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

BAR COUNSEL, **Petitioner** **vs.** **LAURA MARSHARD, ESQ.,** **Respondent**	**B.B.O. File Nos. C5-14-0055** **C5-16-0008**

HEARING REPORT

On September 6, 2016, bar counsel filed a petition for discipline against the respondent, Laura Marshard, Esq. The petition charges that the respondent, an assistant district attorney, failed to disclose exculpatory evidence and wrongfully interfered with criminal defendants' access to defense testimony by raising witnesses' privilege against self-incrimination (count one); without obtaining counsel's assent, communicated with a represented witness in a criminal prosecution concerning the subject matter of the representation (count two); and either knowingly failed to correct false testimony before a grand jury, or failed to prepare for the grand jury proceedings sufficiently to recognize and correct the falsity (count three).

On November 7, 2016, represented by counsel, the respondent filed her answer. The answer denies that she failed to disclose evidence she knew was exculpatory (count one); asserts that her expressed concerns about witnesses' privileges were warranted and proper (count one); denies improperly communicating with a represented witness about the subject of the representation (count two); and denies knowing the grand jury testimony was false despite reasonable preparation (count three).

We held a telephonic pre-hearing conference on Monday, December 5, 2016.

We received the evidence at hearings on May 3, 4, 8, 9, and 11, and June 7, 13, and 26, 2017. The record was held open until July 6, 2017, while the parties and the committee eliminated unnecessary or irrelevant materials from the exhibits offered into evidence. Ultimately, seventy-six exhibits were admitted. Fourteen witnesses testified, including defense counsel in the three underlying criminal matters, members of the Office of the District Attorney for the Cape and Islands, the clerk of the Edgartown District Court, and the witness whose allegedly exculpatory statement the respondent was charged with wrongfully withholding.

On August 4, 2017, the parties filed their proposed findings and conclusions.

Introductory Statement

The respondent crossed an ethical line, and for that we recommend that she receive a public reprimand. Other conduct on her part was problematic but, in the rough-and-tumble world of criminal prosecutions, it did not cross the ethical line into the charged misconduct.

The parties over-litigated this case. Our findings in the numbered paragraphs below address the matters reasonably necessary for a fair determination of the issues. In Appendix A, we address certain matters the parties litigated at length, but which merit no more than summary discussion.

Findings and Conclusions[1]

Common Facts

1. The respondent, Laura Marshard, Esq., was admitted to the Massachusetts bar on May 20, 1991. Ans. ¶ 2.

2. At all relevant times, the respondent was an assistant district attorney in the Office of the District Attorney for the Cape and Islands. Ans. ¶ 3. She began working in that office

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[1] The transcripts shall be referred to as "Tr. [vol]:[page];" the matters admitted in the answer shall be referred to as "Ans. ¶_;" and the hearing exhibits shall be referred to as "Ex._."

We have considered all of the evidence, but we have not attempted to identify all evidence supporting our findings where the evidence is cumulative. We credit the testimony cited in support of our findings to the extent of the findings, and we do not credit contradictory testimony. In some instances, we have specifically indicated testimony that we do not credit.

around 2004. Tr. VI:146-147 (Trudeau); Tr. VII:5 (Marshard). She joined with "considerable" prior experience, and was assigned to Martha's Vineyard after a short training period. Tr. VII:6-12 (Marshard). "[A]lmost from the beginning" of the respondent's assignment on Martha's Vineyard she handled cases in the district, superior, and juvenile courts and before grand juries. Tr. VI:155 (Trudeau); Tr. VII:12, 18 (Marshard).

Count One (Exculpatory Evidence and Fifth Amendment Issues): Findings of Fact

3. This count concerns the respondent's conduct in connection with a prosecution for assault with intent to murder based on a fight that originated in a bar. Ultimately, we find that bar counsel did not carry her burden of proof to show misconduct when the respondent (a) did not receive any new exculpatory evidence from, or report to defense counsel concerning, her meeting with Christine Arenburg, who later testified for the defense, and (b) asked the court to inquire of defense witnesses Corey Randolph, and Josh Crossland (and, purportedly, Arenburg) whether they would raise their Fifth Amendment privilege against self-incrimination if called to testify.

A Disturbance at the Ritz; Divergent Witness Statements

4. On the evening of March 9 to March 10, 2013, a disagreement arose between Daryl Baptiste and Frank Cray (Frank) at The Ritz Cafè (The Ritz), a bar in Oak Bluffs, Martha's Vineyard. Ans. ¶ 4. According to Frank, it started when Frank bumped into Baptiste, who then said he'd killed people in New York for less. Ex. 1, at 0006.

5. Frank was at The Ritz with his brother, Jason Cray (Jason). Ans. ¶ 6. Baptiste was at The Ritz with Patrece Petersen, Josh Crossland, Tom Buckley, and Corey Randolph. Tr. I:202, Tr. II:90-91 (R.Moriarty); Ans. ¶ 5; Ex. 8, Ex. 19, at ¶ 9.

6. A fight later ensued involving, at least, Baptiste, Petersen, and the two Crays. Ex. 1.

7. The criminal case arising from this fight was beset with complications. The defendants had a history of violence, and the fight had resulted in severe injuries to the two Cray brothers. Tr. IV:116-118 (Amabile); Tr. VII:62-64 (Marshard); Ex.1, at 0012, 0044, Ex. 2. The charged crimes were black-on-white, and raised issues of racial profiling. Ex. 1, at 0005, Ex. 32, at 1201-1202. As described below, the police and the respondent chose to rely on the testimony of the white "victims" (Frank and Jason Cray), one of whom later changed a critical part of his story, and they showed little interest in the witnesses whose version of the facts favored the African American defendants (Patrice Petersen and Darryl Baptiste). In the end, the defendants were acquitted. Ans. ¶ 38.

8. The various witnesses disagreed about the circumstances the fight and the chronology of events. Their disagreements frame the significance of the defense witnesses whose testimony is at issue in this count, along with the respondent's actions regarding them.

9. On one version of events, Frank was cut by a razor or a knife when Baptise forced his way into the bar and wildly slashed at Frank, cutting Frank's neck and his coat. Frank ended up on the floor of the Ritz being choked nearly unconscious by Petersen, who was yelling that he would kill Frank. On another version, there had only been a scuffle in the bar when, following an earlier scuffle outside the bar, some one or more of the Petersen group briefly forced their way back in and were pushed back out; the fight during which Frank was choked occurred when Frank (a mixed martial artist, Ex. 1, at 0014), and his brother Jason (home on leave from military service) left the bar later in the night in pursuit of Baptist and Petersen. On this version, Frank was choked when Petersen came to Baptiste's defense as Frank was choking him. The statements do not all line up quite so neatly, of course, as between the prosecution and the defense; details diverge among witnesses on the same side. Ex. 1, 6, 7, 8, 12, 15, 21. At the outset of the prosecution, however, there was a fairly clear divergence on two points: where Frank's choking occurred; and who may have instigated the fight during which he was choked. Arenburg's statements, one of which the respondent did not disclose, related to those points.

Frank Cray's Credibility Problem

10. Frank gave a number of statements about the fight. His story grew in the telling and eventually he contradicted himself. Frank first said that Baptise had forced his way into the bar and cut him with a razor, then while he was still in the bar Petersen jumped on him from behind and choked him almost to the point of unconsciousness, but he was able to fight his way free. Ex. 1, at 0006. In the hospital after the fight, Frank further elaborated his story and told the police that employees of the Ritz told him to misrepresent that the fight had occurred outside of the bar.[2] Ex. 1, at 0012; Ex. 6. About five days later he added that while Petersen was choking him from behind he could see a murderous look in Petersen's eyes. Ex. 1, at 0014. When questioned in connection with an investigation concerning the Ritz's license, however, Tr. VII:80-81 (Marshard); Ex. 1, at 0019, Frank admitted that the choking by Petersen had happened outside of the bar. Ex. 1, at 0019-0020. The respondent ultimately chose to rely at trial on this latter version of Frank's story. Ex. 20.

11. The police reports do not describe Jason's statement to them; one characterizes it as the same account as Frank's. Ex. 1, at 0012. Jason's written statement, however, did not match Frank's first story. It described fighting outside of the bar. Ex. 7.

The Police Arrest Two Suspects

12. On March 10, 2013, the Oak Bluffs police peacefully arrested Petersen, Baptise, and Buckley. Ans. ¶ 13; Ex. 1, at 0009. Buckley told his and Baptiste's arresting officer that Baptiste had been in a fight the night before. Ex. 1, at 0009. Petersen admitted fighting and choking Frank, and he identified Baptise, who was then under arrest, as the other fight participant in his group. Ex. 1, at 0009. He also told the arresting officer that he and Baptiste had been attacked. Ex. 1, at 0009. Baptiste gave a voluntary statement to the police that day in

[2] We reject the respondent's argument that Frank had no reason to lie. If he aggressively pursued Baptiste and Petersen outside of the bar, he had a reason to fabricate an alternative story about the fight happening in the bar. He would then have a motive to preemptively undercut statements by the Ritz employees that the fight happened outside of the bar.

which he denied stabbing anyone. Beyond the brief summary in one officer's report, Ex. 1, at 0010, his statement was not successfully recorded. Ex. 1, at 0022.

Christine Arenburg's Written Statement

13. Christine Arenburg and her siblings owned the Ritz. Tr. V:58, 102 (Arenburg). Arenburg was the only bartender on the night of the fight. Tr. V:58-59, 79, 102 (Arenburg); Ans. ¶ 9.

14. The police did not interview Arenburg that night; she went to the police station the following morning to give a statement. Tr. V:69, 129-130, 135 (Arenburg); Ex. 1, at 0005, 0012, 0013 (police reports do not list Arenburg as a witness).

15. Arenburg's brief written statement to the Oak Bluffs Police that morning (Tr. V:69-70, 139-140; Ex. 8) stated, in full, as follows:

> There may have been an incident between the two a couple of days earlier, and there was an incident where I think his name is Corey hit Frank in the head. The group of about five men was asked to leave – they came back around 12:40 and were not allowed back in the building, the guy with the dreads got through and caused another fight[3] and was pushed out the door – by the time I got there he was just standing at the door yelling with people inside trying to keep him out Frank and his brother went up the street after them and I believe the fight continued.[4]

16. There is no question in this case that defense counsel received a copy of this statement. See, e.g., Tr. I:212 (R.Moriarty); Tr. IV:70 (Amabile).

17. We do not credit Officer Cassidy's description of Arenburg as a resistant witness that morning, a description the respondent suggests is consistent with her own interactions with Arenburg, described below. See Appendix A.

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[3] Arenburg suggested this may have been a bad choice of words; "he pushed through the door and made a commotion. The guys pushed him back out the door..." Tr. V:147. The "another fight" phrasing was also a poor choice of words; she was referring to the "altercation" over the spilled beer. Tr. V:147-148.

[4] Arenburg said she believed the "fight" (i.e., altercation between the Crays and the Petersen group) continued up the street "Because they came back all injured;" she didn't see the fight up the street. Tr. V:149.

Licensing Proceedings Against the Ritz Commence and Are Dropped Because of Problems with the Police's Witnesses

18. In the next few paragraphs we discuss a licensing proceeding against The Ritz, concerning the Ritz fight. During the investigation, Frank Cray's story changed and more exculpatory information from Arenburg came to light. These points are relevant to our assessment of the respondent's candor and the substance of her testimony; it is more likely than not that whatever part of this, if any, the respondent learned would have confirmed the exculpatory nature of Arenburg's statements and the threat they posed to the respondent's case.

19. At some time around March 29, 2013, Arenburg received notice, issued that day, of a hearing concerning the Ritz's liquor license, to be held on April 23, 2013, and based on the events during the fight. Tr. V:73, 75-76, 150 (Arenburg); Ex. 13. The notice included a copy of one or more police reports that included one or more statements by Frank about the fight. This was the first Arenburg knew of Frank's claim about the location of the fight. Tr. V:73 (Arenburg); Ex. 19, ¶ 28.

20. The licensing proceeding had been triggered at the request of Off. Morse, one of the officers who investigated on the night of the fight (Ex. 1, at 0008-09), and who claimed that the events of March 9th and 10th were the second fight at the bar and not properly reported. Ex. 10.

21. Arenburg considered the licensing hearing to be "pretty serious stuff," especially in light of a previous suspension of the bar's license. Tr. V:162 (Arenburg). Arenburg and her sister decided to meet with the Oak Bluffs police, Tr. V:76-77, 150-151 (Arenburg), having read the statements by the Crays in the police report. Tr. V:159-161 (Arenburg).

22. At some time between March 29, 2013 (Ex. 13) and April 12, 2013 (when the police investigation of the licensing issue was underway, Ex. 1, at 0018-0020), Arenburg and her sister met with Det. Morse and Lt. Williamson of the Oak Bluffs police department. Tr. V:158 (Arenburg); Ex. 15. She cannot recall exactly what she told them, Tr. V:162-163, but the

essence of Arenburg's version of the events in the bar has, all along, been: "There was no fight inside the bar. They were not on the floor getting beat up while people stood around and watched." Tr. V:163-164 (Arenburg). She "tried to basically tell [Williamson and Morse] what happened, that the fight didn't happen inside our building... [and told Morse and Williamson that] they [Frank and Jason Cray] left the building and went up the street somewhere and that's when they came back all beat up. ... Frank left first and Jason followed him. They were basically the only people left in the building at that point. . . ." Tr. V:78 (Arenburg); see also Ex. 19, ¶ 28. In response to the charge that the bar failed to report the fight, Arenburg said that the fight was reported by a cell phone call. Tr. V:78-79 (Arenburg); Ex. 19, ¶ 28.

23. Det. Morse did not write up Arenburg's statement and produce it to Petersen's defense counsel in a formal police report. Ex. 1; Tr. II:150-151 (R.Moriarty). We do not infer from this, as the respondent requests, that Arenburg provided no exculpatory or new evidence to the Oak Bluffs police in her meeting with Morse and Williamson.[5]

24. Whatever Arenburg told Williamson and Morse, however, there is no evidence before us that Morse advised the respondent of it. Bearing in mind the burden of proof, we find that bar counsel has not proved that the respondent knew the contents of that statement.

25. The investigation Lt. Williamson requested in connection with this meeting produced the statement by Frank in which he contradicted his original story. Ex. 1, at 0019-0020.

26. On April 20, 2013, Chief Blake of the Oak Bluffs Police withdrew the request for a hearing on the Ritz's license, writing that: "Lt. Williamson and Office Morse met with the

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[5] The respondent, who asks us to draw that hearsay inference, did not present Morse to explain his omission. As the instigator of the licensing proceedings (Ex. 10), Morse had a motive not to record and publish Arenburg's statements, which had contributed to the withdrawal of the licensing proceeding and contradicted his lead witness against Petersen and Baptiste until that witness changed his story. Morse had a ready excuse for not doing so, where he could credibly claim that the licensing issue was separate from the criminal investigation.

