶ 169). By September 3, 2013, Foster knew she would be dealing with discovery requests in the Penate, Rodriquez, and Watt cases (Report ¶ 173).

A hearing on the discovery requests was scheduled for September 9, 2013 before Judge Jeffrey Kinder in Hampden Superior Court (Report ¶ 210). Foster prepared motions to quash the subpoenas (Report ¶ 200), but did not review any documents or prepare Sgt. Ballou to testify at the hearing (Report ¶¶ 202, 206). At the hearing, Judge Kinder immediately denied the motions to quash (Report ¶ 211). Judge Kinder asked Foster whether she had reviewed the file or any documents, and she candidly admitted that she had not (Report ¶ 211). Judge Kinder then asked whether Sgt. Ballou had his file with him. Foster incorrectly said he did not. Sgt. Ballou did have his file with him and brought it to the witness stand when he testified. For whatever reason, no one asked to look at it (Report ¶¶ 212, 216, 226). Sgt. Ballou, in open court and in Foster's presence, testified that "everything in my case file has been turned over." When asked whether everything in Kaczmarek's file had been turned over, he said: "I believe everything pertaining to the Farak investigation has been turned over. I am not aware of anything else." (Report ¶ 217).

At the conclusion of the hearing, Judge Kinder told Foster that any documents the AGO was withholding from Sgt. Ballou's file on grounds of privilege or were otherwise not discoverable be delivered to him for an in camera review. He did not want to see documents that had already been turned over or which the AGO agreed would be turned over (Report ¶ 221). Foster asked Judge Kinder whether his order was limited to documents in Sgt. Ballou's file, and Judge Kinder said that it was (Report ¶ 222). Judge Kinder wanted any documents being withheld or a statement that no documents were being withheld by September 18, 2013 (Report ¶ 267).

Foster returned to the office on September 10 and explained what had happened at the hearing and what Judge Kinder had ordered. John Verner sent an email to Anne Kaczmarek with copies to Kris Foster and others asking her what was in Sgt. Ballou's file (Report ¶ 229). Kaczmarek responded to the group that "Joe has all his reports and all reports generated in the case. All photos and videos taken in the case. His search warrants and returns. Copies of all paperwork seized from her car regarding new[s] articles and her mental health worksheets." (Report ¶ 232). This is the first time Foster heard the phrase "mental health worksheets." The SHO found that "Verner believed from Kaczmarek's September 10, 2013 email – incorrectly, as it turned out – that the mental health worksheets had been turned over." (Report ¶ 233). The SHO made no finding as to Foster's belief, but Foster received and read the same email, and later in the morning of September 10, 2013, Kaczmarek told Foster that everything had been turned over (Report ¶ 237). Thus, by noon on September 10, 2013, Foster had heard Sgt. Ballou testify under oath that the contents of his file and Anne Kaczmarek's file had been turned over and then had the substance of that testimony confirmed by Anne Kaczmarek's direct statement to her.

Acting on her belief that nothing was being withheld at all let alone on grounds of privilege, Foster wrote a letter to that effect to Judge Kinder on September 16, 2013.

The letter reads:

> Dear Judge Kinder,
>
> > On September 9, 2013, pursuant to a subpoena issued by defense counsel, you ordered the Attorney General's Office to produce all documents in Sergeant Joseph Ballou's possession that [the] Attorney General's Office believes to be privileged by September 18, 2013, to be reviewed by your [sic] Honor in camera. After reviewing 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 [O]ffice to produce for your review on September 18, 2013.

> Please do not hesitate to contact me should your [sic] require anything further.
>
> Sincerely[,]
>
> Kris C. Foster

(Report ¶ 269). Randall Ravitz, Foster's supervisor, reviewed and approved the letter before she sent it (Report ¶ 272).

The SHO found that Foster had written the letter to be intentionally vague (Report ¶ 274). The letter did not identify who had reviewed Sgt. Ballou's file, and although Sgt. Ballou presumably knew what was in his file, no one at the AGO had reviewed it. The fact remains, though, that the purpose of the letter was to inform Judge Kinder whether the AGO was withholding any documents from Sgt. Ballou's file based on privilege grounds. Foster had been told that everything had been produced – that information turned out to be incorrect – but the letter was accurate in stating that nothing was being withheld on privilege grounds.

Kris Foster's final substantive involvement in the Farak-related discovery issues was at a hearing on October 2, 2013 before Judge Kinder. Foster acknowledged that she had not reviewed any documents (Report ¶ 305) and that Anne Kaczmarek and Sgt. Ballou had told her that there was nothing more to turn over (Report ¶ 302). Bar counsel charged in the Petition for Discipline that Foster had committed fraud on the court at the October 2 hearing, by failing to correct alleged false statements made to the Court in her September 16, 2013 letter (Petition ¶ 152). The SHO found that bar counsel had failed to prove any charged misconduct involving the October 2 hearing (Report ¶ 380).

SUMMARY OF THE ARGUMENT

1. The Petition charged Foster with engaging in an intentional scheme to conceal exculpatory evidence. The scheme, which was never supported by any possible motive, involved Foster knowingly violating a direct order of a Superior Court judge that she personally review the documents in the file, knowingly misrepresenting in a letter to the Court that Sgt. Ballou's file had been reviewed and nothing was being withheld, and knowingly misrepresenting to the Court this misrepresentation at a later hearing.

The SHO rejected all of these charges, finding that:

- The order supposedly instructing Foster to personally review the file did not exist. The oral instructions from the Court were properly understood to be an order to the AGO, not to Foster personally, exactly as she had contended.
- Because the personal order did not exist, Foster did not and could not misrepresent her compliance with the terms of the non-existent order.
- Because no misrepresentation had been made, Foster was under no obligation to correct the non-existent misrepresentations.

