

IN THE SUPREME COURT OF THE STATE OF MISSOURI

In re:

KIMBERLY M. GARDNER,

Missouri Bar No. 56780

Respondent.

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) Case No. DHP-21-005

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DISCIPLINARY HEARING PANEL DECISION

INTRODUCTION

A Hearing was held in the captioned matter on April 11, 2022 at the St. Louis County Courthouse in Clayton, Missouri. The Hearing was held before a Disciplinary Hearing Panel comprised of Keith A. Cutler, Presiding Officer; Elizabeth D. McCarter, Attorney Member; and Sheryl L. Butler, Public Member.

Informant was present through counsel Alan D. Pratzel and Sam S. Phillips. Respondent was present in person, and by and through her counsel, Michael P. Downey and Paige E. Tungate.

Upon commencement of the Hearing, an Amended Information was filed wherein Informant alleged that Respondent violated several Rules of Professional Conduct.

Informant and Respondent entered into a *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline*, which was received in evidence by the Panel as Joint Exhibit A. By agreement of the parties, the *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline* also served as Respondent's Answer to the Amended Information.

After considering the evidence presented, including the Joint Stipulation of the parties, the arguments of counsel, and the sworn testimony of Respondent in response to questions from the Panel members, the Disciplinary Hearing Panel finds, concludes, and recommends as follows:

FINDINGS OF FACT

The Disciplinary Hearing Panel adopts Paragraphs 1 through 68, and the unnumbered paragraph which immediately precedes Paragraph 1, of the parties' *Joint Stipulation of Facts*, which is attached hereto as Exhibit 1. Said paragraphs are incorporated herein by reference as though fully set out at this point.

AMENDED INFORMATION FILED AGAINST RESPONDENT

The Amended Information filed alleged that Respondent is guilty of professional misconduct because she violated several Rules of Professional Conduct – to wit:

4-3.4(a), by failing to ensure compliance with discovery obligations in the underlying Greitens prosecution as described in Paragraphs 62, 64, and 65 of the Amended Information;

4-3.4(d), by failing to comply with a legally proper discovery request as described in Paragraph 62 of the Amended Information; and

4-3.3(a), by failing to ensure correction of an erroneous statement contained in a pleading filed with the Court as described in Paragraph 63 of the Amended Information.

RESPONDENT'S POSITION

According to the *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline* filed by the parties -- which also served as Respondent's Answer to the Amended Information -- and the evidence presented at the Hearing, Respondent admits the above allegations of professional misconduct in violation of the Rules of Professional Conduct.

CONCLUSIONS OF LAW

Based on the admissions of Respondent as contained in the *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline* filed by the parties, and the evidence presented at the Hearing, this Panel finds that Respondent DID violate Rule 4-3.4(a), by failing to ensure compliance with discovery obligations in the underlying Greitens prosecution; by allowing the submission of a pleading filed with the Court that erroneously represented that all notes from interviews with the alleged victim had been turned over to the defense; and by representing in open court that all notes from interviews with the alleged victim had been turned over to the defense.

Based on the admissions of Respondent as contained in the *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline* filed by the parties, and the evidence presented at the Hearing, this Panel finds that Respondent DID violate Rule 4-3.4(d), by failing to comply with a legally proper discovery request by an opposing party in failing to produce notes, memoranda, and e-mails pertaining to interviews with the alleged victim in the underlying prosecution.

Based on the admissions of Respondent as contained in the *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline* filed by the parties, and the evidence presented at the Hearing, this Panel finds that Respondent DID violate Rule 4-3.3(a) by failing to ensure correction of an erroneous statement contained in a pleading filed with the Court pertaining to the original authorship of certain bullet points contained in a Memorandum prepared as part of Respondent's investigation.

DISCIPLINE RECOMMENDATION

Having found that Respondent violated one or more of the Rules of Professional Conduct, this Panel now addresses the subject of recommended discipline.