We do not credit the respondent's testimony that the interview that produced Frank's contradictory statement was part of standard follow-up investigation. Tr. VII:81-82 (Marshard). That interview was part of an investigation into the bar's license by two police officers, Lt. Williamson and Sgt. Curelli, who were not at the bar on the night of the fight, and did not take part in the arrests of Baptiste and Petersen. Ex. 1, at 0019.

owner in person at the station and after further review it appears that our case against them is weak. ... The [March 2013 bar fight] is still being investigated by this department criminally. It appears that the fight didn't take place inside and witness statements are shaky at best." Ex. 15.

27. The respondent acknowledges that she received a copy of the Chief's request to cancel the hearing "at some point during the process" and, therefore, knew that the town had not proceeded with the licensing hearing against the Ritz bar. Tr. VIII:73-74 (Marshard).

The Suspects Are Indicted

28. On April 1, 2013, a Dukes County grand jury returned indictments against Petersen and Baptiste based on the events at or near the Ritz. Ans. ¶ 14. The evidence was presented through Officers Cassidy and Morse. Ex. 14. Petersen was indicted for attempted murder, assault and battery and assault and battery with intent to murder; Baptiste, for assault and battery and assault with a dangerous weapon. Tr. I:187, 191-192 (R.Moriarty); Ans. ¶ 14.

The Respondent Interviews Arenburg Without Disclosure to Defendants

29. At some time after March 29, 2013, the respondent interviewed Arenburg at the courthouse about the events on March 9-10, 2013. Ans. ¶ 15. Arenburg and the respondent disagree about how this came about. Contrast, Ex. 19, at ¶ 29 (met with the respondent at respondent's request) with Tr. VII:93-94, 104, Tr. VIII:54 (Marshard) (meeting occurred in August or September 2013 because Arenburg repeatedly told the respondent she did not want to testify).

30. We credit Arenburg's testimony that the meeting occurred at the respondent's request about two months after the fight of March 9-10, 2013. Tr. V:81, 86, 164, 166-167, 168, 176 (Arenburg). While this determination stands on its own, we note the following record evidence consistent with it:

a. Until this interview, neither the respondent nor the police had shown any interest in an in-person interview of Arenburg (see Appendix A), and there is no evidence that Morse had created a report of his earlier meeting with Arenburg.

b. Most likely, the respondent's choice to meet Arenburg at the courthouse did not relate to Arenburg's purported concerns. The respondent did not need a private courthouse meeting to tell Arenburg that she did not intend to call her as a witness.

c. Further, and contrary to the respondent's account, at the criminal trial in 2014 Arenburg did not display any initial unwillingness to testify. As will be described below, she asserted her Fifth Amendment privilege after the trial judge repeatedly explained to her the potential exposure to criminal prosecution she faced for what the judge saw as a change in her story. Even then, Arenburg asserted her privilege only after she had consulted with her own counsel. The respondent's account that the interview occurred because Arenburg did not want to be a witness, therefore, is not consistent with other evidence of Arenburg's behavior

d. The hearing concerning the bar's license was cancelled, but nothing indicates that Arenburg knew of Frank's changed story. The sale of her bar, which had been on the market for years, Tr. V:102-103 (Arenburg), remained pending through the spring of 2013, when the respondent met with Arenburg. Tr. V:58, 104 (Arenburg). She continued to have an interest in protecting that license against Frank's potential accusations, a fact also inconsistent with her being unwilling to testify.

e. The police chief's decision not to proceed with the licensing hearing against the Ritz as a result of, among other things, the change in Frank Cray's story would naturally have increased the prosecution's interest in interviewing Arenburg, whose written statement was now in line with Frank's version of events in certain key respects.

31. The respondent testified that during her courthouse meeting with Arenburg, and aside from what Arenburg had, in substance, disclosed in her written statement to the police and second-hand information that the defendants had already received, Arenburg did not provide her with any new exculpatory evidence. Tr. VII:98-102 (Marshard). We do not rely on the respondent's testimony about this meeting. While this credibility determination stands on its own, we note the following reasons, consistent with our decision not to rely on the respondent's testimony:

a. Considering the respondent's extensive experience, Petersen and Baptiste's admissions that they had been in a fight (Ex. 1), and Petersen's statement when arrested that he and Baptiste had been attacked, we do not credit the respondent's claim that she did not know Baptiste and Petersen would rely on self-defense and the defense of

another. Tr. VII:216-220 (Marshard). A Second Assistant District Attorney acknowledged that in a case involving a fight, the identity of the first aggressor can be important; she agreed that "everybody has a motive to claim the other guy hit him first." Tr. V:33-34 (Thibeault). The respondent must have recognized the exculpatory value of Arenburg's written statement that the Crays had followed Petersen and Baptise out of the bar, Ex. 8, consistent with the defense that the Crays were the attackers.

b. The circumstances of the meeting, therefore, are suspicious. The respondent had already obtained an indictment against Petersen and Baptiste, and she was meeting with a witness whose testimony could be leveraged into an attack on the adequacy and good faith of the police investigation as well as on Frank's credibility, just as it had already contributed to the police chief's dismissal of the licensing action against the Ritz.

c. The reasons the respondent gave us for downplaying the contents of Arenburg's written statement are, in fact, reasons for an experienced litigator to conduct a thorough interview, to determine exactly what Arenburg had observed and what she had not observed. Arenburg's statement to Morse in connection with the licensing proceeding, as related to us by Arenburg, and the affidavit Arenburg gave to defense counsel in 2014 (Ex. 19), related additional personal knowledge consistent with the defendants' view of the facts: at the end of the night when few people were left in the bar, the Cray brothers left the bar spoiling for a fight and then returned to the bar bearing fresh wounds and blood.[6] Tr. V:78 (Arenburg); Ex. 19, ¶¶ 19-21, 23. It is precisely because of the possibility of uncovering such additional detail that an experienced litigator like the respondent would have conducted and recorded a thorough interview.[7]

d. Despite likely knowing that she was meeting with a potentially exculpatory witness, the typically overprepared and meticulous respondent, Tr. III:227 (Stone), Tr. VI:207-208 (Trudeau), says she cannot recall taking notes of the meeting. Tr. VII:99

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[6] It is likely that at trial Arenburg could have testified to this description of the Crays' demeanor, or some similar description, subject to the trial court's discretion, under an exception to the rule against lay opinion testimony. Mass. Guide to Evidence § 701, explanatory note and cases cited (e.g., "boisterous" and "in an arrogant manner" permissible in court's discretion).

[7] Contrary to the respondent's request, we decline to infer from Arenburg's cryptic testimony about a call from a "private detective" during the summer of 2013, Tr. V:85-86, 178-180 (Arenburg), and defense counsel's failure to contact Arenburg until fall 2014 (Tr. I:218-212 (R.Moriarty)), that Arenburg had no exculpatory evidence to offer beyond her written statement. Arenburg was "pretty sure" the caller *said* he was a private detective, Tr. V:180. On the other hand, it is common knowledge that law enforcement uses pretextual investigative techniques, including "sting" operations, to unearth evidence. See discussion in Matter of Crossen, 450 Mass. 533, 577-578, 24 Mass. Att'y Disc. R. 122, 161-165 (2008). The respondent's carefully worded testimony, Tr. VII:96-97, 218, did not exclude that explanation.

(Marshard). Of course, it would have been in her interest to take a detailed statement to limit the potential damage Arenburg might cause to her case. We do not credit the respondent's excuses for not doing so, all of which assume that the respondent knew in advance the interview would produce nothing new. Tr. VII:99-100 (Marshard).

e. The respondent acknowledges that she called Arenburg into a meeting at the courthouse on a day when police officers were available to take Arenburg's statement. Tr. VII:101 (Marshard). There was no reason not to ask for their attendance, and that was a "simple precaution" that she usually takes and should have taken. Tr. VII:101-102, 103-104, 253-254 (Marshard). The reasons the respondent gives for not having a police officer present again assume that the respondent knew beforehand what the outcome of the meeting would be and do not explain why one was not present at the outset. Tr. VII:100-101, 102 (Marshard). The respondent's rationalization why she did not have a police officer present, i.e., that she "thinks" she knew Arenburg's concerns about being forced to testify, but made the wrong choice, Tr. 102-103 (Marshard), is inconsistent with other police conduct in the investigation of the case; faced with a witness who refused to give a written statement, a police officer threatened the witness with being subpoenaed.[8] Ex. 1, at 0017.

f. Finally, both Arenburg and the respondent recall the respondent ending the meeting with the respondent's statement that Arenburg had no admissible evidence to offer at trial. Ex. 19, at ¶29, last sentence; Ex. 72, at 2. Wholly aside from the first-hand knowledge in Arenburg's written statement of March 10, 2013, this statement is not an honest and objective evaluation of the relevant information Arenburg says she provided to Morse and, in 2014, to Petersen's counsel, which a thorough interview would have disclosed.

32. Nevertheless, there is no evidence that during the meeting with Arenburg the respondent received additional exculpatory evidence beyond the March 10, 2013 written statement. We do not rely on disbelief in the respondent's testimony to fill the gap; this would, in effect, flip the burden of proof to the respondent.[9] We have considered the affirmative proof

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[8] On March 31, 2013, Officer Cassidy spoke with Ethan Leite. On April 7, 2013, Leite declined to give a written statement. Off. Cassidy told Leite that he might be compelled to do so by the court. Ex. 1, at 0017.

[9] Contrast Matter of London, 427 Mass. 477, 482-483, 14 Mass. Att'y Disc. R. 431, 438-439 (1998) (burden of proof not shifted to respondent where fact-finder had evidence of misuse and rejected the attorney's proffered excuses) with Zarrillo v. Stone, 317 Mass. 510, 512 (1945) and Emery v. Sturtevant, 91 Mass. App. Ct.

of what, as a result of her meeting with Arenburg, the respondent knew of the evidence Arenburg had to offer. We find that bar counsel has not carried the burden of proving that the respondent learned new exculpatory evidence during that meeting. Tr. V:81-86; 170-176; 195 (Arenburg); Ex. 19, at ¶ 29.

33. Bar Counsel might have argued, but did not, that this committee can infer that Arenburg provided the respondent with additional exculpatory details based on the following: (i) the conversation lasted "maybe" fifteen minutes, Tr. V:86 (Arenburg), Tr. VII:100 (Marshard), more than enough time to talk about the basic story in her written statement as well as additional details of the type reported to Morse and, later, defense counsel; (ii) Arenburg testified before us that she had told Morse additional exculpatory detail; (iii) Arenburg provided a consistent statement to that effect to defense counsel (Ex. 19); and (iv) Arenburg volunteered details during her testimony before us in a manner suggesting how she would likely have talked with the respondent.

34. We find, however, that this inference is barred by three facts. First, Arenburg told us that because she has had many conversations with a number of people, she does not recall what she told and to whom. Tr. V:189-190 (Arenburg). Second, during her examination at the disciplinary hearing Arenburg was pressed about what she told the respondent, including by open-ended questions from the committee, Tr. V:193-195 (Arenburg), and she did not testify to information beyond what could be gathered from her written statement of March 10, 2013 and from paragraph 29 of her affidavit, which does not materially expand on that statement. Third, although Arenburg testified before us about the additional exculpatory details she provided to Morse in connection with the licensing issue, she did not include those details in her testimony about her conversation with the respondent, and instead emphasized that the respondent terminated their conversation abruptly after discussion of other witnesses whose information had

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502, 511 (2017)) (citing Kunkel v. Alger, 10 Mass. App. Ct. 76 (1980)) (mere disbelief of testimony is not equivalent to proof of facts to the contrary).

been provided to the defense and the reiteration of the key points of her written statement. Tr. V:86 (Arenburg); Ex. 19, at ¶ 29. We find her testimony before us to be credible.

35. We find, therefore, that the record contains no positive evidence that Arenburg provided the respondent with additional exculpatory evidence during their courthouse conversation, and the preponderance of the evidence does not support a finding that Arenburg did so.

36. The respondent did not disclose her conversation with Arenburg to the defendants' counsel. Ans. ¶ 17.[10] In our conclusions of law, below, we explain why we find no sanctionable ethical misconduct where the respondent did not report information to the defendants that they already had.

Additional Exculpatory Statements

37. We now discuss certain other exculpatory statements the respondent received during 2013, to put into context her conduct at the trial in 2014, when she suggested that some or all of the people who gave those statements might have Fifth Amendment privilege issues.

38. After the indictment, Petersen was represented by Robert Manning, Esq., a staff attorney in the Committee for Public Counsel Services. Tr. I:188, 189, Tr. II:79-80 (R.Moriarty); Tr. III:110-112, 158, 175 (Manning); Ans. ¶ 14. Baptiste was represented by John Amabile, Esq. Tr. II:77-78 (R.Moriarty); Tr. IV:66, 68-69 (Amabile).

[10] Our resolution of this matter, on the basis of the testimony concerning the Arenburg-respondent conversation, makes it unnecessary to address all of the voluminous testimony presented to us about defense counsel's handling of Arenburg's October 2014 affidavit (Ex. 19), discussions with members of the district attorney's office concerning disposition of Petersen's case, and defense counsel's handling and argument of the motion to dismiss concerning the charge of withheld evidence and the respondent's opposition to that motion. See, e.g., Tr. I:218-220, Tr. II:127-133, 134-139, 161-162, Tr. III:14-18 (R. Moriarty) Tr. IV:215-219, 225-232, 236-246, Tr. V:20-27, 36, 41-42, 53-55 (Thibeault); Tr. VI:187 (Trudeau); Ex. 75, Ex. 76. Further, all of that evidence would also have been immaterial if, based on testimony about the conversation between the respondent and Arenburg, we *had* found that the respondent received from Arenburg, and failed to disclose to defense counsel, new exculpatory evidence. Where we discuss the motion to dismiss below, we do so as a predicate to our discussion of the issues concerning the other charge in this count, concerning the respondent's conduct in raising Fifth Amendment issues about defense witnesses.

39. Around August 5, 2013, the respondent became aware of a written statement given by Corey Randolph concerning the events in and near the bar on the night of the fight. Ex. 1, at 0024.

40. Randolph's statement, dated March 21, 2013, was consistent with Arenburg's in saying that Frank was choked outside the Ritz; also, that it occurred in response to Frank choking Baptiste. It portrayed the Crays as the aggressors and Petersen as intervening to defend Baptiste; Randolph saw no knife or similar weapon. Ex. 21, at 0132-0133.

41. Around that same time, the respondent also received from Manning statements purporting on their face to be from Thomas Buckley and Josh Crossland, who were at the Ritz with Petersen and Baptiste along with Randolph. Those statements described the Crays pursuing Baptiste and Petersen outside of the Ritz and instigating a fight in which one of the Crays had Baptiste in a choke hold and Petersen intervened to restrain the Cray brother. Tr. II:97 (R.Moriarty); Tr. VIII:64 (Marshard); Ex. 21, at 0134-138; Ans. ¶18.

New Counsel for Petersen; Trial Continued

42. Petersen's and Baptiste's criminal trial was initially scheduled to begin on October 21, 2013. About two weeks before then, Petersen terminated Manning's representation and retained Robert Moriarty, Esq. Tr. I:148, 187-188, Tr. II:79 (R.Moriarty); Tr. VII:67-68, 114-115 (Marshard); Ans. ¶ 20. The trial was continued. Tr. II:83-85 (R.Moriarty); Tr. VII:114-115 (Marshard).