(pp. 11-14).

What the SHO found as to Foster was a far cry from the intentional and knowing misconduct charged in the Petition. The SHO found that she was assigned work that she lacked the experience to perform and that she was inadequately supervised by her superior, who lied about whether he had approved a critical letter. He found that she had violated the Rules regarding competence and diligence, and that in one instance this was prejudicial to the administration of justice and reflected adversely on her fitness (pp. 14-16).

The presumptive sanction for unintentional conduct of this type is, at most, a public reprimand. Once the presumptive sanction is established, the next step is to determine whether the mitigating and aggravating factors warrant an adjustment. In this case, the mitigating and

aggravating factors largely cancel each other out. But to the extent an adjustment is appropriate, the mitigating factors predominate (pp. 16-20).

The SHO never says what the presumptive sanction should be. Instead, he inappropriately relies on uncharged misconduct. He notes that the presumptive sanction for the uncharged misconduct would be a year and a day suspension, which is exactly the same sanction he recommends for the much less serious misconduct with which Foster was charged and for which he found her responsible. Thus, the SHO bases his entire recommendation on conduct that was never charged, which Foster did not know would be subject to scrutiny, and as to which she did not have an opportunity to defend herself. In this regard, it is important to note that Foster successfully defended herself against the charged intentional misconduct. There is every reason to believe that she would have been equally successful in defending against the uncharged misconduct (pp. 20-28).

The SHO never addressed the application of Mass. R. Prof. C. 5.2(b) to the facts as found. The SHO expressly found that Foster was assigned work she was not competent to handle, and she was then poorly supervised. Her supervisor, Randall Ravitz, approved the letter to the Court to which the SHO found to be intentionally vague and misleading. It should be no surprise that the end product was a poor one, but the fault rests more with the supervisor, who clearly violated Rule 5.1, than with Foster, who only did the tasks she was assigned and confirmed her instructions and actions every step of the way. Whether Foster's subordinate status is deemed exculpatory under Rule 5.2, it is, at a minimum, a substantial mitigating factor and should have been addressed in the SHO's Supplemental Report (p. 28-31).

GROUNDS FOR THE APPEAL

1. The findings the SHO made in the Hearing Report establish that Kris Foster engaged in negligent conduct in connection with the September 9, 2013 hearing and the September 16, 2013 letter. He properly rejected bar counsel's charges of intentional misconduct. The presumptive sanction for the violations that bar counsel charged and proved as to Kris Foster is at most a public reprimand.

2. The SHO's recommended sanction of a suspension of a year and a day was impermissibly based on uncharged misconduct as an aggravating factor and should be disregarded.

3. Rule 5.2(b) was expressly pleaded and briefed and substantial evidence concerning it was presented. Foster was at all times an inexperienced subordinate lawyer, who relied on the guidance of her supervisors. The Report, however, makes none of the factual findings the Rule requires and disposes of the issue in a one sentence footnote. The Supplemental Report does not address the issue at all. It was an error for the SHO not to address and apply Rule 5.2(b) to the facts of this case. Properly applied, given the findings of fact by the SHO as to Foster's in experience and subordinate status, it should have at least been found to be a substantially mitigating factor.

ARGUMENT

I. THE SPECIAL HEARING OFFICER'S RECOMMENDATION THAT KRIS FOSTER BE SUSPENDED FOR A YEAR AND A DAY IS NOT SUPPORTED BY THE RECORD AND IS NOT WARRANTED

In determining an appropriate sanction, one begins with the sanction that would be warranted absent any mitigating or aggravating factors. See Matter of Kane, 13 Mass. Att'y Disc. R. 321, 324 (1997). The SHO is the sole judge of credibility. Matter of Saab, 406 Mass. 315, 328 (1989). The Board, however, may make its own independent findings of fact based on the

evidence, although deference may be given to the SHO. The Board reviews sanction recommendations de novo with no deference to the SHO.

This determination involves a two-part analysis. First, one determines the presumptive sanction for the violations found on the proven charges brought by bar counsel. Second, one then applies appropriate mitigating and aggravating factors to the presumptive sanction.

This analysis establishes three propositions about the sanctions appropriate for Kris Foster. First, the conduct for which she was found responsible was non-intentional misconduct. The SHO specifically rejected the charges of intentional misconduct. Second, the presumptive sanction for non-intentional misconduct is either an admonition or a reprimand depending on the existence or potential existence of serious injury to a client or third party. The presumptive sanction is not a suspension. Third, the SHO's reliance on uncharged misconduct as an aggravating factor to increase what should be, at most, a reprimand into a suspension was improper.

A. The SHO Correctly Found That Kris Foster Did Not Engage In Intentional Misconduct

There is a marked disparity between the charges bar counsel brought against Kris Foster in the Petition for Discipline and the findings of the SHO. The case bar counsel charged was strikingly different from the case bar counsel proved. The charges against Foster are all found in Count III of the Petition. They fall into four categories. Here is a comparison of the charges and the conclusions of law relating to the charges.

Charges Relating to the September 9, 2013 Hearing Before Judge Kinder

Charges. These charges relate to Foster's handling of the Watt subpoena and the Rodriquez and Penate motions. Bar counsel charged violations of Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 3.4(c), 3.4(a), 8.4(a), 8.4(d), and 8.4(h) (Petition ¶ 148). The charges of violations of Rules 1.1, 1.2(a), and 1.3 are essentially negligence-based charges. The other charges are more serious, involving as they do intentional misconduct.

Conclusions. The SHO found that Foster had mishandled the subpoena and motions. He found, however, that bar counsel had proved only violations of Rules 1.1, 1.2(a), and 1.3. (Report ¶ 372).

