LITIGATION NEWS

ABA Litigation Section

FEATURE STORY

Supervising Attorney Receives Slap on the Wrist

By Grant H. Hackley – March 26, 2025

How much are supervising attorneys permitted to rely on the work of a subordinate attorney? The answer is, of course, it depends. ABA Litigation Section leaders encourage senior attorneys responsible for the work of others to employ the well-worn Cold War adage of trust but verify.

In the Matter of Kris C. Foster & Others was a disciplinary proceeding that arose out of Committee for Public Counsel Services & Others v. Attorney General & Others, in which the Supreme Judicial Court for the County of Suffolk, Massachusetts, had sought "to remedy egregious governmental misconduct arising out of the scandal at the State Laboratory Institute in Amherst." The egregious misconduct at issue in the underlying case was the action of several chemists in the state crime lab that ultimately led to the dismissal of nearly 40,000 drug convictions based on tainted lab results. The incident led to a widely viewed four-part documentary series on Netflix, entitled How to Fix a Drug Scandal.

The Massachusetts Attorney General's Office arrested and prosecuted several of the chemists. During the criminal investigation of one of them, the Attorney General's Office, through its lead prosecutor, failed to disclose inculpatory evidence against the chemist to other defendants for whom the evidence would have been exculpatory and who were being prosecuted based on the potentially tainted lab results.

As a result, the Massachusetts Board of Bar Overseers initiated disciplinary proceedings against three prosecutors over the "deceptive withholding of exculpatory evidence." The board's recommended sanctions were (1) disbarment for the lead prosecutor as she bore "the greatest culpability"; (2) a 366-day suspension for the attorney handling discovery responses, as her misconduct amounted to "gross incompetence" and "reckless lawyering"; and (3) a three-month suspension for the supervising attorney "for neglecting his supervisory duties."

The Massachusetts Supreme Court found that all three lawyers "failed in their collective duty to disclose potentially exculpatory information," but reduced the supervising attorney's punishment to nothing "more severe than a public reprimand" because he had "reasonably relied in good faith on [the lead prosecutor]'s misrepresentations that she had turned over exculpatory information." In addition, the supervisor "knew [the lead prosecutor] to be an experienced prosecutor who had demonstrated her competence" and had led the prosecution with no prior signs she "was not complying with the rules of professional conduct."

Supervisors Are Duty-Bound to Ensure Supervisees Behave Ethically

Litigation Section leaders disagree, to varying extents, with the Massachusetts Supreme Court's decision regarding the supervising attorney. "Prosecutors have an absolute duty to supervise anyone in their office to ensure compliance with the law," admonishes Professor Ellen C. Yaroshefsky, Hempstead, NY, Co-Chair of the ABA's Prosecutorial Independence Task Force. She goes on to note that the duty "is not only an ethical obligation but a practical one, rooted in case law and the Massachusetts Rules of Professional Conduct, specifically Rule 5.1." It is absolutely necessary that "supervisors must engage in reasonable measures to ensure that all exculpatory evidence is turned over" so as "to prevent miscarriages of justice," she adds.

Under Rule "5.1(b), which mirrors the ABA model rules, supervising attorneys must make reasonable efforts to ensure their supervisees' conduct conforms to professional rules," emphasizes Darryl A. Goldberg, Chicago, IL, a leader within the Section's White Collar & Criminal Litigation Committee. "In cases involving significant procedural issues, such as a subpoena from a criminal defendant, supervisors should ensure that the entire universe of potentially exculpatory material is provided for an in-camera review, rather than relying solely on representations from supervisees," he advises

Jeanne M. Huey, Dallas, TX, Co-Chair of the Section's Ethics & Professionalism Committee, feels the "the supervising attorney should have considered … the harm and the notoriety of the case" in "deciding whether it was reasonable or not to rely on another attorney's assurances that the exculpatory evidence had all been turned over." Huey observes, though, that "one of the problems in this case appeared to be the number of lawyers that were being supervised by one person."

Can Supervisors Rely on Supervisees? It Depends

Section leaders agree that in some cases a supervising lawyer may satisfy their ethical duties by relying on a subordinate's representation. However, whether the supervising attorney may do so depends on the context of the supervisor-supervisee relationship and the supervisee's training, experience, and competency.