43. Moriarty received various materials, including police reports and witness statements, from Manning, Petersen's prior counsel. Tr. I:189, 195, 196-197, 197-198, 202-203 (R.Moriarty); Ex. 1, Ex. 6, Ex. 7, Ex. 21. These included the respondent's witness lists to that point, the earliest of which included Arenburg's name. Tr. I:209 (R.Moriarty); Ex. 18. Amabile had also received the police reports. Tr. IV:70 (Amabile).

Trial Begins with A Motion to Dismiss

44. On October 20, 2014, the Petersen and Baptiste trial began. Ans. ¶ 24; Ex. 23.

45. That morning, Moriarty presented a motion to dismiss, in which Amabile joined, based on the respondent's alleged failure to disclose exculpatory evidence, i.e., Arenburg's statement to the respondent. Tr. I:220-221 (R.Moriarty), Tr. IV:91 (Amabile); Ex. 23, at 0143-0144. The motion, filed the previous Friday, was accompanied by a copy of an affidavit Moriarty had drafted and Arenburg had signed on October 14, 2014.[11] Tr. I: 214, 221, Tr. II:124, 132 (R.Moriarty), Tr. V:90, 97, 182, 183, 184 (Arenburg), Tr. VII:200 (Marshard); Ans. ¶¶ 21, 22; Ex. 19 (affidavit in evidence is date-stamped as received by the court on the 17th), Ex. 23, at 0144, 0145-0149.

46. Among other things, Arenburg's October 14, 2014 affidavit stated:

a. When Arenburg started to close the bar, Frank and Jason Cray were still there. Ex. 19, at ¶ 19. Arenburg tried to calm Frank and Jason Cray; they were "obviously agitated." Ex. 19, at ¶¶ 19, 20. Frank Cray then left the bar and went up the street in the same direction as Petersen's group; his brother Jason then followed him.[12] Ex. 19, at ¶ 21. Frank was "clearly looking for a fight when he left the Ritz." Ex. 19, at ¶ 22.

b. Frank and Jason Cray returned about ten minutes later and it was obvious they had been in a fight; Jason showed her his knuckles, which were bleeding, and said that he'd hit someone in the mouth who was "bleeding like a pig." Frank said he'd been choked, and his jacket "was torn to shreds."[13] Ex. 19, at ¶ 23.

c. The next day, Arenburg went to the police station to give a brief statement. Ex. 19, at ¶ 27.

d. A couple of weeks later, Arenburg received notice of the Town's action against the Ritz and, for the first time saw a police report about the incident. She contacted the police and told Morse that the Crays were "lying through their teeth" about the fight; the

[11] Arenburg's testimony before the hearing committee about the events on the night of the fight was substantially consistent with her October 2014 affidavit, Ex. 19. Tr. V:59-66 (Arenburg).

[12] Arenburg testified before us that when Frank and Jason were "like the last people in there," Frank left first, then Jason followed him, this was about 1:00 a.m. Tr. V:117-118, 119 (Arenburg).

[13] Arenburg testified before us that she saw no part of a fight in the bar, but saw "them" [the Crays] when they came back into the bar. Tr. V:116 (Arenburg). Frank was injured, with a mark on his neck, cuts on his elbows and some other "bangs;" Jason showed his cut knuckles. Tr. V:120.

real fight had happened up the street, where the Crays had followed the Petersen group looking to carry on the fight; and Frank Cray was the instigator. Ex. 19, at ¶ 28.

e. A couple of months after Arenburg talked with Morse, the respondent called Arenburg. They planned to meet at the courthouse. There, Arenburg told the respondent the same story but not in as much detail. She "was pretty specific" that there was no fight and no knife in the Ritz. When the respondent pressed her on whether it was possible the fight had happened there but she did not see it, Arenburg "was adamant that the fight did not occur in the Ritz, and that there was no knife-wielding fight on the floor." The respondent told Arenburg that her information was based on hearsay, and the respondent would not need her as a witness. Ex. 19, at ¶ 29.

47. The respondent filed a written opposition to Moriarty's motion to dismiss, which included Arenburg's written statement to the police on March 10, 2013. Tr. VII:202-203 (Marshard); Ex. 8; Ex. 20; Ex. 23, at 0145. The respondent and her supervisor had worked on the opposition over the weekend; they concluded that any exculpatory evidence in Arenburg's affidavit had been provided and known to the defense since around the time of the indictment. Tr. VI:196-197 (Trudeau), Tr. VII:202-203 (Marshard); Ex. 20. The opposition also argued that the affidavit contained no exculpatory evidence because it was not based on personal knowledge; that the prosecutor did not see the exculpatory value of the evidence; and that, if the affidavit included exculpatory evidence, it had already been disclosed to the defense. Ex. 20. The opposition stated that Arenburg had told the respondent she did not see the incident and there was no fight in the bar. Ex. 20, at 0131. There was some effort to show some inconsistency as between the details of the written statement of 2013 and the affidavit. Ex. 20, at 0131. The opposition did not state that the inconsistencies were intentional, that Arenburg had attempted to mislead the police, or that she had claimed in her first statement to know nothing.

48. Because we are unable to conclude that Arenburg told the respondent more in their meeting than was embraced by her written statement to the police, we cannot conclude that the factual assertions about that meeting set forth in this opposition were false or knowingly and intentionally misleading. Further, based on Arenburg's initial written statement to the police and her testimony before us about the night of the fight and her statement to Officer Morse, it does

not appear unlikely that Arenburg told the respondent that she did not see any of the tussle at the bar door until its very end, and that she said she did not see a fight in the bar of the magnitude described in Frank's first statements. Tr. V:116-117, 127 (Arenburg).

49. The argument that Arenburg's affidavit had nothing exculpatory to say within her own knowledge appears to us to strain at the limits of legitimate advocacy. If it had occurred, Arenburg would likely have heard a fight in the bar of the magnitude Frank first reported, and Frank later changed his story and placed part of that fight outside. Further, Arenburg's description of Frank and Jason remaining agitated and then leaving the bar at closing when few others were present, only to return with injuries, based on direct personal observation, is consistent with the defense theory that the Crays were the aggressors, and supported the defendants' case.[14] Yet, the respondent's opposition adopts the position that Frank was, in fact, choked outside of the bar. The respondent could reasonably conclude that the most exculpatory portion of the affidavit—contradicting Frank's original story and placing the choking incident outside of the bar—had been substantially negated by Frank's change of story and Arenburg's not providing her with additional exculpatory evidence. We do not find, therefore, that the respondent's arguments exceeded the bounds of permissible advocacy or constituted knowing dishonesty, deceit, or misrepresentation.

50. The judge held the matter for an evidentiary hearing while the respondent obtained coverage from her office to permit her to testify on the motion. Ex. 23, at 0144-0148.

51. The judge's impression at that point was that Arenburg "claimed she didn't know anything" in her initial statement to the police. Ex. 23, at 0145. The respondent replied: "I attached that to my response," without questioning the judge's characterization. Ex. 23, at 0145.

52. The judge's initial impression was incorrect and, as discussed below, the judge eventually recognized his mistake after an in camera hearing with Arenburg. Still, the respondent was not then seeking or opposing affirmative relief on that matter, and she did not

[14] It is also possible that the Crays initiated a verbal confrontation to which Peterson's group took exception and initiated the fight.

offer representations or evidence to the court that were shown to be knowingly false or later discovered to be false. In these circumstances, we do not find that the respondent was under the obligation to correct a misimpression she did not create. Contrast Mass. R. Prof. C. 3.3(a), Matter of deYoung, 27 Mass. Att'y Disc. R. 165 (2011) (attorney was suspended for one month for filing a client's misleading financial statement and not disabusing the court of the misimpression it created); Matter of Mahlowitz, 1 Mass. Att'y Disc. R. 189 (1979) (where attorney represented litigant who planned to sell property and opposed a restraining order on it, it was misconduct not to correct judge's misimpression that there already was an existing restraining order). The respondent's silence in the face of the judge's initial mistake did not unlawfully obstruct the defendant's access to evidence.

Attention Turns to Fifth Amendment Privilege Issues

53. Also on October 20, 2014, counsel for Petersen and Baptiste served and filed a list of potential witnesses, including Arenburg and the three other members of the Petersen/Baptiste group: Corey Randolph, Thomas Buckley, and Josh Crossland. Tr. II:90-91, 97-98 (R.Moriarty); Ans. ¶ 23.

54. Presented with the witness list, the respondent told the court that "many of these [defense] witnesses... m[ight] have Fifth Amendment issues." Tr. I:223, Tr. II:102 (R.Moriarty); Tr. IV:77 (Amabile); Ans. ¶ 25; Ex. 23, at 0160.

55. The respondent's answer concedes that she had been aware that Randolph, Buckley, and Crossland were likely the three other members of the Petersen/Baptiste group with a perceived self-interest in supporting Petersen and Baptiste, as a result of which she had declined to interview them or cause them to be interviewed. Ans. ¶¶ 18, 19, and see Tr. VIII:64 (Marshard), Ex. 1, at 0024, Ex. 21, at 0134-138. We do not credit the respondent's testimony that the police had tried to interview Randolph, Buckley, and Crossland. Tr. VII:65. The police reports do not support that testimony. Ex. 1. In fact, Randolph had appeared at the police station around March 20, 2013, accompanying Petersen, who was looking for copies of the police reports. Ex. 1, at 0024. Randolph identified himself as a witness, elected to take a form for

statements rather than scheduling an interview, and left. Id. There is no evidence in the police reports or elsewhere in the record before us that the police followed up with Randolph, or did anything more with Buckley besides arresting him and releasing him the day after the fight. Ex. 1. Despite being aware of these witnesses and their potential involvement in the fight, the respondent had done nothing to cause them to be prosecuted along with Baptise and Petersen.[15] Ex. 29, at 0987.

56. We do not credit the respondent's testimony that she brought the issue to the court's attention out of concern for whether or not they had a privilege because their testimony could lead to their being charged, even if it did not necessarily do so and whether or not she actually intended to do so. Tr. VII:221 (Marshard). We do credit her testimony that she brought the issue to the attention of the court to give the court the chance to address the issue so the trial could keep moving. Tr. VII:207-208 (Marshard).[16]

57. The respondent pointed out that a prior judge had addressed some Fifth Amendment issues. Ex. 23, at 0160. In fact, during 2013, the judge then presiding had addressed the potential Fifth Amendment issues facing Frank Cray, and Frank had waived his privilege. Tr. VII:114 (Marshard).

58. While the respondent was addressing Cray's Fifth Amendment issue, the judge then interjected: "Well, speaking of Fifth Amendment, there's [Arenburg] ... Do you think she has a Fifth Amendment issue?" Ex. 23, at 0160; Tr. VII:205 (Marshard); Tr. V:99-100, 185-187 (Arenburg); Tr. III:64-65 (R.Moriarty).

59. The respondent replied: "Potentially she could," Ans. ¶ 25; Ex. 23, at 0160, then immediately returned to discussing the prior ruling concerning Frank Cray's privilege. Tr. IV:77-78, 126-127 (Amabile); Ex. 23, at 0160-0161. We credit that the respondent did not

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[15] The respondent testified that the Cray brothers had "felt" there were three others involved, but the prosecution was not sure who they were. We find this an unsatisfactory explanation in light of the defendants' production to the respondent in October 2013 of the written statements from Randolph, Crossland, and Buckley. Tr. VII:206 (Marshard).

[16] This can be important in this venue as there are few attorneys on the island certified for Superior Court work and it can delay a trial if another attorney must be summoned from the mainland. Tr. VII:206-208 (Marshard).

intend to bring up Arenburg as part of the Fifth Amendment discussions, Tr. VII:210 (Marshard), and that she had not yet decided what she would say about that issue. Tr. VII:210 (Marshard). All the respondent said about it was "potentially she could", Tr. VII:211-212 (Marshard), Ex. 23, at 0160, because the respondent herself did not believe that Arenburg was at risk of incriminating herself. Tr. VII:212 (Marshard). The respondent merely acknowledged the court's concern while attempting to return to the task of opposing the demand that counsel be appointed for the Crays, to ensure that she could present the testimony of her intended witnesses.

The Court Addresses Arenburg's Privilege Issue

60. The next day, October 21, 2014, the judge repeatedly commented that Arenburg might be exposed to criminal prosecution because of the perceived differences between her initial written statement and her affidavit. Ex. 24, at 0227-0228, 0230, 0231-0232.

61. The judge asked Arenburg if she wanted to consult with an attorney, and she said she did. Ex. 24, at 0232.

62. The judge then indicated that it was unlikely he would grant the defendant's motion to dismiss for failure to disclose exculpatory evidence because there was no irremediable prejudice, and Arenburg was an obvious candidate as a witness. Tr. III:44-45 (R.Moriarty); Ex. 24, at 0232-0236. Still, the judge wanted to make findings for the record, noting his understanding that Arenburg's evidence might have been exculpatory. Ex. 24, at 0238-0239.

63. After a further recess, the judge reiterated his belief that Arenburg's testimony could expose her to criminal prosecution. Ex. 24, at 0243-0244. The probation department determined that Arenburg was not eligible for court-appointed counsel, Ex. 24, at 0248, and the judge gave Arenburg the opportunity to speak with counsel. Ex. 24, at 0248. The court put the matter over to the following Thursday, October 23, 2014. Ex. 24, at 0248-0253.

64. On Thursday, October 23, 2014, Amabile presented a motion requesting judicial immunity for Arenburg if she invoked her privilege. Ex. 25, at 0258-0261. The judge twice reiterated his belief that Arenburg's testimony might expose her to prosecution. Tr. IV:141 (Amabile); Ex. 25, at 0261-0262, 267, 270.

65. Arenburg, upset and unrepresented, opted to protect herself by exercising her privilege. Tr. V:186, 193 (Arenburg); Ex. 25, at 0271-0272.

66. During colloquy with counsel, the judge again indicated he thought Arenburg's affidavit contained exculpatory evidence (Ex. 25, at 0276; Ans. ¶ 27), and he conducted an in-camera hearing with Arenburg in chambers.[17] Tr. IV:169-170 (Amabile); Tr. V:99-100 (Arenburg); Tr. VII:214 (Marshard); Ans. ¶ 27; Ex. 25, at 0278-0282.

67. After the in-camera hearing, the judge ruled that Arenburg had no reason for concern that she might incriminate herself by testifying in the trial, and therefore her assertion of the Fifth Amendment privilege was overruled. Tr. V:100 (Arenburg); Ans. ¶ 27; Ex. 25, at 0282-0283.[18]

68. The judge cancelled the evidentiary hearing on the defendants' motion to dismiss and denied the motion; he offered what he saw as the appropriate remedy in the circumstances: a continuance. Tr. I:221-222, Tr. III:47 (R.Moriarty); Tr. VII:216 (Marshard); Ex. 25, at 0282-0283. The defendants declined. Tr. III:66-67 (R.Moriarty); Tr. VII:216 (Marshard).

69. The court then ordered that Arenburg's testimony be taken by deposition because she would be unavailable during the latter part of the trial. Tr. V:100-101 (Arenburg); Ex. 25, at 0283-0284, 0403-0408; Ans. ¶ 27. On October 28, 2014, the respondent and counsel for the defendants deposed Arenburg; portions of the transcript were read into evidence at the trial. Ans. ¶ 28; Ex. 26.