Charges Relating to the Failure To Review Sergeant Joseph Ballou's File

Charges. Bar counsel charged that Foster had failed to comply with an order from Judge Kinder that she personally review Sgt. Ballou's file, and that she failed to ensure that his file had been reviewed. Bar counsel charged violations of Rules 1.1, 1.2(a), 1.3, 3.4(c), 8.4(d), and 8.4(h) (Petition ¶ 150).

Conclusions. The SHO found that, contrary to bar counsel's charge, Judge Kinder had not ordered Foster to personally review Sgt. Ballou's file. The SHO did find that Foster failed to have someone at the Attorney General's Office review the file and that this conduct violated Rules 1.1, 1.2(a), and 1.3. He rejected the more serious charges (Report ¶ 376).

Charges Relating to the September 16, 2013 Letter to Judge Kinder

Charges. Bar counsel charged that Foster knowingly made materially misleading statements in her September 16, 2013 letter to Judge Kinder in which she informed him that the AGO was not withholding any documents on grounds of privilege. Bar counsel charged Foster with violations of Rules 3.3(a)(1), 4.1(a), 8.4(c), 8.4(d), and 8.4(h). Alternatively, bar counsel charged that Foster had made statements in the letter in reckless disregard for whether they were true in violation of Rules 8.4(c), 8.4(d), and 8.4(h) (Petition ¶ 151).

Conclusions. The SHO rejected the charge that Foster had made knowing false statements of material fact. Instead, he found that she had "relied, albeit unreasonably, on statements of others who were more senior and more knowledgeable" than she was. Her conduct, while not intentional, demonstrated a lack of competence and diligence, was prejudicial to the administration of justice, and reflected adversely on her fitness to practice law. He found that her conduct violated uncharged Rules 1.1, 1.2(a), and 1.3 and charged Rules 8.4(d) and 8.4(h). (Report ¶ 378).

Charges Relating to the October 2, 2013 Hearing

Charges. Bar counsel charged that Foster had knowingly failed to correct the false statements of fact she had previously made to Judge Kinder at the September 9 hearing and in the September 16 letter. This alleged failure to make corrections occurred "on or after her Court appearance on October 2, 2013 . . . ," and violated Rules 3.3(a)(1), 8.4(c), 8.4(d), and 8.4(h) (Petition ¶ 152)**.** Apart from the alleged failure to correct earlier statements, there was no charge of any other misconduct at the October 2 hearing or thereafter.

Conclusions. The SHO found that "bar counsel has not proved these charges.". He further found that with respect to any other statements Foster made at the October 2 hearing, the statements did not relate to the September 16 letter, and, as a result, he could not "conclude that Foster was actually put on notice that all of her actions at the October 2 hearing 'would be subject to scrutiny.'" (Report ¶ 380).

Without minimizing the gravity of the violations the SHO found, it is significant that he rejected the most serious charges of intentional misconduct. All of the charges he found against Foster related to her conduct at a single hearing on September 9, 2013, and to a letter on September 16, 2013 concerning that hearing. As to the hearing, he found that Foster had had no experience in responding to subpoenas and that given the significance of the matter she should not have been given the assignment (Report ¶ 162; Supp. Report ¶ 13). The September 16 letter, while intentionally vague, had been reviewed and approved by her supervisor Randall Ravitz (Report ¶ 272; Supp. Report ¶ 15). Bar counsel failed to prove any charged misconduct at the October 2, 2013 hearing or thereafter. **Significantly, the SHO found that as to any uncharged misconduct at the October 2 hearing, Foster was not on notice that all her actions at that hearing would be the subject of the disciplinary proceeding (Report ¶ 380).**

The findings against Foster were substantially based on lack of competence and diligence. The sole exception is the findings relating to the September 16, 2013 letter Foster wrote to Judge Kinder. The SHO found violations of 1.1, 1.2(a), 1.3, 8.4(d) and 8.4(h). Those findings, however, suffer from two defects. First, the Petition for Discipline did not charge violations of Rules 1.1, 1.2(a), and 1.3 in connection with the letter (Petition ¶ 151). The SHO found those violations on his own, and they are of doubtful validity. See Matter of Discipline of an Attorney, 448 Mass. 819, 825 n. 6 (2007) (error for hearing committee to find a violation of an uncharged rule); Matter of Orfanello, 411 Mass. 551, 556 (same).

Second, the finding of a violation of Rule 8.4(d) is not supported by the evidence. That rule proscribes conduct that is "prejudicial to the administration of justice." The Court defined that phrase in Matter of Discipline of Two Attorneys, 421 Mass. 619 (1996) as follows:

> "[t]he term is not so broad as to include all conduct which is illegal but rather those activities [such as bribery, perjury, misrepresentation to a court] 'which undermine [ ] the legitimacy of the judicial processes.'" Id. at 628, quoting Florida Bar v. Pettie, 424 So. 2d 734, 737-38 (Fla. 1983).