Acknowledgement of Conduct

At the outset, the Panel acknowledges that Respondent has taken full responsibility for her actions. Prior to the Hearing, Respondent entered into a *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline* (Exhibit A) wherein she admitted her conduct and agreed that she violated the Rules of Professional Conduct. During the Hearing, Respondent admitted that she and members of her Office under her direction tried to have a process for making sure all required documents were produced in discovery, but that the process came up short, and that things were not done in the best manner. As the elected Circuit Attorney and the person in charge of the Circuit Attorney's Office, Respondent accepted responsibility for the errors made. Respondent did not offer any excuses for her conduct, but did offer explanations as to why she believes the mistakes occurred.

Respondent testified that the underlying criminal prosecution was a case like no other, given the specific persons and issues involved. She stated that the case proceeded on a compressed time frame, with motions being filed and hearings being held on an almost daily basis. Respondent testified that she and her Office made every effort to make sure that they produced in discovery all documents required to be produced, and that she was not aware that her typewritten notes in question had not been produced. While not minimizing the import of her conduct, Respondent did volunteer that the non-produced documents at issue in this matter consisted of only five [sic] pages of notes.

Regarding the videorecording of the interview with the alleged victim, Respondent testified that she and her Office first believed that their effort to videorecord the interview was unsuccessful because they could not get the recording to play. Presuming that the videocamera had malfunctioned somehow, and did not record anything, Respondent stated that she believed there was no obligation to disclose or produce any recording in discovery because there was no recording to produce. It was only after subsequent attempts to play the videorecording proved successful that Respondent realized that a videorecording had, in fact, been made. At that point, according to the evidence, the videorecording was produced to the defense within two days thereafter.

With respect to Respondent's failure to correct an erroneous statement contained in a pleading filed with the Court, this issue involves a six-page document consisting of approximately 140 typewritten bullet points prepared by Respondent following her interview with the alleged victim in the underlying prosecution. (*Exhibit 2 to Exhibit A*). Respondent shared the document with her investigator. The investigator subsequently copied, cut-and-paste, or otherwise transcribed some of Respondent's typewritten bullet points into a new, separate document for his own note-taking purposes. In a pleading filed with the Court, Respondent stated that the typescript bullet points in the investigator's subsequent document were the work of the investigator, not Respondent.

At the Hearing before this Panel, Respondent explained that she did not, in her pleading to the Court, intentionally misrepresent her original authorship of the typewritten bullet points. She testified that she was not attempting to convince the Court that she did not prepare the original bullet points. She was only conveying to the Court in her pleading that the investigator had reformatted her original bullet points into his own document.

Respondent was also asked at the Disciplinary Hearing in this matter about the untruthful sworn testimony given by the investigator retained by her Office. The testimony occurred during a deposition at which Respondent and co-counsel from her Office were in attendance on behalf of the State. Among other things, the investigator testified in the deposition that he had not been provided any documents by Respondent prior to the investigator's interview of the alleged victim; that he did not ask any questions of the alleged victim during the interview; and that he did not take any notes during said interview. Each of those statements was false, and Respondent knew the statements were false as the investigator was testifying to them in his deposition.

The parties agree, as reflected in the *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline* that, although they had retained the investigator to work on this case, Respondent and her co-counsel were not representing the investigator as his counsel in his deposition. Moreover, Respondent had not designated the investigator as a witness, did not sponsor or proffer him as a witness, and was not planning to call him as a witness at trial. As they were hearing the testimony in the deposition, Respondent and her co-counsel knew that it was false, but were unsure of exactly what to do in response thereto. At some subsequent point, Respondent advised the Court that the investigator made inaccurate statements in his deposition. Respondent now acknowledges that she had some responsibility to address the issue, since the investigator was retained by her Office. When asked in the Disciplinary Hearing what, if anything

she would do differently regarding the inaccurate deposition testimony, Respondent testified that she would have more vigorously pushed for a continuance of the deposition, because she and her co-counsel were literally forced to attend it at the last minute due to the sudden travel-related unavailability of another one of her co-counsel. Respondent also testified that, although she was neither counsel for nor sponsor of the investigator as a witness, she would have told the witness to tell the truth.