70. Based on the foregoing, we find that the respondent did not obstruct, or attempt to obstruct, the defendants' access to testimony from Arenburg.

General Introductory Observations About the Additional Charge of Obstructing the Defense

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[17] Arenburg spoke with an attorney by telephone, who advised that she plead the fifth, but she was not represented by counsel at the trial or when the judge conducted the in-camera hearing. Tr. V:185 (Arenburg); Ex. 25, at 0271-0272. Contrast the erroneous testimony and admission at Tr. VII:213-214 (Marshard) and Ans. ¶ 27, respectively.

[18] This would indicate that the judge found no substantial differences between her initial statement and her October 2014 affidavit.

71. The competing witness accounts put credibility at the center of the Petersen/Baptiste prosecution. To exercise its role in choosing some, none, or all of each witness's testimony as the credible basis for its verdicts, see Matter of Donaldson, 28 Mass. Att'y Disc. R. 221, 239 (2012) ("The hearing committee is thus entitled, like any finder of fact, to believe some portions of the respondent's testimony and disbelieve others."), the jury would have been helped by hearing as many witnesses with personal knowledge of the events of the fight as was reasonably possible.

72. Instead, both the defense (with respect to the Crays; see Tr. II:82, 87-88 (R.Moriarty).) and the prosecution (see below) used the Fifth Amendment in an effort to bar testimony that would have been helpful to the jury. Based on our subsidiary findings below, however, we find that the respondent's efforts in this regard did not cross an ethical line.

73. Preliminarily, we reject the respondent's suggestions (see, e.g., the concessions the respondent extracted from defense counsel at Tr. II:89-90, 96-97, 107-108, Tr. III:23 (R.Moriarty)), that she acted pursuant to an "absolute duty" to bring to the attention of the trial judge any potential Fifth Amendment privilege issues. Our research has disclosed no such duty and neither party has cited any statutory or decisional law imposing one. The respondent's superior in the prosecutor's office referred only to a "policy" of raising the privilege issue. Tr. VI:198 (Trudeau). The respondent testified that she raised the Fifth Amendment privilege issues about the defense witnesses as a "courtesy," but she did not say she did so because of an obligation to do so. Tr. VII:207 (Marshard).

a. The respondent did not act consistent with a sense of a duty or policy to ask the judge to warn any exposed witness of their Fifth Amendment rights. Jason and Frank Cray had such issues. See, e.g., Tr. III:23-24 (R.Moriarty) (concerns about fifth amendment privileges would reasonably extend to any participant in a brawl). Yet, it was defense counsel who raised their Fifth Amendment issues. Tr. I:222-223 (R.Moriarty); Tr. VII:112-114 (Marshard). Likewise, under count two, the events of which were roughly contemporaneous with the events under count one, the respondent did not raise the Fifth Amendment privilege with respect to her own two witness who were participants in another fight. The respondent did not believe she had an absolute duty at

law or under a policy of the district attorney's office to warn witnesses of their potential Fifth Amendment privilege issues; she did so only when it would impair the defense.

b. A witness may successfully invoke the Fifth Amendment privilege against self-incrimination if the testimony sought could potentially expose the witness to criminal prosecution, even where an individual prosecutor expresses the intention not to bring charges. See Massachusetts Guide to Evidence, § 511(b) (2016); Brodin and Avery, Handbook of Massachusetts Evidence, 2017 Edition, §5.14.2, pp. 306-308. Yet that is different from whether the respondent was *obligated* to raise the issue.

c. Any such obligation appears to be based on a concern about fundamental fairness, for instance, preventing a prosecutor from obtaining coerced testimony from a witness while that witness is the target of an investigation,[19] or fairness to a defendant where the prosecutor has advance warning that a witness might raise the fifth amendment privilege in a manner that suggests the defendant's guilt.[20]

d. There is no evidence in the record that, before any of the witnesses about whom she raised Fifth Amendment concerns were about to testify, the respondent had an actual belief that they intended to raise their Fifth Amendment privilege. She had no opportunity to form any such belief because the prosecution did not follow up with Randolph, Crossland, and Buckley after becoming aware in 2013 of their exculpatory testimony. Ans. ¶¶ 18, 19, and see Tr. VIII:64 (Marshard).

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[19] "If at the time a witness appears before a grand jury, the prosecutor has reason to believe that the witness is a target or is reasonably likely to become a target of the investigation then the witness must be advised before testifying that 1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and 2) anything that he or she does say may be used against the witness in a subsequent legal proceeding." 30A Mass. Prac., Criminal Practice & Procedure § 17:45 ("Right of witness to be advised of privilege") (4th ed. 2017), citing Commonwealth v. Woods, 466 Mass. 707, 716–20 (2014).

[20] "When it is clear that a witness intends to exercise the privilege against self-incrimination, the witness should not be permitted to do so before the jury. Commonwealth v. Hesketh, 386 Mass. 153, 158, 434 N.E.2d 1238 (1982). Commonwealth v. Labbe, 6 Mass. App. Ct. 73, 79, 373 N.E.2d 227 (1978). Where there is some advance warning that a witness might refuse to testify, the trial judge should conduct a voir dire of the witness, outside the presence of the jury, to ascertain whether the witness will assert some privilege or otherwise refuse to answer questions. ... However, reversal is not required in every case where the jury hear a witness assert some privilege or refuse to testify. ... Rather, when a witness refuses to answer questions in front of the jury, '[t]he inquiry is (1) whether the prosecutor has so unfairly exploited the matter as to constitute prosecutorial misconduct, and (2) whether inferences from the witness's refusal to answer may have added critical weight to the prosecution's case.'" Commonwealth. v. Fisher, 433 Mass. 340, 349–50 (2001), quoting Commonwealth v. Kane, 388 Mass. 128, 138 (1983) and citing Commonwealth v. Martin, 372 Mass. 412, 414 (1977). To a similar effect, see Brodin and Avery, Handbook of Massachusetts Evidence, 2017 Edition, § 5.14.6, pp. 314-316.

The Fifth Amendment Issue Concerning Corey Randolph

74. On October 29, 2014, the respondent asserted that Randolph and Crossland had reason to be concerned that their testimony would implicate their rights under the Fifth Amendment. Tr. VII:225-226 (Marshard); Ans. ¶ 29; Ex. 29, at 0985. She asked the judge to advise them of their privilege and to appoint counsel. Ans. ¶ 29; Ex. 29, at 0984-0986. Both Moriarty and Amabile ultimately agreed that Corey Randolph, as well as unidentified "others" might have a Fifth Amendment privilege. Tr. II:100-102, 103, 105-106, 109-110, 111-112, 115-116 (R.Moriarty); Tr. IV:129 (Amabile); Tr. VII:227 (Marshard); Ex. 28, at 0552.

75. The court requested justification for the respondent's claims that Randolph and Crossland had reason to be concerned about self-incrimination. Ex. 29, at 0985-0986.

76. The respondent said—correctly—that Randolph had reason to be concerned because witnesses had testified that Randolph had re-entered the Ritz swinging his fist. Ans. ¶ 30; Ex. 29, at 0985. We credit that the respondent considered the evidence about Randolph's involvement to be a legitimate basis for his assertion of his Fifth Amendment privilege. Tr. VII:231-232 (Marshard); see also Tr. II:91, 92-93, 112 (R.Moriarty). We do not credit, however, that was the reason she brought it to the attention of the judge. Tr. VII:231-232 (Marshard).

77. The respondent articulated no specific reason for Crossland to be concerned about incriminating himself, stating "It's certainly possible that Mr. Crossland participated as well. I don't know that ... but in an abundance of caution, think it's appropriate at least..." Ex. 29, at 0985.

78. The judge observed that he was not obligated to advise of fifth amendment rights and expressed doubt why the respondent raised the issue if she was not interested in prosecuting. Ex. 29, at 0985-0986. The respondent offered to review the witness statements, including Crossland's, that she said she had received "many months after the case was charged" (Tr. II:114 (R.Moriarty) Ex. 29, at 0986-0987), but which she had received over a year before, with no intervening move to prosecute. Ex. 29, at 0987; Ans. ¶¶ 18, 19, and see Tr. VIII:64 (Marshard).

79. After the respondent had rested and the defense case was about to begin, Tr. VII:225-226 (Marshard), the respondent told the judge: "[W]e leave it to the Court whether Randolph] should be advised and speak with an attorney. But as an officer of the Court, I'm instructed to inform the Court that Mr. ... Corey Randolph ... may have such an issue." Ex. 29, at 1054. We credit the respondent's testimony that she stated this at the direction of her superiors in the district attorney's office. Tr. VII:226-227 (Marshard).

80. On October 30, 2014, the court appointed counsel to consult with Randolph. Tr. II:116 (R.Moriarety); Ans. ¶ 33; Ex. 30, at 1145-1146. Randolph, through counsel, informed the court that he would refuse to testify. Tr. VII:227 (Marshard); Ans. ¶ 33; Ex. 30, at 1159.

81. The court asked the respondent to state why Randolph was in jeopardy of prosecution, and the respondent said: "I didn't say that he had [a Fifth Amendment privilege], Judge. I, as an officer of the court, was attempting..." Ex. 30, at 1159. The Court interrupted and pointed out that the respondent had narrowed the privilege issue down to Randolph, and asked the respondent to state the factual basis "why you may prosecute him." Ex. 30, at 1159-1160. The respondent replied that witnesses had said Randolph had come into the bar swinging, that Petersen and Baptiste had help from others, and that Randolph had socialized with Petersen and Baptiste at the bar. Ex. 30, at 1160-1161.

82. After an *in camera* hearing with Randolph and his counsel, Ex. 30, at 1162-1163, the court sustained Randolph's assertion of his Fifth Amendment privilege. Tr. II:116 (R.Moriarty); Tr. IV:130 (Amabile); Ans. ¶ 33; Ex. 30, at 1163.

83. Defense counsel argued that the respondent was using the threat of criminal prosecution against Randolph to deny the defendant access to exculpatory evidence. Ex. 30, at 1164; Ans. ¶ 35. The judge indicated he would consider the issue of judicial immunity; he expressed concern about the defendants receiving a fair trial; then he suspended the trial and invited the defendants to brief the issue the next day. Ans. ¶ 35; Ex. 30, at 1164-1168.

84. On October 31, 2014, Moriarty filed a motion to dismiss or, in the alternative, for judicial immunity for Randolph or to admit his written statement, arguing that the threat of prosecution against Randolph was part of a pattern of prosecutorial misconduct by the respondent. Ex. 31; Ex. 32, at 1191.

85. The court heard argument that morning. Ex. 32, at 1191-1200. During the argument (Exs. 32, at 1193), the court raised the possibility of granting judicial use immunity to Randolph in accordance with *dictum* in Commonwealth v. Vasher, 469 Mass. 425, 438-440 (2014), while inviting the respondent to consider alternatives for getting Randolph's statement before the jury. Ex. 32, at 1193. The respondent opposed any relief and denied wrongdoing, asserting that she had acted as an officer of the court in raising Fifth Amendment issues. Ex. 32, at 1194-1198.

86. As a predicate to granting immunity, the court made findings that the respondent had engaged in a course of prosecutorial misconduct with respect to various matters in the case. Ex. 32, at 1200-1204. The court did not hold an evidentiary hearing that would have provided the respondent the opportunity to rebut the allegations of misconduct through her own testimony, even though in earlier proceedings, concerning the allegation that the respondent had improperly failed to disclose Arenburg's statement to her, another prosecutor had come from the mainland to handle such a hearing to permit the respondent to testify.[21] Tr. III:36-37 (R.Moriarty); Tr. VII:214-216 (Marshard); Ex. 24, at 0231. After reviewing the possibility of an order of judicial immunity, an order that the Commonwealth seek immunity or suffer dismissal, or the admission of Randolph's statement, the judge took a recess to allow the parties to confer about what remedy might be appropriate. Ex. 32, at 1204-1205.

87. The respondent, with the support of First Assistant DA Trudeau, decided that the prosecution would not seek immunity for Randolph, "a defense witness." Tr. VI:203 (Trudeau).

[21] The court had heard oral argument or conducted colloquy on most or all of the issues on which the judge made findings, but it had not taken sworn evidence, as it had proposed to do concerning Moriarty's motion concerning Arenburg's statement to the respondent. See, e.g., ¶¶ 58-62, 66, 68-69, above, Ex. 24, at 0236-0238, and Ex. 29, at 0814-0825.

We do not credit Trudeau's testimony that at the time, under Massachusetts law, there was no authority "whatsoever" for the judge's proposed action. Tr. VI:202-203 (Trudeau). See Commonwealth v. Vasher, 469 Mass. 425, 438-440 (2014).

88. Eventually, the parties held a colloquy, which could not be transcribed. Ex. 32, at 1251-1253. As the pleadings establish, however, the parties agreed that Randolph's written statement could be read to jury, Ans. ¶ 37, and the respondent acknowledges that she agreed to that as a compromise, at the direction of one of her superiors, possibly Trudeau. Tr. VII:232-233 (Marshard); see also Tr. VI:203-205 (Trudeau).

89. During the discussions about judicial immunity or other relief, the respondent stated that Buckley and Crossland did not have Fifth Amendment privilege issues "at this point." Ex. 32, at 1211-1213.

90. The respondent abandoned her suggestion that counsel be appointed for Crossland, Ex. 29, at 1054; Ex. 32, at 1211-1213, and Crossland testified on October 31, 2014. Ans. ¶ 37; Ex. 32, at 1215-1251.

91. The court then told the jury that Randolph was unavailable and that his statement would be read. Ex. 32, at 1253. Moriarty read Randolph's statement into the record before the jury. Ex. 32, at 1253-1254.

92. The only witness who did not testify because of a Fifth Amendment privilege was Randolph, who the judge concluded had a valid Fifth Amendment privilege. Other witnesses with potential Fifth Amendment privileges either testified or were not called to testify by defense counsel. Tr. II:108, 109, Tr. III:25-27, 66 (R.Moriarty), Tr. IV:125 (Amabile).

93. On November 3, 2014, the defendants were acquitted on both indictments. Tr. IV:159 (Amabile); Ans. ¶ 38; Ex. 33, at 1433-1437.