Rule 8.4(d) applies only where the conduct is "flagrantly violative of accepted professional norms." Id., quoting Matter of Hinds, 90 N.J. 604, 632, 449 A.2d 483 (1982). See Matter of the Discipline of an Attorney, 442 Mass. 660, 668 (2004) (to violate Rule 8.4(d), conduct must be "egregious"). The Rule has been applied only in narrow circumstances and always in cases involving intentional misconduct. See, e.g., Matter of Budnitz, 425 Mass. 1018 (1997) (lying under oath to grand jury); Matter of Gargano, 460 Mass. 1022 (2011) (intentional false statements to court); Matter of Finn, 433 Mass. 418 (2001) (lying on bar application); Matter of Moran, 479 Mass. 1016 (2018) (intentionally filing fraudulent estate accounts); Matter of Grella, 438 Mass. 47 (2006) (assault and battery on respondent's wife). Without these constraints, the Rule "presents the risk of vagueness and arbitrary application." Two Attorneys, 421 Mass. at 628-29. The charge here does not involve intentional misconduct. This case does not involve bribery or perjury, and the SHO specifically rejected charges of misrepresentation (Report ¶ 378). None of the usual predicates for a Rule 8.4(d) violation exists. Even if one assumes the finding of violations of Rules 1.1, 1.2(c), and 1.3 was valid, the totality of the misconduct does not violate Rule 8.4(d). See Bar Counsel v. An Attorney, BBO File No. C-2-19-00258083 (Board Memorandum, Nov. 8, 2021) (fact that respondent misrepresented facts in a motion and was found to have violated Rules 1.1 and 1.3 warranted an admonition and did not constitute Rule 8.4(d) violation).

This leaves the finding of a violation of Rule 8.4(h), conduct reflecting adversely on a lawyer's fitness to practice law. In a general sense, one could say that a violation of any of the Rules of Professional Conduct reflects adversely on a lawyer's fitness. As a free-standing violation, however, Rule 8.4(h) suffers from the same problems of vagueness and arbitrary application as Rule 8.4(d). That is why it is almost always "joined with a rule that sanctions more specific conduct, such as Rule 8.4(c) . . . ." Matter of Discipline of an Attorney, 451 Mass. 131, 145 n. 21 (2008). The few cases in which only a Rule 8.4(h) violation is charged are usually minor and usually result in an admonition. See Admonition No. 20-07, 2020 WL 8839428 (2020) (threatening opposing counsel at a hearing); Admonition No. 99-26, 1999 WL 33721419 (2020) (making sexually suggestive remarks). Even if one assumes that the Rule 1.1, 1.2(a), 1.3 findings are valid, the finding of a violation of Rule 8.4(h) adds nothing. If, as is likely, the Rule 1.1, 1.2(a), and 1.3 findings are not valid because bar counsel did not charge them, then Rule 8.4(h) as a stand alone violation is unduly vague.

B. The Presumptive Sanction for Lack Of Competence And Inadvertence By An Inexperienced Attorney Who Was Improperly Supervised Is At Most A Reprimand And Is Not a Suspension

The SHO proceeded on the assumption that "Massachusetts provides no precedent for determining appropriate sanctions in a case of this type." (Supp. Report p. 16). This is only partially accurate. Although the specific facts of this case are unique, Massachusetts law provides guidance for the generic type of misconduct at issue. This case involves the issue of the appropriate sanction for a public official who has violated an ethical rule in the performance of her duties. The American Bar Association's Annotated Standards for Imposing Lawyer Sanctions (2d ed. 2019)

("ABA Standards") provide specific guidance for cases such as this.[1] The Board and the Court have cited them with approval and have relied on them in formulating appropriate sanctions. See Matter of Kane, 13 Mass. Att'y Disc. Rep. 328; Matter of Palmer, 413 Mass. 33, 37 (1992) (noting the Court's prior approval of the ABA Standards); Matter of Grella, 438 Mass. 47, 52 n. 10 (2002); Matter of Dawkins, 412 Mass. 90, 97 (1992); Matter of Griffith, 440 Mass. 500, 509 (2003); Matter of Kerlinsky, 406 Mass. 67, 76 (1989).

The most relevant section of the ABA Standards is § 5.2, which deals with "public officials who engage in conduct that is prejudicial to the administration of justice . . . ." The ABA Standards specifically apply to prosecutors in the context of their handling of exculpatory evidence. ABA Standards at 233-35, 303-305. Although Foster was not acting as a prosecutor, her role in responding to the subpoenas and motions seeking exculpatory evidence is sufficiently close so that § 5.2 should control. That section draws two critical distinctions in determining the appropriate sanction. First, it distinguishes between intentional conduct and negligent conduct. Second, it distinguishes between cases in which there is injury or potential injury and cases in which there is little or no injury or potential injury. Cases involving intentional conduct presumptively call for disbarment or suspension. See § 5.21 (disbarment for misuse of position with intent to obtain benefit for oneself or with intent to cause harm to a party or the legal process); § 5.22 (suspension for knowingly failing to follow proper procedures). Cases involving negligent conduct presumptively call for a reprimand or an admonition. Whether conduct warrants a reprimand or admonition depends on the presence of injury or potential injury. Section 5.23 reads:

> Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or

[1] Although Foster raised and applied the ABA Standards in her sanction briefing, the SHO did not address or even refer to them in his Supplemental Report on Aggravating and Mitigating Factors.

> rules and causes injury or potential injury to a party or to the integrity of the legal process.

Section 5.24 reads:

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

The guidelines the Board established in Kane are consistent with the ABA Standards:

> 1. Admonition is generally appropriate when a lawyer has failed to act with reasonable diligence in representing a client or otherwise, and the lawyer's misconduct causes little or no actual potential injury to a client or others.
>
> 2. Public reprimand is generally appropriate where a lawyer has failed to act with reasonable diligence in representing a client or otherwise has neglected a matter and the lawyer's misconduct causes serious injury or potentially serious injury to a client or others.
>
> 3. Suspension 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 potential serious injury to a client or others.

13 Mass. Att'y Disc. R. at 327-28. Bar counsel has "a heavy burden to demonstrate . . . why the sanctions as recommended [in Kane] . . . should not be imposed." Id. at 329.