Injury/Harm Resulting from Conduct

According to the *Joint Stipulation of Facts, Joint Conclusions of Law, and Joint Recommended Discipline*, the alleged witness was interviewed by Respondent on January 24, 2018, and again by Respondent's investigator (*with Respondent present*) on January 29, 2018. The Grand Jury Indictment was handed down on February 22, 2018. On February 23, 2018, counsel for the defendant entered their first appearances, and on that same date, propounded discovery requests to Respondent for, *inter alia*, "any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment." (*Exhibit 6 to Exhibit A, Request Number 10*)

Pursuant to the Court's Scheduling Order, all then-available discovery materials were required to be turned over to the defense by March 5, 2018. Any discovery materials obtained after March 5, 2018 were to be turned over to the defense within 48 hours after receipt by Respondent's Office. (*Exhibit 9 to Exhibit A*) By March 6, 2018, almost all discovery had been produced to the defense. However, the videorecording of the interview and the investigator's

annotated version of Respondent's bullet point notes, had not been produced by that time. Those materials were not produced to the defense until April 11, 2018.¹ The charges in the underlying criminal prosecution were dropped on May 14, 2018. Thus, the prosecution was officially pending for 81 days.

Under Sections 6.1 and 6.2 of the American Bar Association Standards for Imposing Lawyer Sanctions ("ABA Standards"), a factor to be considered in determining discipline is the injury or harm resulting from Respondent's conduct. In this case, the primary harm is essentially financial. The defendant in the criminal prosecution likely incurred substantial legal fees to compel discovery of evidence that should have been voluntarily produced by Respondent and/or her Office. Similarly, taxpayer dollars were spent responding to claims of discovery malfeasance on the part of Respondent and/or her Office. And in the wake of Respondent's non-production, already thinly stretched judicial resources were expended to hold several hearings, review motions and pleadings, and issue orders and rulings, all pertaining to documents and evidence that should have been voluntarily produced.

While not minimizing the financial impact on the parties during those 81 days, the Panel does recognize that certain other things did *not* occur as a result of the failure to produce the evidence in question. To the extent the ultimate dismissal of the charges might have occurred sooner had the evidence in question been produced earlier, the delayed production did not cause the defendant to spend more time in jail than he otherwise would have, because he was not incarcerated during the pendency of the criminal proceeding. The charges against defendant were ultimately dismissed; thus, this was not a situation where a criminal defendant was wrongfully

¹ The record does not reflect that Respondent's original typewritten bullet point notes from the first interview were ever produced to the defense.

convicted because exculpatory evidence was not provided to his defense. Finally on this point, an argument could be made that Respondent should have endeavored earlier to determine how to get the videorecording of the alleged victim's interview to properly play. The evidence before this Panel, though, is that there was an initial good faith belief that the attempt to record the interview had failed. Once subsequent attempts were made to get the recording to play, the recording was provided to the defense within 48 hours thereof, consistent with the Judge's Scheduling Order. At that point, the defense had the best evidence of what was said in the alleged victim's interview – the actual videorecording itself. To a large degree, any notes taken during the interview reflecting what the alleged victim said became virtually inconsequential.

Aggravating Factors

The Panel considered for reference purposes the applicability of aggravating factors, including those set forth in Section 9.22 of the ABA Standards. Of concern to the Panel is the fact that the conduct engaged in by Respondent involves one of the most basic responsibilities of a prosecutor. Since 1963 when Brady v. Maryland² was decided by the United States Supreme Court, it has been the law of the land that a prosecutor is required to disclose to the defense any evidence that may tend to exculpate the defendant. That principle is so fundamental in the criminal prosecution milieu that one would think it would be second-nature, almost reflexive, for a prosecutor to assess, evaluate, categorize, handle, aggregate, house, and store all evidence in a case with an eye toward Brady compliance, particularly statements taken from the sole alleged victim in the criminal case. The evidence does not directly disclose whether Respondent's Office

² 373 U.S. 83 (1963).

engaged in a Brady analysis of Respondent's notes from her interview with the alleged victim. Since the testimony was that Respondent was unaware that her notes had not been produced in discovery, it appears that it was Respondent's intention that said notes be produced. The evidence did reveal that other notes and documents were disclosed and produced to the defense by Respondent and her Office, just not the notes from her interview with the alleged victim.

Given the potential Brady implications appertaining to Respondent's interview notes with the sole alleged victim, if nothing else was produced to the defense, those notes should have been at the top of the list – literally and figuratively. The evidence does not reflect that there was a dishonest or selfish motive in Respondent's actions, as referenced in Section 9.22(b) of the ABA Standards. However, the fact that those notes were nevertheless overlooked is concerning to the Panel.