Count One: Conclusions of Law

94. Bar counsel charges that by failing to disclose Arenburg's exculpatory statements

to defense counsel, the respondent violated Mass. R. Prof. C. 3.4(a) (unlawfully obstruct another's access to evidence), 3.4(c) (knowing disobedience of obligations under rules of tribunal), 3.8(d) (prosecutor's duty to disclose exculpatory evidence) and 8.4(d) (conduct prejudicial to the administration of justice). For the reasons discussed below, we find that the respondent did not violate any of these rules.

a. The respondent did not violate rule 3.8(d). Bar counsel did not prove by a preponderance of the evidence that the respondent received new exculpatory evidence during her meeting with Marshard. As the rule would reasonably be understood at the time, the respondent was not obligated to re-disclose exculpatory evidence that had already been disclosed to the defendants. Mass. Rule of Criminal Procedure 14(a)(1)(A)(iii), as amended, 444 Mass. 1501 (2005) provided: "The prosecution shall disclose to the defense . . . (iii) Any facts of an exculpatory nature. . . ." Disclosure of facts that are not material, however, was not required. Commonwealth v. Wilson, 381 Mass. 90, 107–08 (1980). The information the respondent heard during her meeting with Arenburg, to the extent it was proved to us by a preponderance of the evidence, was not "material" in the sense that it was merely cumulative of what the defendants already had available. Therefore, the respondent did not violate the criminal rules by not disclosing it. Mass. R. Prof. C. 3.8(d), in turn, appears to simply incorporate the accepted definition of "exculpatory evidence"[22] as that term is used in Mass. Rule of Criminal Procedure 14(a)(1)(A)(iii). See 30A Mass. Prac., Criminal Practice & Procedure (4th ed., 2017), § 26:16, "Definition of exculpatory evidence." "The Rules of Professional Conduct are rules of reason," S.J.C. Rule 3:07, Scope, ¶ 1, and the reasonable prosecutor would likely have read rule 3.8(d) as simply the ethical counterpart to the rule of criminal procedure. By a new comment 3A to this rule, of course, the Court has clarified rule 3.8(d): "The obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by substantive law. Disclosure is required when the information tends to negate guilt or mitigates the offense without regard to the anticipated impact of the information. . . ." However, the clarification that amendment provided, that materiality was not an issue under rule 3.8(d) as it was under Mass. R.

[22] "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. . . ." Mass. R. Prof. C. 3.8(d).

Crim. P. 14(a)(1)(A)(iii), was not available to the respondent during the Petersen/Baptiste proceedings. See order of January 7, 2016, amending rule 3.8 in other respects and incorporating new comment 3[A].[23] No clear authority in Massachusetts interpreted rule 3.8(d) to require the respondent to produce repetitive information from a witness known to the defendants, and the rule cannot be said to be unambiguously decisive one way or the other where the decisional law and advisory opinions from other jurisdictions had gone both ways[24] and the Court found it necessary to issue a clarifying comment. In these circumstances, we find that the respondent did not violate rule 3.8(d) in 2014.

b. The respondent likewise did not violate Mass. R. Prof. C. 3.4(c) by failing to disclose the conversation with Arenburg where she did not violate a rule of ethics or of criminal procedure by failing to do so.

c. Where the respondent did not violate either a rule of professional conduct or a rule of criminal procedure by her conduct with respect to Arenburg's meeting with her, and where Arenburg's original statement and her status as a likely witness were known to the defendants, we find no conduct so egregious as to constitute "conduct prejudicial to the administration of justice," in violation of Mass. R. Prof. C. 8.4(d). Matter of the Discipline of an Attorney, 442 Mass. 660, 668-669, 20 Mass. Att'y Disc. R. 525, 593-596 (2004) (conduct that does not violate a specific rule must so flagrantly violate accepted professional norms as to undermine the legitimacy of the judicial process to violate rule 8.4(d)).

d. Finally, where the defendants already had a copy of Arenburg's statement, and Arenburg was an obvious candidate for an interview as a result of her having tended bar on the night of the fight, we find that the respondent's non-disclosure of her interview did not constitute obstruction of others' access to evidence in violation of Mass. R. Prof. C. 3.4(a). We were given some pause in this matter where the respondent erroneously told Arenburg that her testimony was not based on personal knowledge and would not be admissible. Still, while the respondent's bad advice to Arenburg was ill-advised, and perhaps tainted by too zealous a desire to obtain a conviction, we cannot say that it was an obstruction to the *defendants'* access to Arenburg's testimony.

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[23] http://www.mass.gov/courts/docs/sjc/rule-changes/rule-change-sjc-rule-307-january-2016.pdf

[24] See, e.g., Cone v. Bell, 556 U.S. 449 (2009), ABA Formal Ethics Op. 09-454 (2009) (ethical duty is broader than under Brady), and contrast In re Riek, 834 N.W.2d 384 (Wisc. 2013) (prosecutors should not be subjected to discipline for complying with disclosure obligations). Cases and ethical opinions are collected in Annotated Model Rules of Professional Conduct, Eighth Edition, pp. 422-423 (ABA 2015).

95. Bar counsel charges that by raising the issue of self-incrimination for defense witnesses without a good faith basis and in an attempt to interfere with the defendants' ability to present their defense to the jury, the respondent violated Mass. R. Prof. C. 3.4(a), 3.4(e) (before a tribunal state or allude to irrelevant matter or matter not supported by admissible evidence) as in effect prior to July 1, 2015, 4.4 (use of means with no substantial purpose other than to embarrass, delay, or burden a third person) and 8.4(c) (dishonesty, deceit, misrepresentation, or fraud) and (d).

96. For the reasons discussed below, we find that the respondent did not violate any of these rules with respect to Arenburg's testimony.

a. Rule 3.4(a): The judge, not the respondent, raised the issue of Arenburg's potential privilege based on the judge's misimpressions about Arenburg's two statements. To constitute a violation of the rule, the obstruction must be "unlawful," not merely the run-of-the-mill advocacy involved when a litigator raises objections that are overruled, files motions in limine that are denied, or keeps a studied silence in the face of an erroneous ruling by the trial court on a matter about which she is not advocating. The respondent's mere silence in response to the judge's misimpression violated no rules requiring disclosure, and did not constitute the type of obstruction we understand the rule to prohibit. Nor do we discern any "concealment" or "destruction" of evidence where Arenburg's identity and statement had been disclosed to the defendants.

b. Rule 4.4: Where the respondent undertook no obstructive course of conduct concerning Arenburg's testimony, there was no use of means with no substantial purpose other than to harass or delay the defense.

c. Rule 3.4(e): The respondent did not make any representations to the court about Arenburg in connection with her Fifth Amendment privilege, other than a non-committal statement to the court in an effort to move on to another issue. Therefore, the respondent did not allude to unsupported or irrelevant matters concerning Arenburg's privilege.

d. Rule 8.4(c): The respondent said virtually nothing about Arenburg's privilege and what little she said was so bland and non-committal that it did not violate rule 8.4(c).

e. Rule 8.4(d): For reasons similar to those discussed concerning non-disclosure of the respondent's interview of Arenburg, we find no violation of rule 8.4(d) in connection with the court's consideration of and ruling on Arenburg's Fifth Amendment privilege.

97. For the reasons discussed below, we find that the respondent did not violate any of these rules with respect to Randolph's testimony.

a. Rule 3.4(a): To constitute a violation of the rule, the obstruction must be "unlawful," not merely run-of-the-mill advocacy. The respondent's request for appointment of counsel for Randolph to advise him of his Fifth Amendment privilege had a legitimate basis in fact and law, even if the circumstances did not *require* her to make that request. We cannot conclude that the respondent's "obstruction" was "unlawful."

b. Rule 4.4: The respondent's purpose in raising Randolph's Fifth Amendment privilege was not what she represented to us. Yet that does not strip her conduct of a substantial legitimate purpose. Randolph had a valid privilege, and by raising it before Randolph took the stand, the respondent avoided interference in the trial and a potentially prejudicial invocation of privilege in the presence of the jury. These purposes might have been a pretextual "cover story" for the respondent's behavior. Nonetheless, they were substantial and, objectively speaking, legitimate, reasons. We conclude that the respondent did not violate rule 4.4.

c. Rules 3.4(e), 8.4(c): Other than her assertions concerning her own motivations, the respondent did not make any representations to the court about Randolph in connection with his Fifth Amendment privilege that were not based in fact and a correct appreciation of the law. Therefore, the respondent did not allude to unsupported or irrelevant matters concerning Randolph's privilege and she did not engage in misconduct under rule 8.4(c).

d. Rule 8.4(d): For reasons similar to those discussed concerning non-disclosure of the respondent's interview of Arenburg, we find no violation of rule 8.4(d) in connection with the court's consideration of and ruling on Randolph's Fifth Amendment privilege.

98. Likewise, where the respondent made only preliminary statements about Crossland that had a reasonable basis in fact and she ultimately conceded that there was no Fifth Amendment privilege issues requiring the appointment of counsel for him, the respondent violated none of the charged ethical rules as to him.

Count Two: Findings of Fact (Sylvia)

99. Under this count, bar counsel charges that the respondent committed misconduct when she met with a witness for the prosecution, Dave Sylvia, to whom counsel had been appointed for the purpose of discussing the witness's Fifth Amendment privilege against self-incrimination, before that witness had spoken with the appointed counsel. This was the sole ethical violation proved by bar counsel under the three counts of the petition.

100. On or about July 27, 2014, Petersen (one of the defendants under count one) was involved in a fight with Clayton Santos and Dave Sylvia at a house party. Tr. I:66-67 (T.Moriarty); Tr. I:148-150 (R.Moriarty); Ans. ¶ 41; Ex. 35; Ex. 36.

101. This case, also, had complications raising the risk of racial prejudice. As under count one, there was a black-on-white division of "accused" and "victims." Ex. 35, at 1443. Witness statements diverged and one of the witnesses expressed anger at his treatment by the police. Ex. 35, at 1444-1445. This case, however, bore the additional trigger point of contested accusations of sexual predation by a black man. Contrast Tr. I:149-150, Tr. II:12-15 (R. Moriarty) with Ex. 36, at 1455.

102. The respondent was "very" familiar with one of the alleged victims, Dave Sylvia. She had prosecuted criminal cases against him in the district court "repeatedly over ... the prior roughly ten years" on misdemeanor charges. Those charges included driving with a suspended license, and assault and battery. Tr. VII:117-118 (Marshard).

103. As a result of the fight, Petersen was charged in Edgartown District Court with assault and battery with a dangerous weapon, assault and battery on a police officer, mayhem, resisting arrest and disturbing the peace. Tr. I:150 (R.Moriarty); Ans. ¶ 41. Once again, Petersen was represented by Rob Moriarty. Tr. I:150 (R.Moriarty); Tr. VII:126 (Marshard).

104. On August 11, 2014, about two weeks after the fight, the respondent and Edgartown police detective Snowden met with Sylvia "to ascertain his level of cooperation and to get a complete statement." Ex. 72, Appendix 6, at 1, and see Tr. VII:120-121 Tr. VIII:14-16,

18, 19 (Marshard). The respondent "didn't know if [Sylvia] would cooperate" and she was "concerned he would not." Tr. VIII:16 (Marshard).

105. During that August 11 meeting, Sylvia "expressed concern for retaliation" . . . "if he participated in the court process." Tr. VII:121-122 (Marshard); Ex. 72, Appendix 6, at 1.

106. The respondent and Det. Snowden "told Mr. Sylvia Mr. Petersen could not be held accountable without the cooperation of the witnesses." Ex. 72, Appendix 6, at 1, and see Tr. VIII:24 (Marshard). By the end of the meeting Sylvia had assured the respondent and Snowden he would cooperate, and he had provided a written statement. Ex. 72, Appendix 6, at 1.

107. Some of the new charges against Petersen were felonies for which the district court did not have final jurisdiction, and the court scheduled a probable cause hearing, to occur on September 22, 2014. Tr. I:150-153, 155, Tr. II:19 (R.Moriarty); Ans. ¶ 42.

108. A probable cause hearing typically involves the taking of live testimony before a judge, who will decide whether there is probable cause to charge the defendant with a crime. Tr. II:21 (R.Moriarty); Mass. Rule Crim. Pro. 3(f). A probable cause hearing was appropriate for this type of case: "When you have people who are drinking and there are a lot of people involved and there are various levels of cooperation and different concerns, it can be helpful to see exactly who is going to testify to what. What they tell the police or they write in the statement is not always the same as what is actually testified or what comes out of cross-examination." Tr. VII:124-125 (Marshard).

109. First Assistant D.A. Trudeau suggested the respondent conduct a probable cause hearing at which Sylvia testified. Tr. VII:123-124 (Marshard). The respondent agreed, because a probable cause hearing would allow her to evaluate Sylvia's cooperation and his testimony, given his criminal record. Tr. VII:117, 120, 124, 125-126 (Marshard); Ex. 72, Appendix 6, at 1.

110. Further, a probable cause hearing provided the respondent the opportunity to preserve Sylvia's testimony for use at trial against Petersen in the event Sylvia, a participant in the very fight that led to Petersen's arrest, Ex. 35, asserted his Fifth Amendment privilege against

self-incrimination. Massachusetts Guide to Evidence, § 804 (a)(1), (b)(1), and Note accompanying section (b)(1).

111. The respondent did not proceed with a probable cause hearing concerning the fight in count one, notwithstanding that the relevant circumstances were generally the same as under count two: a fight involving drinking with many people involved. Under count one, however, there appeared to be no question that the Crays would cooperate as witnesses. Count two, then, is distinguished by the respondent's concern for assuring that Sylvia's story would get before the jury.

112. At the first call of the probable cause hearing on September 22, 2014, Moriarty informed the court that counsel should be appointed to consult with Sylvia and Santos concerning their rights against self-incrimination under the Fifth Amendment. Tr. I:66, 69 (T.Moriarty); Tr. I:165-166, Tr. II:50 (R.Moriarty); Tr. VII:126-127 (Marshard); Ans. ¶ 43; Ex. 37, at 1471-1474.

113. That same day, Sylvia was scheduled to be present at a clerk's show cause hearing to determine whether a complaint would issue against him and Clayton Santos for the same fight about which Sylvia was to testify at the probable cause hearing. Tr. I:77 (T.Moriarty); Tr. I:164-165, 171 (R.Moriarty); Ex. 36, at 1454-1459.

114. The court appointed Timothy Moriarty, Esq. to consult with Sylvia. Tr. I:167, 170 (R.Moriarty). Tim,[25] who was one of the duty attorneys that day, Tr. I:63-64, 84 (T.Moriarty), was present in court when appointed. Tr. I:69 (T.Moriarty). The court also appointed counsel to Clayton Santos. Tr. VII:128 (Marshard). The matter was postponed until a second call of the list. Ans. ¶ 44; Ex. 37, at 1475, lines 6-25.

115. Tim is Rob Moriarty's brother. Tr. I:66, 80 (T.Moriarty); Tr. I:146, 232 (R. Moriarty). Moriarty supervised Tim in Tim's capacity as bar advocate/appointed counsel. Tr. I:146-147, 172 (R.Moriarty). We acknowledge that Tim faced a conflict of interest by

[25] For simplicity and convenience, and meaning no disrespect, we refer to Robert Moriarty as "Moriarty" and to Tim Moriarty as "Tim."

volunteering (Ex. 37, at 1474, line 20) for this appointment.[26] Moriarty acknowledged that it would have helped Petersen if Tim had talked Sylvia out of testifying. Tr. I:232, 235 (R.Moriarty).

116. Nevertheless, we put no weight in the extensive cross-examination of Moriarty and Tim about their relationship as brothers and within the bar advocates system, and the theoretical conflict of interest arising from Tim's appointment. First, we do not credit that the respondent had a serious concern about Tim's waivable conflict, per se. The respondent acknowledged that she would have accepted Tim's appointment to advise Santos, Tr. VII:131 (Marshard), but Tim's conflict would have existed with Santos, as well. Second, we find that the respondent did not present any substantial objection to Tim's representation of Sylvia for Fifth Amendment purposes.[27] Third, Tim's technical conflict did not ripen into an actual conflict. Tim did advise Sylvia, in our view, correctly, that he had a Fifth Amendment privilege to refuse to testify.[28] Yet at critical points Tim did not advance his brother's cause; he did not object to

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[26] The governing rule at the time, 1.8(i) expressly called for informed consent in the circumstances.