"There has to be a policy," says Yaroshefsky, along with "training, adequate supervision, and then ongoing training." "If you trust a lawyer, and they are deemed trustworthy over time, then periodically looking over their work can be sufficient," she adds. Nevertheless, verification is important, especially in the criminal context.

Huey also argues for periodic, "randomly" selected check-ins for "proof of something," especially for "turning over exculpatory evidence." These check-ins "would help ensure that those being supervised knew that their work would be double-checked—and give the supervising attorneys confidence in the work of those being supervised," Huey continues.

The supervisory role is particularly important in the criminal context. "Failure to turn over evidence is one of the most common causes of a conviction being overturned," underscores Yaroshefsky. "Prosecutors are not just there as advocates to win a case; they are ministers of justice," she adds.

Goldberg agrees: "There is no general requirement to micromanage the actions of others," but with respect to the chemists' prosecution, it was "unreasonable" for the supervising attorney "to not follow up and make sure the entirety of exculpatory information was disclosed." "It does not seem like an overly burdensome task," he says, "to personally check disclosures endeavoring to provide full transparency, particularly given what was at stake in this case."

Criminal Law Experts Think the Punishments Fit the Crimes

Section leaders generally agree with the sanctions doled out by the Massachusetts Supreme Court, namely the lead prosecutor's disbarment and the discovery attorney's suspension. "Disbarment is obviously the ultimate sanction short of independent civil actions or criminal prosecution, but I do think it was appropriate here," explains Goldberg. He notes that prosecutorial power "comes with special obligations."

Goldberg notes further that the lead prosecutor was "unrepentant," and that her "intentional and egregious misconduct … affected thousands of criminal defendants." He is unequivocal. "In this case, there are no excuses and simply no worthy explanations for the lead prosecutor's unethical conduct." "A zealous prosecutor seeking justice should instantaneously recognize that this exculpatory information should have been disclosed in the interest of justice for the thousands of defendants potentially affected by this rogue chemist," Goldberg concludes.

And in some cases, disbarment might not be the only sanction. Yaroshefsky adds that "if this had taken place in California, [the lead prosecutor] might have been criminally" liable.

A Reflection of Broader Criminal Justice Issues

Yaroshefsky's opinion is particularly relevant in this case. She and several other scholars joined the DKT Liberty Project on an amicus brief for the 2018 Committee for Public Counsel Services case. The court even cited to a law review article she authored in its request that a standing

advisory committee "draft a proposed Brady checklist to clarify the definition of exculpatory evidence."

The chemists' prosecution is emblematic of "a massive, massive problem," says Yaroshefsky. She thinks the "case should serve as a signal to every prosecutor's office that they must take action; they can't rely on someone being a good lawyer they trust as the sole reason to rely on them."

Yaroshefsky stresses that improvement is possible, pointing generally to morbidity and mortality conferences common to "the medical profession" or companies like Toyota that have "created an environment where everyone can come together to solve the problem," without a fear that management will "pinpoint individuals or assign blame." And specific to criminal justice, Yaroshefsky emphasizes the effectiveness of "open-file" discovery, which is the idea that a criminal defendant is entitled to the entirety of the prosecution's file, including witness lists and statements, expert reports, etc.

Open-file discovery is a growing but jurisdiction-specific practice. As detailed in a 2013 article by the National Association of Criminal Defense Lawyers, North Carolina was the first state to enact an open-file statute. The Connecticut Bar Association issued a 2019 primer noting broad discovery laws had been enacted in Colorado, New Jersey, Ohio, Louisiana, Texas, and parts of Florida and New York. As of today, according to a tracker maintained by Strengthening the Sixth, 40 states require disclosing a defendant's criminal history, 37 require disclosing a witness list, 27 require disclosing grand jury transcripts, and 24 require disclosing police reports.

Ultimately, Yaroshefsky believes that prosecutors' offices should follow "good policies and good practices" and that, put bluntly, "this is not rocket science."

Grant H. Hackley is a Managing Editor for Litigation News.

Related Resources

- Debra Cassens Weiss, "Ex-prosecutor disbarred for disclosure failures in drug-lab scandal; supervisor, underling get different sanctions," ABA J. (Sept. 5, 2023).
- *Comm. for Pub. Counsel Servs. & Others v. Attorney Gen. & Others*, 480 Mass. 700 (Mass. 2018).