The Panel does note that none of the other aggravating factors referenced in Section 9.22 of the ABA Standards – such as prior disciplinary offenses, a pattern of misconduct, obstruction of the disciplinary process, refusal to acknowledge wrongful nature of conduct, etc. – appears to present in this case.

Mitigating Factors

While the Panel considered aggravating factors, the Panel also considered mitigating factors, as well, as set forth in Section 9.32 of the ABA Standards. The Amended Information filed with the Missouri Supreme Court indicates that Respondent does not have a prior disciplinary history. There has been no evidence presented that Respondent has a history of failing to disclose or produce evidence in criminal prosecutions, nor is there any evidence that such is a regular practice of Respondent or of her Office. The evidence also indicates that the failure to disclose

and produce the documents in question to the defense was not intentional. Respondent testified that it was an unfortunate oversight for which she takes full responsibility. Similarly, there has been no evidence presented that Respondent has a history of including false or misleading statements in court filings, or failing to correct any such misstatements upon learning of their falsity. It appears to the Panel that all of the conduct in this case was isolated and was, at least in part, due to the unique circumstances of the underlying criminal case.

Because Respondent is an elected official, a factor to be considered under Section 5.2 of the ABA Standards is whether her conduct constituted a breach of the public trust, or would otherwise serve to undermine the public confidence in the Circuit Attorney's Office. The importance of respecting the constitutional rights of criminal defendants is unquestioned, and the public must have confidence that the prosecutor they have elected will perform his or her duties within those constitutional boundaries. In this case, the dispute over the disclosure and production of documents was more an issue of negligence than intentional non-disclosure. As such, the Panel does not believe that the conduct involved in this case rose to the level of a potential breach of the public trust.

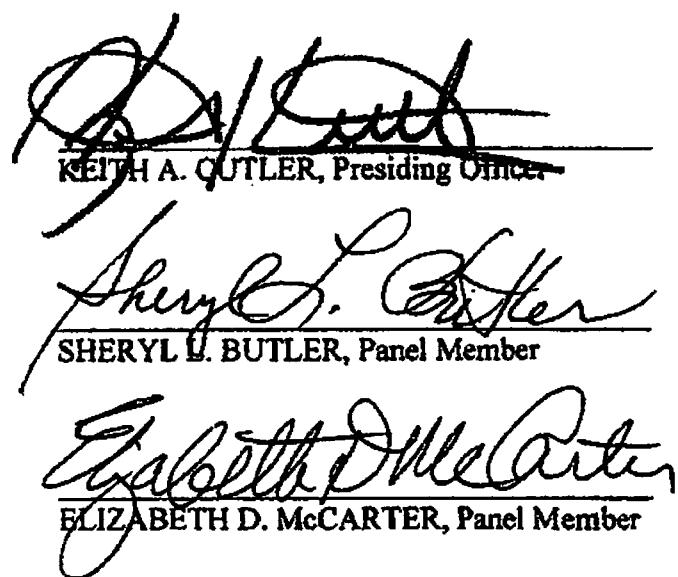
Recommendation

Consistent with Section 3.0 of the American Bar Association Standards for Imposing Lawyer Sanctions (“ABA Standards”), the Panel considered, as set forth hereinabove, the duties violated, Respondent’s mental state, the potential or actual injury caused by Respondent’s misconduct, and the existence of aggravating or mitigating factors. The Panel also considered for reference purposes the applicability of the range of sanctions set forth in Sections 5.2, 6.1, and

6.2 of the ABA Standards, the applicability of aggravating factors as set forth in Section 9.22 of the ABA Standards; and the applicability of mitigating factors as set forth in Section 9.32 of the ABA Standards.

After due consideration of the evidence presented and all factors involved, the Disciplinary Hearing Panel recommends that a Public Reprimand be issued to Respondent pursuant to Supreme Court Rule 5.16(d).

DATED: May 10, 2022



KEITH A. OUTLER, Presiding Officer

SHERYL L. BUTLER, Panel Member

ELIZABETH D. McCARTER, Panel Member