The charged misconduct the SHO found as to Foster involved a single set of facts and a single assignment: handling a hearing on September 9, 2013 and then writing a letter to the judge concerning that hearing. The findings do not support a claim of either repeated failures to act with reasonable diligence or a pattern of neglect. Compare In re Gould, 253 A.D.2d 233, 237, 686 N.Y.S.2d 759, 761 (1999) (three instances of failures to communicate is not a "pattern of neglect") and In re Reardon, 759 A.2d 568, 576 (Del. 2000) (two cases of misconduct did not establish a "pattern" of neglect) with Matter of Zak, 476 Mass. 1034, 1038 (2017) ("repeated and multiple ethical violations in connection with a loan modification and mortgage foreclosure cases over a

number of years" warranted enhanced sanctions). See also Matter of McInerney, 389 Mass. 528, (1983) ("persistent and extended pattern of improper and unethical behavior" including a prior suspension for similar conduct); Matter of Lansky, 22 Mass. Att'y Disc R. 446, 447, 450 (2006) ("pattern of neglect" extending over eight years where respondent already had prior admonition for two other cases of neglect).

Whether Foster's conduct caused harm is a closer question. There is no question that the Farak matter caused harm to the criminal justice system, and the SHO noted that he "accept[s] 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." (Supp. Report ¶ 36). But accepting bar counsel's description of the harm is not the same as finding that Foster caused that harm, and the finding the SHO made as to Foster tends to negate causation. As a mitigating factor, he found that "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 . . . . 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." (Supp. Report ¶ 14). The SHO dealt more specifically with this aspect of the causation element in his findings as to John Verner. Specifically, he found 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 part of Ballou's file), were deliberate acts for which Verner bore no responsibility." (Supp. Report ¶ 12). Two points bear noting about this finding. First, if Kaczmarek's statements to Verner were deliberate acts intended to mislead him, then the statements are equally deliberate acts intended to mislead Foster.

(Supp. Report ¶ 14). Second, Foster was also a recipient of Kaczmarek's September 10, 2013 email implying that the mental health worksheets had been turned over (Report ¶¶ 231, 232), and the SHO specifically found that Kaczmarek had told Foster on September 10, 2013 that "everything had been turned over." (Report ¶ 237). Further, the SHO found that "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." (Supp. Report ¶ 46).

The critical causation issue is whether a different outcome would have ensued had Foster personally reviewed Sgt. Ballou's file, however that file is defined and whatever it might have included. Having been told by both Ballou and Kaczmarek that everything had been turned over, even if Foster had seen the mental health worksheets, she could reasonably have assumed that they had already been produced. At a minimum, bar counsel has not proved that a different result would have ensued.

There is a compelling argument that Kaczmarek's intentional conduct cut off causation with respect to Foster just as it did with respect to Verner, but the Board need not resolve that issue to arrive at a presumptive sanction. Even assuming Foster's conduct caused actual harm, the presumptive sanction under both the ABA Standards and Kane is at most a reprimand, not a suspension.

II. THE SHO'S HEAVY RELIANCE ON UNCHARGED MISCONDUCT TO SUBSTANTIALLY INCREASE THE RECOMMENDED SANCTION WAS INCONSISTENT WITH LONG STANDING, AND RECENTLY REAFFIRMED, BOARD PRECEDENT.

Before one considers the effect of mitigating and aggravating factors, the presumptive sanction is at most a reprimand. This result is required by the precedent of the Court and the Board

as well as by the ABA Standards. The aggravating factors found by the SHO should not change that result.

The primary aggravating factor the SHO uses to justify his recommendation of a year and a day suspension is uncharged misconduct. This involved Foster's appearance at a motion hearing before Judge Kinder on October 2, 2013 and her testimony before Judge Carey in December 2016 (Supp. Report ¶¶ 19, 28). He noted that "[h]ad fraud on the Court been charged as to the uncharged misconduct [at the October 2, 2013 hearing] I have found was proven as to Foster, the presumptive sanction would have been a one-year suspension." (Supp. Report at p. 19). Bar counsel, however, did not charge that conduct, and he was unable to prove the intentional misconduct that he did charge. Nevertheless, the SHO recommended the same sanction that would have been appropriate had Foster been charged with the uncharged misconduct, had been given notice and an opportunity to defend against it, and had been found to have committed it.

Before discussing the two instances of uncharged misconduct, a discussion of the role of uncharged misconduct is in order. While uncharged misconduct can be considered in some circumstances as an aggravating factor – see Matter of an Attorney, 448 Mass. 819, 825 n. 6 (2007) – its use presents serious issues of unfairness. On a basic level, the unfairness is structural. "While a respondent must plead facts in mitigation, B.B.O. Rule, Sec. 3.15(f), the same rule does not apply to bar counsel with regard to facts in aggravation. Thus, a respondent approaches trial at a significant disadvantage." Matter of Kelley, 37 Mass. Att'y Disc. R. ___, 2021WL3704010 at *10 n. 4 (July 16, 2021).[2] A respondent is entitled to "fair notice of the charges and an opportunity for explanation and defense." Matter of Gargano, 460 Mass. 1022, 1024 (2011), quoting Matter

[2] The single justice reported the Kelley case to the full Court in July 2021. None of the issues underlying the report involve the Board's instructions regarding the role of uncharged misconduct.

of Kenney, 339 Mass. 431, 436 (1987). "By asserting uncharged misconduct as an aggravating factor, bar counsel potentially deprives respondents of the opportunity to marshal evidence in their own defense." Kelley, 2021 WL 3704010 at *8. For this reason, the Board has recently announced that "while at times we may consider uncharged misconduct in aggravation, . . . such circumstances should be the exception, not the rule . . .. If the misconduct is sufficiently serious to warrant a sanction, bar counsel should plead it in the Petition for Discipline." Id. "[I]t is the rare case where bar counsel may assert uncharged misconduct in aggravation." Id. at *10 n. 4.