[27] The transcript of the criminal proceeding does not indicate either that the respondent *objected* to Tim being appointed to represent Sylvia, or that any extensive colloquy occurred as a result of the obvious relationship between the two Moriarty's. There was some colloquy towards the end of the appointment of counsel for Sylvia and Santos that, unfortunately, could not be transcribed. Ex. 37, at 1474, lines 23-24. Rob Moriarty's recollection about discussion of Tim's conflict, apparently referencing this unrecorded colloquy and apparently intended to impress us that the issue of conflict was fully aired, successively framed the respondent's reaction to Tim's appointment more pointedly as about conflict of interest the more he was cross-examined by the respondent about Tim's conflict. See Tr. I:172 ("I think Ms. Marshard might have said something about ***the fact that I supervise all of them***"), 231-232 ("[I]t was brought to everyone's attention. Everybody knew about it. It wasn't like – ***everyone knew that Tim Moriarty was my brother.***") (R.Moriarty) (emphasis supplied); contrast Tr. II:27-28 (R.Moriarty): "[I]t was raised by Ms. Marshard that ... ***there was a conflict.***" (emphasis supplied). At Tr. VII:127-128, the respondent testified that she raised a question about Tim's appointment and mentioned it to the judge, but to her recollection no one responded to her concern. She also testified that she discussed it with her office, but cannot recall that anything was done about it. Tr. VII:128 (Marshard). However, when the respondent reported in writing to her superiors the events of count two, her discussion of appointment of counsel does not indicate that she objected to Tim's appointment. Ex. 72, at Appendix 6, pp. 1-2. There is, therefore, no reliable evidence that the respondent objected to Tim's appointment, and the preponderance of the evidence weighs in the other direction.

[28] We do not find that Tim told Sylvia, erroneously, that he would be charged if he testified. The respondent in substance objected to our hearing Tim's account of his advice to Sylvia, Tr. I:76-77, but the record of the proceedings before the trial court includes both Sylvia's purported assertion—related by Det. Snowden—that Tim told Sylvia he would be charged if he testified, and Tim's vehement denial of that statement. Ex. 37, at 1499-1501. The respondent has urged us to consider Sylvia easily confused by the proceedings, e.g., Tr. VII:134-135, 151 (Marshard); Ex. 37, at 1501, lines 13-14, and Sylvia's colloquies with the judge supports this, as does Clerk Williamson's description of Sylvia. Tr. VI:110-111 (Williamson); Ex. 37, at 1490, line 10 to 1491, line 10 (Sylvia

the respondent's meeting with Sylvia that is the basis for this count and her possible influence over Sylvia's decisions.[29] Finally, and in any event, if the respondent was seriously concerned about the conflict of interest, that conflict alone did not negate Tim's representation of Sylvia (else there could never be a charge of conflicted representation under rule 1.7) and the obligations that representation imposed on the respondent. Her remedy, if one was needed, was to address the court, not to intrude unilaterally into the existing attorney-client relationship between Sylvia and Tim.

117. Sylvia was not in the courtroom when Tim was appointed to represent him concerning his privilege. Tr. I:69 (T.Moriarty); Tr. VII:131 (Marshard); Ans. ¶ 44. Before the clerk's show cause hearing on the complaint against Sylvia and the next call of the probable cause hearing against Petersen, the respondent directed a detective from the Edgartown Police Department to locate Sylvia and bring him to the courthouse law library. Tr. VII:135 (Marshard); Ans. ¶ 45 (not denied, plus see next ¶). The detective did so. Tr. VII:135-136 (Marshard); Ans. ¶ 46.

118. The respondent did not seek Tim's permission to meet with Sylvia without Tim's presence. Tr. VIII:39 (Marshard); Ans. ¶ 45 (not denied). She cannot recall Tim "saying anything specific." Tr. VIII:40 (Marshard). She saw Tim on a bench outside the library and "might have said I am going to speak with Mr. Sylvia briefly;" Tim did not say anything in response. Tr. VII:136-137 (Marshard). The respondent cannot recall any further discussion, or comment by Tim, who did not follow the respondent into the library. Tr. VII:137 (Marshard).

119. This did not constitute a request for consent or the obtaining of it, and the respondent as an experienced prosecutor no doubt was familiar with the distinction between

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first denies, then admits, discussing the facts of the case with Moriarty), and see Tr. I:67-72 (T.Moriarty); Ex. 35; Ex. 36 (Tim had been provided with a copy of the police report, and the application for criminal complaint against Sylvia).

[29] Tr. I:101-102, 118-119 (T. Moriarty); Tr. VII:149-150 (Marshard); Ex. 37, at 1486-1508; Tr. I:120-121 (T.Moriarty); Tr. VII:158 (Marshard); Ex. 42, at 1518, lines 21-25.

consent and mere acquiescence to assertion of authority.[30] Nor has the respondent argued to us that she was in some way authorized to speak to Sylvia about the subject matter of Tim's appointment after Tim's appointment to represent him. See Respondent['s] ... Requests for Findings of Fact and Rulings of Law, ¶100, at 25-26 (not arguing authority).[31] We credit the respondent's rebuttal of Williamson's testimony that the respondent had asked the judge for permission to speak with Sylvia. Tr. VII:140-141 (Marshard); contrast Tr. VI:53, 68, 85-86, 106 (Williamson).

120. We credit, however, that while the respondent was meeting with Sylvia, Tim indicated to the district court clerk his awareness that Sylvia was in the courthouse library with the respondent. Tr. VI:48, 49-51, 104-105 (Williamson).

121. Based on the foregoing, we find that the respondent did not obtain Tim's consent before speaking with his client Sylvia. Further, by failing to deny this specific allegation, Ans. ¶ 45 (does not deny the allegation that the respondent "failed to seek permission from Sylvia's counsel to discuss with Sylvia the subject of that counsel's representation of Sylvia"), the respondent admitted it. B.B.O. Rules, § 3.15(d), last sent. We note, also, that to the extent consent is an affirmative defense, cf. Matter of Hoicka, 442 Mass. 1004, 1006, 20 Mass. Att'y Disc. R. 239, 242 (2004) (client consent to conflict must be proved by the respondent attorney); Matter of Eisenhauer, 426 Mass. 448, 452, 14 Mass. Att'y Disc. R. 251, 256 (1998) (same), the respondent neither pled (and therefore waived, BBO Rules, § 3.15(d) ("The answer shall ... state fully and completely the nature of the defense.")), nor affirmatively proved the defense that Tim had given consent to her conversation with Sylvia.

122. The only evidence before us about what happened in the courthouse library

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[30] "Although the defendant need not express a positive desire to have the search conducted in order to render his consent a voluntary waiver, it must amount to more than mere submission or acquiescence in the nature of resignation to constitute a valid consent." 30 Mass. Practice, Criminal Practice & Procedure § 5:145, "Submission to authority—Voluntariness of consent" (4th ed. 2017).

[31] Contrast Ex. 72, where the respondent's superior argued, apparently in response to the ethical charges against the respondent but without citing authority, that the respondent was "authorized" to speak with Sylvia.

between the respondent and Sylvia, in the presence of two police officers, Tr. VII:138-139 (Marshard) comes from the respondent and one of the police officers with her at the time, and from Sylvia's statement to the court that he was not given any promises, rewards or inducements. We address each in turn.

123. In a letter written at the request of First Assistant DA Michael Trudeau, Det. Sgt. (now Lieutenant, see Tr. VII:142 (Marshard)) Chris Dolby of the Edgartown Police Department wrote a memo concerning the discussion he observed in the library. Tr. VII:142 (Marshard); Ex. 44. The respondent characterizes this memo as a "pretty accurate summary of what happened." Tr. VII:143 (Marshard). It states, in part: "ADA Marshard . . . attempted to explain his Fifth Amendment rights to [Sylvia] which he still didn't quite understand. He asked a number of questions and advised that he now needed to have his court-appointed attorney address his concerns. At no time were any of the specifics of the Petersen case discussed in this conversation with Sylvia. The conversation was mostly trying to get Sylvia to calm down as he couldn't understand why he needed an attorney and was afraid he was now in trouble." Ex. 44.

124. We do not credit the respondent's denial that she spoke to Sylvia about charges being brought against him—except in the narrow sense that she did not use those specific words. Tr. VII:153 (Marshard). Based on her own testimony and admissions, we affirmatively find that the substance of the respondent's message to Sylvia was an assurance that Sylvia was not being charged and would not be charged. Both before and during the meeting, the respondent wanted Sylvia—whom she had prosecuted repeatedly—to know, and communicated to him, that unlike in those prior matters where counsel had been appointed for him, he was not in trouble. Tr. VII:133-134 (Marshard). She has acknowledged numerous times that her intended message was that Sylvia was not in trouble with the prosecutor and not a target of the prosecution. Tr. VII:133, 134, 136, Tr. VIII:39-40; Ex. 44; Ans. ¶¶ 45, 47, 48; Ex. 72. The respondent told Sylvia, in substance, that she did not intend to charge him with a crime.

125. We do not find that Sylvia understood the import of the judge's questions to him whether the respondent had given him any promises, rewards, or inducements, or that the

respondent's promise that he was not in trouble might constitute a promise, reward, or inducement. Ex. 42, at 1524 to 1527; and see note 29, above.

126. We find that the respondent spoke with Sylvia about the subject matter of Tim's representation of him, i.e., Sylvia's Fifth Amendment privilege and whether he would assert it. Lt. Colby's letter contradicts the respondent's denial that she discussed the privilege; according to him, the respondent "attempted to explain his Fifth Amendment rights to [Sylvia] which he still didn't quite understand." Ex. 44. The respondent asks us to conclude that she was merely passing along an innocent (and brief) message, yet she did so by bringing Sylvia into the law library to meet with her and officers Dolby and Snowden, Tr. VII:135-136, 138-139 (Marshard); Ex. 44, instead of asking the courthouse victim-witness advocate (see Tr. VI:129-132 (Williamson)) to advise Sylvia to save his questions for appointed counsel. The respondent met with Sylvia in the absence of his counsel, but did not do so with Santos, because Sylvia's commitment as a witness was questionable, and she gave the implicit promise or assurance that Sylvia would not be exposed to prosecution if he testified, all for the obvious purpose of convincing him to testify. See, e.g., Tr. VII:146-147 (Marshard).

127. It appears the respondent was aware that she exceeded the proper bounds of communication with a represented person. The respondent points out no record in the transcripts of an admission to the judge that she told Sylvia he was "not a defendant," "not in trouble," and "not a target" of the district attorney, and we are aware of none. The respondent told the judge that "the purpose in our, in our meeting with the, uh, witnesses was to explain what was going on, and nothing further, judge." Ex. 42, at 1520, lines 6-8. When the court asked: "And Mr. Timothy Moriarty was not present at that meeting," she attempted to tell the judge that Tim had not yet been appointed, but Tim corrected her. Tr. I:130-131 (T. Moriarty); Ex. 42, at 1520, lines 9-14. The court had appointed Tim as counsel for Sylvia in the respondent's presence. Tr. I:63, 132 (T.Moriarty); Ans. ¶ 44; Ex. 37, at 1474, lines 5-22.

128. We do not credit the respondent's testimony that at some point during the three days of hearings she told the judge she had assured Sylvia he was not in trouble. Tr. VIII:29-30

(Marshard). The respondent has not identified any such transcript passage, and we do not find it likely to have occurred. On the very day of the respondent's ex parte meeting with Sylvia, Det. Snowden disclosed that he had assured Sylvia he would not be charged with a crime if he testified. Ex. 37, at 1499, line 6 to 1501, line 1. The judge commented that neither side should be telling Sylvia that there will or won't be charges brought. Ex. 37, at 1503, lines 2-8. In light of that judicial comment and the respondent's incomplete description for the judge of her discussion with Sylvia, see ¶ 127, above, it is more likely than not that the respondent did not volunteer that she, too, had done what the court said should not be done.

129. Sylvia eventually waived his Fifth Amendment privilege. Tr. I:121-122 (T.Moriarty); Tr. VII:159 (Marshard); Ex. 42, at 1519, lines 1-7. The court, not having the benefit of all of the information available to us, Ex. 42, at 1522-1527, ruled that Sylvia had not been given any promises, rewards, or inducements for his testimony and denied the defense request to preclude that testimony. Tr. I:129 (T.Moriarty); Tr. VII:158-159 (Marshard); Ex. 42, at 1528, line 16 to 1529, line 11.

130. In light of the foregoing findings, it is not necessary to address the voluminous testimony and documentary evidence concerning Clerk Williamson's involvement in bringing to light the respondent's meeting with Sylvia, Petersen's complaint to bar counsel about it, the district attorney's investigation of, and conclusions concerning, the propriety of the respondent's meeting with Sylvia, or the additional details of the criminal proceedings concerning Sylvia's testimony.

Count Two: Conclusions of Law

131. Bar counsel charges that by communicating with Sylvia about the subject of Sylvia's representation without the consent of Sylvia's counsel, the respondent violated Mass. R. Prof. C. 4.2 and 8.4(d). We find that the respondent violated these rules as charged.

Count Three: Findings of Fact

132. This count concerns the respondent's reaction to incorrect testimony presented by

a state trooper before a grand jury. According to the trooper's testimony, at the time of an arrest in a drug sting operation, a cell phone belonging to an arrestee had displayed a one-word text message ("here") sent by a police officer from the cell phone the officer had used to pose as a drug buyer. This text message, the trooper told the grand jury, confirmed that the arrestee was the suspect with whom the police had set up a phony drug buy using earlier text messages from that cell phone. Ex. 45, Ex. 53. As became clear in a later proceeding before a trial court judge, however, the arrestee's cell phone had not displayed that message. The officer who had engaged in the pretextual cell phone communications to set up the phony buy could not even confirm for the trial judge that the arrestee's cell phone had ever received the message. Ex. 57. Based on our subsidiary findings, below, we find that bar counsel did not carry the burden of showing that the respondent knew the trooper's testimony was false and failed to correct it or, alternatively, that she had failed to prepare the trooper adequately for his testimony.

133. On April 7, 2014, the respondent presented to a Dukes County grand jury evidence of alleged crimes by Mike Jean-Francois, Quentin Phillip, and Brian Merkman. Tr. VII:172-173 (Marshard); Ans. ¶ 57; Ex. 53; Ex. 57, at 1859. Francois, Phillip, and Merkman had been arrested on September 3, 2013 on drug charges, including drug trafficking, as the culmination of a sting operation in which the police used the texting function of a cell phone seized from another suspect, "Viaggio," to set up a phony drug buy from a seller whose name appeared on Viaggio's phone as "Peters." After the arrests, one of the arrestees was found to be in possession of drugs, and more drugs were found under a hat at a restaurant table where two of the arrestees had been sitting. Ex. 45.

134. The respondent presented the case against the defendants to the grand jury through testimony from State Police Sergeant Jeffrey Stone, based on Stone's recollection and his review of police reports. Tr. III:225-226 (Stone); Ans. ¶¶ 57, 58. Sgt. Stone is a thirty-seven year veteran on the state police. Tr. III:222 (Stone). He has been a member of, or in charge of, the Martha's Vineyard Drug Task Force for over twenty years. Tr. VI:192 (Trudeau).