Against this legal background, it is apparent that using uncharged misconduct involving Foster's actions at the October 2, 2013 hearing and her testimony at the December 2016 hearing before Judge Carey as aggravating factors was error for at least two reasons. First, Foster was not on notice that the uncharged conduct would be subject to scrutiny. Second, Foster's statements are not intentional misrepresentations to a court.

a. The October 2, 2013 Hearing

Recall that bar counsel did charge Foster with intentional misconduct at the October 2 hearing. This misconduct, however, was limited to failing to correct earlier alleged intentional misrepresentations in the September 16, 2013 letter (Petition ¶ 152). The SHO found that Foster had made no intentional misrepresentations in the letter (Report ¶ 378), and found that bar counsel had not proved any of the charges relating to the October 2 hearing (Report ¶ 380). Most significantly for purposes of considering uncharged misconduct, the SHO added that he could not "conclude that Foster was actually put on notice that all her actions at the October 2 hearing 'would be subject to scrutiny.'" (Report ¶ 380). This finding alone prevents the use of any uncharged conduct at the October 2 hearing from being considered in aggravation. Although Foster is not entitled to all of the due process rights of a criminal defendant, she is entitled to the basic right to know the charges against her and to defend against them. Gargano, 460 Mass. at 1024.

This is not simply a formal objection. The right to have notice of the charges, the right to be heard on them, and to mount a defense are all instrumental to revealing the truth. Bar counsel charged Foster with intentional misconduct in connection with the September 9 hearing, the September 16 letter, and the October 2 hearing. Bar counsel was unable to prove any of the intentional misconduct he charged. Had Foster been on notice that all of her conduct at the October 2 hearing would be subject to scrutiny, there is no reason to believe she would not have been able to mount an effective defense against those charges. For example, the SHO points out that at the October 2 hearing Foster opposed Luke Ryan's request to inspect the physical evidence by arguing that allowing him to inspect the evidence would "open the floodgates" for other defense counsel to inspect the evidence (Supp. Report ¶¶ 22, 24). Foster's argument, however, accurately reflected the position of the AGO: it would not consent to any defense counsel inspecting the physical evidence until the Farak prosecution was concluded (Report ¶¶ 251-56). This was not Foster's personal view nor was it a policy of her making. As an AAG, she was accurately representing the position of the Criminal Bureau of the AGO on this issue.

The other uncharged aggravating factor the SHO found with respect to the October 2 hearing is that Foster stated in court that the AGO was not withholding exculpatory evidence, that she had spoken to Anne Kaczmarek and Joseph Ballou, and that they both had said that everything has already been disclosed (Supp. Report ¶¶ 25, 26). The SHO considered these statements to be misrepresentations because they purported to be on her personal knowledge when they were not (Supp. Report ¶ 27). The alleged misrepresentation, however, was a statement as to what other people had told Foster, and the facts found by the SHO support the conclusion that Foster had spoken to Anne Kaczmarek and Joseph Ballou, and that they both had said that everything had already been disclosed. The SHO specifically found that Foster and Kaczmarek had a conversation

on September 10, 2013 and that Kaczmarek had told Foster that everything had been produced (Report ¶ 237). Foster also heard Joseph Ballou testify under oath in open court that everything in his file had been turned over and that he believed everything in Kaczmarek's file had been turned over (Report ¶ 217). This is a more than sufficient basis to support the statement Foster made on October 2. Had she known those statements would be the subject of scrutiny, she would have developed a defense that is amply supported by the evidence, and she would have dealt with those issues squarely in her Request for Findings and Rulings.

b. The December 2016 Hearing

If, as the SHO found, Foster had no notice that all of her conduct at the October 2 hearing would be under scrutiny, she had no notice that any of her testimony at the December 2016 hearing would be under scrutiny. The Petition for Discipline mentions the hearing in two paragraphs:

> 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.

In contrast to the October 2 hearing, bar counsel brought no charges against Foster or any of the other respondents in connection with the December 2016 hearing. Indeed, bar counsel's position at the hearing of this case was that Foster's earlier testimony at the December 2016 hearing was true, and bar counsel did not argue in his Brief on Aggravation Mitigation and Sanctions that anything Foster did or said at the December 2016 hearing constituted uncharged misconduct. See Bar Counsel's Brief at 10-14. There is a clear lack of notice and opportunity to explain and defend against what the SHO now describes as uncharged misconduct.

And the four specific instances of uncharged misconduct the SHO notes could, indeed, have been explained and a compelling defense presented. The circumstances under which Foster testified at the hearing are necessary to give context to the SHO's findings. At the time of the hearing in December 2016, Foster had been gone from the AGO for a year, having left in January 2016. She was on maternity leave with a two-month-old baby (Report ¶ 348). She had asked the AGO to represent her, but she was required to sign an engagement letter in which she waived many of her rights (Id.). She was not carefully prepared to testify about things that had happened two to three years earlier, and the AGO developed a conflict of interest in representing her, which SHO found became "dramatically" apparent. (Report ¶ 355). Most significantly "the AAGs sought to blame Foster – whom they represented – for misrepresentations before Judge Kinder . . . . As Foster described it, they '[t]hrew me under the bus.'" (Report ¶ 356).