135. One of the reports Sgt. Stone reviewed was written by Oak Bluffs Police Sgt. Nicholas Curelli. Stone worked closely with Curelli on the sting that resulted in the arrest of Francois, Merkman, and Phillip, as well as other investigations, and they know each other well. Tr. III:195 (Curelli), Tr. III:222-223 (Stone). Curelli was the officer who had used Viaggio's cell phone to set up the buy with the drug dealer identified on the Viaggio cell phone as "Peters." Ex. 45. Curelli's report described the set-up of the sting, and the incidents during Francois' arrest and at the police station later that day. Ex. 45. No other police report related the course of the texting conversation and its culmination at the time of the arrest. Id.

136. Curelli had seized Francois's cellphone at the time of his arrest, sent the text message "here" to "Peters" at the arrest scene, and later photographed screen shots of the text messages exchanged between "Viaggio" and "Peters" during the sting. Tr. III:190-194, 203-211 (Curelli); Ex. 46, Ex. 45, at 1727-1728.

137. Stone did not take part in Francois' arrest, which occurred out of his sight down the street "half a football field or more away." Tr. III:224 (Stone). The respondent understood that Stone had not participated directly in Curelli's encounter with Francois or in the seizure of Francois's cell phone. Tr. VIII:90 (Marshard); Ans. ¶ 57.

138. As was typical, the respondent initially requested that Curelli, the case officer, present the case to the grand jury. Tr. III:194-195 (Curelli); Tr. VII:173 (Marshard). Curelli, however, was scheduled to be out of town with his family on the day the matter was to go before the grand jury. Tr. III:195 (Curelli); Tr. III:225 (Stone); Tr. VII:173 (Marshard). As a result, Stone was asked to present the matter to the grand jury. Tr. III:195 (Curelli); Tr. III:224-225 (Stone); Ans. ¶ 57. It was not unusual for a prosecutor to use a single police officer to present the entire case to the grand jury and to cover for an absent officer. Tr. III:129-130 (Manning); Tr. III:196-197 (Curelli); Tr. VI:189 (Trudeau) ("pretty much routine").

139. During her presentation to the grand jury on April 7, 2014, the respondent provided the grand jury with copies of photographs of the cell phone screen shots Curelli had taken. Ex. 53, at 1756, 1759-1771. With one exception, the screen shots shown to the grand jury

were photos of text messages displayed on Viaggio's phone and not pictures taken of the "Peters" (i.e., Francois's) phone. Tr. III:212-213 (Curelli); Ex. 57, at 1842-43. They, along with the exception—a side-by-side picture of both phones taken at the police station, and attached as the last page of the packet of photos—are in evidence before us as Ex. 46. Tr. III:208-210, 212-213 (Curelli); Ex. 45, at 1728; Ex. 46.

140. During Stone's testimony, neither the respondent nor Sgt. Stone advised the grand jury that Viaggio's phone displayed the text messages. Ex. 53, at 1760, 1761-62, 1764.

141. Stone is bad at cell phone technology, and he "rel[ies] on the younger detectives to do all that." Tr. III:230, 231-232 (Stone). Before presenting the evidence to the grand jury, Stone had gone over the case enough with Detective Curelli and the others involved, and read the report, to satisfy himself that he had "a good understanding of what happened." Tr. III:234 (Stone).

142. Stone had worked with the respondent on "numerous grand juries" before this one. Tr. III:226 (Stone). He never felt inadequately prepared when he worked with the respondent, and considered the respondent "overly prepared." "[S]he would go over things again and again and again to make sure I knew everything that was going on with that case." Tr. III:227 (Stone). The respondent acknowledged at the disciplinary hearing that she had heard "grumblings" about the extent of her preparation, including that Sgt. Stone found it annoying, but, especially with superior court cases, she "would rather meet an extra time and be confident that the preparation is where it should be." Tr. VII:176 (Marshard). The respondent's supervising First Assistant DA, Michael Trudeau, corroborated Stone's evaluation of the respondent as overprepared: "if there's one fault Laura has, it's overpreparation. . . she would have a tremendous amount of knowledge about the particular details of the case. . . a firm command on the facts and circumstances . . . ." Tr. VI:207-208 (Trudeau).

143. In her preparation for the grand jury testimony, the respondent met with Stone. Tr. III:226 (Stone); Tr. VII:175-176, Tr. VIII:89 (Marshard). Together they reviewed the photographs and decided which to present to the grand jury. Tr. VII:177-178, Tr. VIII:89

(Marshard). Together, they went through the text messages between Curelli, posing as Viaggio, and "Peters", Tr. VIII:89 (Marshard), to ensure they would be understandable to the grand jurors. Tr. VIII:89-90 (Marshard). The respondent understood the side-by-side photo of Viaggio's and Francois's cell phones, attached at the end of the packet of screen shots, corroborated that the two phones were in communication with each other to set up a drug transaction, and that the call depicted there had been made and photographed at about 5:30 p.m., when the police were back in the police station. Tr. VII:178-179 (Marshard).

144. Stone gave the following testimony to the grand jury, with additional questions from the respondent as follows:

> A: So they pat-frisk [Francois] and they found his cell phone and they told him they were working on a narcotic investigation, and then Nick Curelli picked up Peter – I mean, Viaggio's phone and texted back to this guy he's been texting all day known as Mike Peters, and Detective Curelli types in, "Here." And then in the other hand is Mike Francois', Jean-Francois' phone and, and it buzzes and it shows, "Here."
>
> Q: Does it say "here" or "test"?
>
> A: I thought he said "here." So now we know—
>
> Q: Hold on one second, if you could, Sergeant. Just give me one second.
>
> A: Yeah. He then texts—
>
> Q: At 3 p.m., he says "here"?
>
> A: Yes.
>
> Q: Okay.
>
> A: So now we know we have the right person.

Ans. ¶ 58; Ex. 53, at 1771.

145. Stone's testimony before the grand jury varied from Curelli's report (Ex. 45) on a number of points.[32] Most pertinent to the charges before us, according to Curelli's report

[32] For instance, according to Curelli's report, Lt. Williamson was holding the cell phone seized from Francois when Curelli sent the "here" text; as quoted above, Stone testified that Curelli held the Viaggio phone in one hand and Francois's in the other. Also, during Stone's testimony, the prescription bottle containing drugs that was found under an abandoned baseball hat morphed into "the big jar underneath the baseball hat." Cf. Ex. 53, at 1775 with Ex. 53, at 1778.

Francois's phone "sounded an alert type sound immediately" (Ex. 45), but Stone testified that Francois' phone buzzed and displayed the word "here." Before the committee, Stone acknowledged his understanding of the importance of the "here" text in connecting Francois to the text exchanges between Curelli, posing as Viaggio, and "Peters," thus helping to establish probable cause to justify a stop and seizure. Tr. III:238-239 (Stone).

146. In fact, Curelli never saw the word "here" displayed on Francois's cell phone. After the grand jury indicted the defendants, Curelli gave sworn testimony at a hearing (Ex. 57) on defense motions to suppress, Tr. III:130-132 (Manning); Ex. 56, and to dismiss the indictment. Tr. III:133-134 (Manning); Tr. IV:21 (Nolan); Ex. 55. Curelli first said he did not recall seeing the word "here" on Francois's phone, then acknowledged that he was unable to access the contents of Francois's cell phone; there was no screen shot of text messages displayed on Francois's phone; Curelli did not see anything on his phone at the time of the arrest; and at the time of Curelli's testimony at the suppression hearing, "we don't know if that phone actually received the text message." Ex. 57, at 1838, 1839-1840, 1842, 1843.

147. Stone's explanation for his testimony that Curelli saw the word "here" on Francois's cell phone was that, because he read the word "observed" in Curelli's report and had seen the screen shots, he thought Curelli had seen the word "here" on Francois's cell phone. Tr. III:228-229 (Stone). We need not determine the credibility of Stone's testimony that at the time he gave his grand jury testimony he believed it was true. Tr. III:230 (Stone). The issue before us is whether the respondent knew or learned that the testimony was false and failed to take action or, in the alternative, the respondent did not prepare adequately.

148. We do not credit the respondent's testimony that there was nothing "unusual" about Stone's testimony, Tr. VII:180 (Marshard), where the respondent interrupted and paused Sgt. Stone immediately after he incorrectly said that Francois's phone displayed the "here" text. Ex. 53, at 1771.

149. Nevertheless, and as discussed above, our credibility determinations do not constitute affirmative findings to the contrary. The respondent's hesitancy at Stone's testimony

before the grand jury is not the same as knowledge of its falsity. Nor can we infer such knowledge; the respondent might well have thought that Stone's testimony varied from Curelli's report because Stone had talked about the matter with Curelli and obtained more information. This was one of seven or eight presentments to the grand jury the respondent handled that day, Tr. VIII:104 (Marshard), and it is also possible that respondent was somewhat overwhelmed and not as sharp as usual.

150. It is, of course, open to bar counsel to argue that the respondent's typically thorough preparation must have disclosed to her that Curelli never saw the word "here" on Francois's phone where, as noted above, Curelli was clear on that point during the suppression hearing and before us, as well. Tr. III:202, 206-207, 213 (Curelli). Further, it might be argued that the respondent could not possibly have been confused by the screen shots into thinking they came from Francois's cell phone. If she had, she would have told the grand jury because that would have been, as Stone recognized, a firm link between the drug-dealing "Peters" identified on Viaggio's phone and Francois's cell phone. Yet, the respondent never told the grand jury, or asked Stone to tell the grand jury, which phone the screen shots came from. Ex. 53. Thus, it might be argued, she knew that Francois' phone had not displayed the word "here," and simply chose not to clarify that for the grand jury.

151. We find these inferences of complicity in a knowing fabrication to be too attenuated to support actual belief based on a preponderance of the evidence. There is no affirmative evidence that the respondent spent any substantial time with Curelli, and Stone was her witness. Even if, as a result of his conversations with Curelli, Stone knew or should have known that Curelli never saw the word "here" on Francois's phone, there is no evidence Stone transferred that information to the respondent, or that she otherwise became aware of it, before the grand jury session. We also note the following. In front of the grand jury the respondent appeared confused about what Curelli did or did not see, and on which cellphone.[33] When Stone

[33] We note, without suggesting that this was dispositive, that both defense counsel stated on the record to the court that they were seeking dismissal without prejudice as they did not believe there had been any deliberate

said that Curelli saw the word "here", the respondent interrupted to ask whether he saw "here" or "test." This was a confusion; the word "test" was texted from Viaggio's phone at 5:16 p.m., when Curelli was at the police station, Ex. 46, at 1745, 1746; Ex. 45, at 1728; Ex. 57, at 1839. Given Curelli's testimony about the "here" message, he would not have been able to see "test" on Francois's cell phone, either.[34]

152. Perhaps bar counsel suggests that the respondent committed misconduct because she did not correct Stone's false testimony before Curelli's testimony at the later hearing on the defendants' motions to suppress and to dismiss the indictment. Yet there is no evidence the respondent received new evidence between the grand jury proceeding and the hearing on the motions to suppress and to dismiss. Further, even at the hearing on those motions, the respondent continued to display confusion about what Curelli saw or did not see on Francois's phone and when he saw it. She asked Curelli when he saw something on Francois's phone, and when he said he couldn't recall seeing anything, she began to ask Curelli about seeing an incoming call at 5:30, when he was at the police station. Ex. 57, at 1838.

153. The defendants' motions to dismiss and to suppress, as well as the additional motions to dismiss filed after the falsity of Sgt. Stone's testimony came to light, Tr. III:173-174. (Manning); Tr. IV:24, 47 (Nolan); Tr. VII:195 (Marshard); Ex. 59, were never heard. Tr. IV:24-25, 26 (Nolan); Tr. VII:195 (Marshard). On December 22, 2014, the Commonwealth entered a nolle prosequi of the charges still pending based on its inability to prove the charges beyond a reasonable doubt.[35] Tr. III:218 (Curelli); Tr. IV:24-25, 26 (Nolan); Ex. 62, Ex. 63.

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misconduct. Ex. 30, at 74, line 28 through 75, line 22. This suggests the prima-facie confusing nature of the evidence available to them, i.e., the photos, Curelli's report, and Stone's testimony.

[34] The respondent's suggestion that she has seen encrypted phones that display text messages, Tr. VII:179-180 (Marshard), and the observation that Francois's phone displayed an incoming call, are beside the point, where, as indicated above, we credit Curelli's explicit testimony that he was not able to see any text on Francois's phone and could not even confirm that Francois had received his arrest-scene text of the word "here."

[35] The charges against Quentin Philip did not proceed because Philip was killed after indictment and the respondent entered a nolle prosequi. Tr. III:133 (Manning).

154. We put no substantial weight in, and do not discuss, the voluminous additional testimony and evidence of motion practice, opinions of defense counsel concerning their evaluation of defense strategy, etc., none of which was helpful.

Count Three: Conclusions of Law

155. Bar counsel charges that by failing to correct false testimony, the respondent violated Mass. R. Prof. C. 3.3(a)(4) as in effect prior to July 1, 2015 and 8.4(c), (d) and (h). We find that bar counsel has not proved that the respondent knew the pertinent testimony was false at any time before its falsity was disclosed to her, the judge, and defense counsel at the suppression hearing. As a result, we find no violation of Rule 8.4(c). Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633, 645-646 (2001), Matter of McCabe, 13 Mass. Att'y Disc. R. 501, 511-512 (1997). Based on the evidence before us, the respondent simply made a mistake, and we are not prepared to say that mistake was of such culpable magnitude as to constitute conduct prejudicial to the administration of justice or conduct reflecting adversely on the respondent's fitness to practice. Therefore, she did not violate rules 8.4(d) and 8.4(h).

156. Alternatively, bar counsel charges that by failing to prepare adequately to present the matter to the grand jury, the respondent violated Mass. R. Prof. C. 1.1, 1.2, 1.3 and 8.4(d) and (h). We do not find any such violations where an overburdened prosecutor simply made a mistake. See Matter of an Attorney, 18 Mass. Att'y Disc. R. 586, 598 (2002), aff'd, 437 Mass. 1001 (2002) (rescript) (isolated lapse of judgment does not necessarily require a sanction), citing Matter of McCabe, 411 Mass. 436, 449-450, 7 Mass. Att'y Disc. R. 181, 195 (1991).[36]

[36] Even if there had been a technical violation of rule 1.3, which we do not find, we would recommend dismissal of this charge. The board has stated: "We are left, then, with a single violation of rule 1.4 that sprang from an innocent mistake of fact . . . . Not every rule violation requires the imposition of discipline, and 'an isolated lapse in judgment does not necessarily constitute sanctionable conduct.' Matter of an Attorney, 18 Mass. Att'y Disc. R. 586, 598, aff'd 437 Mass. 1001, 18 Mass. Att'y Disc. R. 586 (2002). See also Matter of Doe, 15 Mass. Att'y Disc. R. 833, 837-838 (1999); Bar Counsel v. Doe, BBO File No. C5-03-022, Board Memorandum at 7-8 (July 7, 2007). We agree with the hearing committee's unanimous opinion that the respondent's error does not warrant discipline." Matter of an Attorney, BBO No. C6-2007-0021 (12/14/2009).