The first instance of uncharged misconduct is that Foster testified incorrectly that she had not "worked closely with" Susanne Reardon on Farak-related issues (Supp. Report ¶ 28). The phrase "worked closely with" is not an objective criterion. Randall Ravitz was Foster's immediate supervisor (Report ¶ 18). He assigned Foster the Farak matter (Report ¶¶ 162-164) and approved the letter she wrote to Judge Kinder (Report ¶ 272). Ravitz was out of the office around September 6, 2013 for a religious holiday so Reardon edited Foster's work on the motion to quash the Watt subpoena. (Report ¶¶ 189, 197 n. 22). Whether Foster worked closely with Reardon is a matter of opinion that was entirely irrelevant to the purpose of the hearing. The second and third instances involve Foster's testimony to the effect that she was not sure or did not remember that in November 2014 the AGO possessed documents that had not been turned over and that Luke Ryan had advised the AGO that he had found documents that had not been produced (Supp. Report ¶ 28). A review of the transcript shows that her answers were based on a lack of memory as to the specific time

frame, not to the fact that these things did not happen (Ex. 164 at 32, 36-38). She never disputed that documents had not been turned over or that Luke Ryan had found them after an inspection. She cannot be faulted for not remembering dates, as opposed to events, two years after the fact and a year since she had left the AGO. Whatever these three pieces of testimony might be, they are not false statements of fact, let alone false statements of material fact.

The fourth instance of uncharged misconduct involved this question and answer (Supp. Report ¶ 28):

> Q. (By Mr. Ryan) Now I just want to be clear, you did not review any documents that Anne Kaczmarek possessed?
>
> A. I haven't reviewed any documents related to Sonja Farak ever. (Ex. 164 at 41).

This answer is not only true, it was Foster's failure to review any documents related to Farak that was the catalyst for this prosecution. The Hearing Report is replete with findings concerning Foster's failure to review documents. See, e.g., Report ¶ 189 ("Despite having never reviewed Ballou's file…"); ¶ 196 ("aside from requesting Ballou's grand jury testimony, she asked for and reviewed nothing else"); ¶ 202 ("Foster filed these materials without having reviewed Ballou's file"); ¶ 203 (Foster's reliance on statements of Kaczmarek rather than reviewing the file herself was unreasonable); ¶¶ 211, 300 (acknowledging to the court that she never personally reviewed the file); ¶ 305 ("I infer from Judge Kinder's comments to Foster that he was not favorably impressed by her lack of expected preparation and her failure, yet again, to review any of the materials about which she was writing and speaking."); ¶ 379 ("…she did not educate herself about the Farak investigation and documents obtained from Farak, she apparently did not see the pros memo, which would have been available to her, and did not look at Kaczmarek's trial box or her emails or Ballou's file.")

When one removes the uncharged misconduct from the analysis, one is left with a presumptive sanction of, at most, a public reprimand. The mitigating factors the SHO found are compelling. First, Kris Foster had no experience in handling subpoenas and should not have been given the assignment (Supp. Report ¶ 13). Second, she was misled by Anne Kaczmarek into believing that everything had been disclosed and that this "mitigates her conduct in the sense that it is causally related to the misinformation she gave to Judge Kinder about what had been produced." (Supp. Report ¶ 14). Third, her supervisor Randall Ravitz reviewed and approved the September 16, 2013 letter to Judge Kinder before she sent it (Supp. Report ¶ 15). These factors paint a vivid picture of an inexperienced lawyer who relied on information she received from her professional colleagues and who sought and obtained the approval of her superiors. They are entirely consistent with the SHO's findings of essentially negligent misconduct and his categorical rejection of the charged intentional misconduct.

It is paradoxical that the SHO should place such emphasis on what he sees as uncharged misconduct. After all, his 92-page Report is largely devoted to findings that the intentional misconduct with which Foster was actually charged did not occur. The paradox is heightened when one considers that the SHO saw first-hand how an actual defense that focused on real charges can illuminate the truth and aid in the fact-finding process. The SHO overstepped his bounds by finding misconduct that bar counsel did not charge and presuming that he could evaluate possible defenses without input from Foster's counsel. This reaches a level of unfairness that violates due process.

It is also significant that the uncharged misconduct involved intentional misrepresentations, which is a particularly treacherous area. A knowing misrepresentation requires actual knowledge of the falsity of the statement. Mass. R. Prof. C. 1.0(g). It is not enough

that Foster may have made statements that turned out to be incorrect. Considering the findings that Anne Kaczmarek was actively concealing the truth and that she had misled Foster and others as to what had been disclosed, a finding of a knowing misrepresentation by Foster would not be supported by any evidence.

The Board has held repeatedly that notice and an opportunity to be heard are not mere formalities. This case demonstrates the soundness of that principle. A respondent is entitled to know the charges against her and to present a defense to those charges. This is a matter of both fundamental fairness to the respondent and assurance that the fact-finding process is accurate and based on a well-developed record. The SHO is entitled to substantial deference on matters of credibility. But it was clear error for him to depart from his role as fact finder to find aggravating factors based on uncharged misconduct that even he acknowledged Foster was not on notice would be subject to scrutiny.

Considering the remaining aggravating factors on their own, and without minimizing them, they are not enough to convert what should be a reprimand into a suspension of a year and a day. Considering them in conjunction with the mitigating factors, they at worst cancel each other out. One is left with the presumptive sanction of no more than a public reprimand.

III. THE SHO FAILED TO CONSIDER THE RESPONDENT'S STATUS AS A SUBORDINATE LAWYER FOLLOWING THE INSTRUCTIONS OF A SUPERVISOR TO BE A MITIGATING FACTOR, THE MINIMUM REQURED BY MASS. R. PROF. C. 5.2.