Matters in Aggravation and Mitigation

Aggravation

157. The respondent's substantial experience in criminal law is a matter in aggravation. See Matter of Crossen, 450 Mass. 533, 580, 24 Mass. Att'y Disc. R. 122, 179 (2008); Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993).

158. The respondent's misconduct under count two and her testimony about it displayed a lack of understanding of her ethical obligations. See Matter of Eisenhauer, 426 Mass. 447-448, 456, 14 Mass. Atty. Disc. R. 251, 261-262, cert. denied 524 U.S. 919 (1998) ("must consider lack of candor, lack of remorse, and lack of awareness of wrongdoing in formulating a recommendation for discipline").

159. Lack of candor before the committee is a matter in aggravation. See Eisenhauer, supra; ABA Standards for Imposing Lawyer Sanctions, § 9.2(f) (1992). The respondent demonstrated lack of candor concerning several matters and at various times. The consistency and extent of her misleading or false assertions bespeaks something more than mere negligence or slip of the tongue during her testimony before us, and in each instance the respondent was defending herself or her case against charges of misconduct. She demonstrated lack of candor:

a. Concerning the various matters addressed in her testimony before us, as previously noted in this report, which find counterparts in instances of lack of candor elsewhere, as described below;

b. before the trial court, when incompletely describing her improper ex parte meeting with Sylvia under count two, as described above;

c. in her description, in a memorandum of law to the court, Ex. 20, of the fate of the licensing proceeding against the Ritz Café under count one;[37]

d. in her testimony before us concerning Judge Chin's finding of prosecutorial misconduct, Tr. VII:238-252, and in a report to her superiors (Tr. VI:243), apparently prepared for the purpose of responding to Judge Chin's findings of prosecutorial misconduct and Petersen's complaint to bar counsel. Tr. VI:210-211 (Trudeau).

[37] In that memorandum to the court, the respondent referenced the licensing proceedings but did not disclose their outcome favorable to the Ritz or their unfavorable assessment of the respondent's witnesses. Ex. 20.

Contrast, e.g., Ex. 72, with Ex. 30, at 1164-1168; Ex. 31; Ex. 32, at 1191, 1193, 1194-1214, 1251-1253).

160. Without suggesting that the media coverage in this case was an aggravating factor with respect to the respondent's misconduct, but to provide background, Judge Chin's findings of prosecutorial misconduct were the subject of media coverage in print and digital media during October and November 2014. Ex. 72, fourth page. The matter remained the subject of media attention during the disciplinary hearing; reporters were in attendance every day. One bar counsel witness complained that on May 10, 2017, the Cape Cod Times had quoted a defense witness characterizing him as an "alarmist" who "sometimes sees things that are not there." Ex. 75, at sixth page. Bar counsel's recommendation for a sanction was in the board's file while it remained subject to public—and media—scrutiny. Adverse publicity does not necessarily mitigate misconduct; rather, extensive publicity can warrant a public response to a matter of misconduct that is already the focus of public attention. Matter of Ryan, 6 Mass. Att'y Disc. R. 275, 277 (1990) ("At oral argument the respondent's attorney furnished me with a newspaper account stating, with substantial accuracy, the nature of the complaint ... and the recommended sanctions. In this context I see no reason to preserve the fiction of a private reprimand, although that is... the appropriate level of discipline"). See also Matter of Holzberg, 12 Mass. Att'y Disc. R. 200, 204-205 (1996) (adverse publicity was not mitigating, and was consistent with the imposition of public discipline). Cf. Matter of Killam, 388 Mass. 619, 623-624 (1983) (judicial discipline case) ("In any view of the attendant circumstances, Judge Killam's conduct deserves the imposition of a sanction. Because that conduct occurred in public and generated a public prosecution with the publicity attendant to it, it deserves the imposition of a public sanction.").

Mitigation

161. The respondent presents no evidence that may rightly be called mitigating. Perhaps the respondent suggests that she was the victim of overzealous defense counsel seeking the advantage of their clients by accusing her of misconduct, or a vindictive clerk, or a too-lenient judge. This is not mitigating, because the question is not whether the respondent "has

already been punished enough" in some manner other than disciplinary proceedings. Matter of Nickerson, 422 Mass. 333, 337, 12 Mass. Att'y Disc. R. 367, 375 (1996). "To make that the test would be to give undue weight to [the respondent's] private interests, whereas the true test must always be the public welfare." Matter of Keenan, 314 Mass. 544, 547 (1943).

Recommended Disposition

Bar Counsel recommends that the respondent be suspended for three months, on the assumption that all charged misconduct was proved. The respondent recommends that the petition be dismissed, on the assumption that no charges were proved. We recommend that the respondent be publicly reprimanded.

Contacting a represented party without the consent of counsel, as bar counsel acknowledges, typically warrants an admonition. AD No. 16-20, 32 Mass. Att'y Disc. R. --- (2016); AD No. 00-46, 16 Mass. Att'y Disc. R. 519 (2000); AD No. 99-77, 15 Mass. Att'y Disc. R. 795 (1999); see also Matter of Kent, 21 Mass. Att'y Disc. R. 366 (2005) (public reprimand for both communicating with unrepresented party and, when that party was later unrepresented, presenting papers for execution without disclosing that he was acting in the interest of a different party).

The typical sanction is not enough, however, in the circumstances of this case. The respondent's misconduct in contacting a represented party without the consent of that party's attorney was willful and intentional, not accidental or peripheral. It was aggravated by the respondent's lack of candor before us about that incident and about other incidents that were the subject of this disciplinary proceeding, as well as her substantial experience and failure to recognize the wrongfulness of her misconduct under count two. Finally, we are concerned that apparently one of the respondent's witnesses, a Second Assistant District Attorney, and perhaps a First Assistant District Attorney as well, took the position that the respondent's ex parte contact with a represented person concerning the subject of the representation was, in effect, business as usual. Tr. IV:235 (Thibeault); Tr. VI:181-182 (Trudeau). This is troubling coming from attorneys with a special overarching duty to seek justice. Mass. R. Prof. C. 3.8, Comment (1).

That being so, a mere private admonition would not send the appropriate message to the bar. "The primary factor in bar discipline cases is 'the effect upon, and perception of, the public and the bar.'" Matter of Zak, SJC-12073, slip op at 10 (4/10/2017)).

While the matter is somewhat close, we conclude that a public reprimand is warranted and sensible in the circumstances.

Conclusion

For the foregoing reasons, we recommend that the respondent be publicly reprimanded.

RESPECTFULLY SUBMITTED
by the hearing committee

James Breslauer, Esq., Chair

Molly Ambrose, Member

Walter B. Sullivan, Esq., Member

Filed: 10/26/17

APPENDIX A

Trial Court Findings of Prosecutorial Misconduct

Bar counsel did not obtain an order of issue preclusion concerning the findings, by superior court Judge Chin, that the respondent had engaged in a sustained course of prosecutorial misconduct in connection with the facts under count one. Ex. 32, at 1200-1205. Therefore,

those findings are not binding on us. See Matter of Brauer, 452 Mass. 56, 24 Mass. Att'y Disc. R. 40 (2008); Matter of Goldstone, 445 Mass. 551, 558, 21 Mass. Att'y Disc. R. 288 (2005); and Matter of Cohen, 435 Mass. 7, 17 Mass. Att'y Disc. R. 129 (2001) (predicate findings for application of issue preclusion), and B.B.O. Rules, sec. 3.18 as in effect before 9/1/2017 (the board chair or the board chair's designee has jurisdiction over motions for issue preclusion).

The judge's findings, however, were admitted by agreement. But see Matter of Santuosso, 318 Mass. 489 (1945) (trial court findings inadmissible) and contrast Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 11 Mass. Att'y Disc. R. 291 (1995) (findings given effect under doctrine of issue preclusion). Yet, unlike the trial judge who issued them, we have a full evidentiary record, live testimony subject to cross-examination, and a sole focus on the ethical issues.

Likewise, other rulings during the criminal proceedings are not binding on us and we give them little weight for the same reasons. Also, where trial court findings were apparently favorable to the respondent, as a matter of law they are not binding on us. S.J.C. Rule 4:01, § 11. We say all of this with respect for the trial court judges, who faced highly contentious litigants, time constraints, and the need to apply a complex body of substantive and procedural law that does not entirely overlap in terms or purpose with the rules of professional conduct.

"Expert" Testimony

We give no weight to the unhelpful testimony offered by bar counsel and the respondent about the ethical propriety of the respondent's conduct or what the respondent could or could not have known. Expert testimony concerning the fact of an ethical violation is not appropriate, Matter of Crossen, 450 Mass. 533, 570, 24 Mass. Att'y Disc. R. 122, 168 (2008), and opinion testimony is entitled to evidentiary weight only to the extent it is helpful to the finder of fact. See Mass. Guide to Evidence, §§ 701 (Lay Opinion), 702 (Expert Opinion).

Bar counsel presented testimony by two criminal defense counsel in the cases underlying count one (Attorneys Robert Moriarty and John Amabile). Aside from the incompetence of their testimony concerning ethical issues, Crossen, supra, their pro-defense slant and self-interest in

justifying their conduct, especially in the presence of a disciplinary body, together with their lack of access to background facts, rendered unreliable their ultimate judgments about the ethical propriety of the respondent's conduct.

The respondent presented testimony from two defense counsel under count three to the effect that the respondent could not have known the falsity of certain grand jury testimony. While somewhat helpful in confirming our own view that the materials available to the respondent were somewhat confusing, the testimony was far from dispositive. It lacked adequate foundation because these defense counsel did not have access to all of the information in the possession of both the prosecutors and police. What was dispositive to us was the lack of evidence that the respondent knew of all of this evidence, especially Curelli's later testimony.

The representatives from the Cape and Islands District Attorney's office had an institutional interest in defending the conduct of a member of their office and the positions they themselves took in court, later repeated in writing to bar counsel. Tr. III:37 (R.Moriarty), Tr. VI:196, 210-211 (Trudeau), Tr. VII:202-203, 215 (Marshard); Ex. 20, Ex. 24, at 0236-0238, Ex. 72. Their testimony suffered from an additional shortcoming: with the exception of the transcripts of the criminal proceedings (which, in turn, reflect limited access to information), and a letter from a police officer, their views all appear to have depended on the respondent's reports to them of the underlying facts.[38] See, e.g., Ex. 72 (includes the respondent's memos to supervisor(s)). Where we have substantial doubts about the respondent's credibility on key points, we give no weight to the opinions of the office of the District Attorney concerning whether the respondent acted ethically. See Tr. VIII:118-119, 120-124 (O'Keefe); Tr. VI:156 (Trudeau); Tr. VI:178-182, 249-250 (Trudeau); Tr. VI:193 (Trudeau); Tr. IV:235 (Thibeault).

The Purported Williamson—Marshard Feud

The respondent did not persuade us that count two in this matter was nothing more than

[38] First Assistant DA Trudeau's written defense of the respondent's conduct, Ex. 72, states that it is based on interviews of percipient witnesses, but no witnesses are identified, and the information appears to have come primarily from the transcripts and the respondent.

the product of a long-standing feud between her and Liza Williamson, the Clerk of the Edgartown District Court, over the respondent's long-ago prosecution of Williamson's mother. Tr. I:29-31 (opening statement); Tr. IV:175-195 (Toomey). That narrative was irrelevant; bar counsel, not the complainant, "owns" and investigates the case, which stands or falls on the evidence bar counsel presents. See S.J.C. Rule 4:01, § 10 (prosecution does not depend on continued cooperation of the complainant); Matter of Simkin, 471 Mass. 1013 (2015) (no private standing to file petition for discipline). Still, we credit that intervention by a local police chief addressed the purported feud, Tr. IV:190 (Toomey), and it was so insignificant that District Attorney O'Keefe brushed it off at the time, and could only cite media coverage concerning the underlying matters and this disciplinary proceeding as purported evidence that it had continued. Tr. VIII:117-118 (O'Keefe). Williamson's bias against the respondent was clear enough from her testimony, without the respondent having to put this episode on the record. We have credited Williamson's testimony only to the very limited extent that we cite it here.

Officer Cassidy's Trial Testimony About Arenburg's Conduct When Giving Her Written Statement

At the Baptiste/Petersen trial, Cassidy described Arenburg as unwilling to give a statement the morning after the fight in count one. The respondent did not call Cassidy to testify before us. That description was presented to us by the transcript of the criminal trial. Ex. 29, at 0805-0810. If true, it would be consistent with and supportive of the respondent's narrative that Arenburg asked to talk to the respondent because she did not want to testify at the trial.

We do not credit Cassidy's narrative. We explain the record basis for this determination because our determination is not based on an assessment of live testimony.

According to his recorded testimony, Cassidy asked Arenburg to come to the police station to give a statement. Ex. 29, at 0806. That testimony has no counterpart in his police report. Ex. 1, at 0006-07. Arenburg had no recollection of being asked to come to the police station; she recalled that she went there on her own initiative. Tr. V:133-135, 137 (Arenburg).

The police reports do not mention Arenburg's trip to the police station, either. Ex. 1, at 0007, 0009; Ex. 29, at 0845-0847. That is consistent with Arenburg's testimony that she went to the police station of her own accord, but was unable to speak with a police officer and instead was handed a statement form and asked to write a brief summary of events. Tr. V:69, 71, 131-132 (Arenburg). Cross-examination at the criminal trial by Petersen's counsel, as well as the police reports concerning the events of that morning, confirm that the police were busy writing their reports and looking for, and arresting, Petersen and Baptiste.

Arenburg already knew of a fight in the bar about two weeks earlier, when someone had been hit with a bar stool, Tr. V:156-157 (Arenburg), and the bar's license had previously been suspended for twenty days at some time not disclosed to the committee. Tr. V:162 (Arenburg). Arenburg's desire to preserve her bar's license in the face of accusations about fights there, Tr. V:103-104 (Arenburg), and her later visit to the police station when the bar's license was at risk in a licensing proceeding, see Ex. 15, undercut the credibility of Officer Cassidy's trial testimony about Arenburg being a reluctant witness. Ex. 29, at 0805-08; contrast Tr. V:136-138 (Arenburg).

Further, if Cassidy had in fact requested Arenburg to come to the station and give a statement, and if she had done so as he testified, his failure to include reference to his request and to Arenburg's statement in his reports is inexplicable. The facts that on the night of the fight Frank Cray was requested to give, and did give, oral and written statements are meticulously recorded. Ex. 1, at 0006, 0007, 0012, 0014. So also was Cassidy's unsuccessful effort to obtain a written statement from Ethan Leite. Ex. 1, at 0017.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the report of the Hearing Committee of the Board of Bar Overseers, in the matter of Bar Counsel, Petitioner v. Laura Marshard, Respondent, by first class mail to the Respondent's Counsel, Michael E. Mone, Esq. and Elizabeth Nevins Mulvey, Esq., and by delivery in hand to Bar Counsel, Constance V. Vecchione, Esq. and Assistant Bar Counsel, Stacey A. L. Best, Esq.

Dated this 26th day of October 2017.

BOARD OF BAR OVERSEERS

By _____
June D. Risk
Legal Administrative Assistant