The SHO failed to address in anything other than a cursory way the impact of Rule 5.2(b), which provides:

> A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

By its terms, the Rule is exculpatory, but at a minimum, it is a substantial mitigating factor. Indeed, it is the only mitigating factor expressly included in the Rules of Professional Conduct. Foster is not asking the Board to give the Rule exculpatory effect. She is, however, asking that the Rule be given substantial mitigative effect. Foster was at all times acting as a subordinate lawyer. She raised Rule 5.2(b) at the outset of the proceeding in her Answer. The importance of the Rule was raised at numerous critical junctures in the form of briefing, uncontested expert testimony, and proposed findings. The Report, however, disposes of the issue in a one sentence footnote. The Supplemental Report does not address it at all.

Foster's supervisor, Assistant Attorney General Randall Ravitz was expressly found to have given her an assignment beyond her experience level, (Report ¶ 162), and then to have failed to have "exercis[ed] appropriate supervisory responsibility" (Report ¶ 273). Rule 5.2(b) was clearly an overriding issue relevant to all of the claims against Foster. Notwithstanding the central importance of this issue, the SHO made no findings whatsoever concerning it. His entire discussion of this key issue in the Report is the following footnote:

> [30] Foster has argued that Rule 5.2(b) relieves her of responsibility for her disciplinary violations because she was a subordinate lawyer acting in accordance with her supervisors' instructions "on an arguable issue of professional duty." See generally Foster PFCs, p. 3, 33, 46. I have not found any pertinent cases accepting a 5.2(b) defense, and I reject this analysis. See generally In re Lightfoot, 217 F.3d 914, 917 (7th Cir. 2000) (reliance on a superior's order is a defense only when reasonable); In re Douglas' Case, 147 N.H. 538, 545, 809 A.2d 755 (NH 2002) (no "arguable question of professional duty" where lawyer's conduct was in clear violation of rules).

This is inadequate given the importance of the principles embodied in Rule 5.2(b). The SHO should have addressed the Rule in his Supplemental Report, and the Board should give it its full mitigating effect.

A. Bar Counsel Made Foster's Supervisor, Who Was Expressly Held to Have Provided False Testimony, A Key Witness Rather Than A Respondent

This case is unusual. Bar Counsel's theory of the case was that Foster was a rogue subordinate acting independently of her supervisor, Assistant Attorney General Randall Ravitz, the head of the Appellate Division. The SHO expressly rejected this theory, finding Ravitz's self-serving testimony about his ignorance of key events to lack credibility. The result was an anomalous situation. Virtually every case involving a Rule 5.2(b) defense involves a supervisor who was found responsible for a much more serious offense that typically renders the supervisor's instructions inherently unreasonable. The SHO could not find a case "accepting a Rule 5.2(b) defense" because no other disciplinary authority in the country has ever done what was done here: prosecute a subordinate lawyer while not only allowing the supervisor who approved the subordinate's conduct to go free, but also presenting the supervisor's false testimony as a centerpiece of the subordinate's prosecution.

B. The SHO's Findings Of Fact Support the Application of Rule 5.2 As A Substantial Mitigating Factor.

Although a lawyer's status as a subordinate lawyer is not always linked to inexperience, in this case they are. Foster had been practicing law for less than five years when the events at issue took place. (Report ¶ 18). Although she had substantial appellate experience, she had no experience in responding to subpoenas. (Report ¶ 162). She had been at the AGO for about a month when she was assigned to handle the subpoenas. Inexperience is a recognized mitigating factor. Matter of the Discipline of an Attorney, 448 Mass. 819, 834 (2007). "This factor typically carries the most weight when an inexperienced subordinate lawyer is carrying out the directives of a senior lawyer." Massachusetts Bar Discipline at 394. This describes Foster's role in this matter.

Foster had been told that everything had been turned over. (Report ¶ 237). The SHO found that "while Foster should have asked more questions of Kaczmarek, she relied on statements of

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

There is a clear and close connection between Foster's inexperience, her handling of the subpoenas, and her reliance on her supervisors, who gave her an assignment and then failed to give her proper support and guidance. She accepts responsibility for her shortcomings, but, as has been found, she did not act intentionally. Had she had more experience, there is still no guarantee that the outcome would have been different. It is not all obvious that the mental health worksheets would have been produced given Kaczmarek's intentional concealment.

Rule 5.2(b) is not a nullity. The SJC obviously intended it to apply to some situations. It is difficult to imagine a situation to which it would apply if not this one. Throughout this proceeding, bar counsel has made clear that he disapproves of Rule 5.2(b). The Rules of Professional Conduct, however, are promulgated by the SJC and it is the task of the Board to apply fairly and evenly all of the Rules, even those bar counsel might find inconvenient. Thus, it was an error for the SHO not to conclude that Rule 5.2, at the least should be applied as a substantially mitigating factor as to Foster, and the facts actually found by the SHO allow the Board to do that.

CONCLUSION

Kris Foster was a junior lawyer at the AGO who was given an assignment beyond her expertise. She was not supervised appropriately, and she was intentionally misled by professional colleagues in the AGO and State Police. Bar counsel was unable to prove any of the intentional misconduct with which he charged Foster. The SHO found she engaged in essentially negligent misconduct, which should have resulted in a recommended sanction of no more than a public reprimand. The SHO, however, recommended a suspension of a year and a day based on uncharged misconduct as an aggravating factor. The Board should reject the SHO's recommendation and order a sanction of no more than a public reprimand.

REQUEST FOR ORAL ARGUMENT

The respondent Kris Foster requests oral argument on her appeal.

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DATED: December 17, 2021

CERTIFICATE OF SERVICE

I, Kristyn M. Kelley, hereby certify that on this 17th day of December, 2021, I served the above document via email to:

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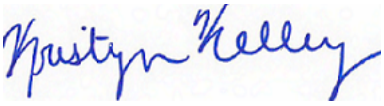

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