[J-106-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2624 Disciplinary Docket No. 3
	:	
Petitioner	:	No. 166 DB 2017
	:	
	:	Attorney Registration No. 71711
v.	:	
	:	(Snyder County)
	:	
FRANK G. FINA,	:	
	:	ARGUED: November 20, 2019
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 19th day of February, 2020, upon consideration of the Report and Recommendations of the Disciplinary Board and following oral argument, Frank G. Fina is suspended from the Bar of this Commonwealth for a period of one year and one day, and he shall comply with all the provisions of Pa.R.D.E. 217. Respondent shall pay costs to the Disciplinary Board pursuant to Pa.R.D.E. 208(g).

Justice Wecht files a concurring statement in which Justice Donohue joins.

Justice Dougherty files a concurring and dissenting statement.

Chief Justice Saylor did not participate in the consideration or decision of this case.

Judgment Entered 02/19/2020

DEPUTY PROTHONOTARY

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CONCURRING STATEMENT

JUSTICE WECHT **DECIDED: FEBRUARY 19, 2020**

I join the Court's *per curiam* order suspending Frank Fina from the practice of law for one year and one day.

As Chief of Criminal Prosecutions in the Office of Attorney General ("OAG"), Fina led the investigation into child abuse allegations against Gerald A. Sandusky, a former assistant football coach at Pennsylvania State University. In December 2010, the OAG subpoenaed the testimony of two senior Penn State administrators, Timothy Curley and Gary Schultz. Later, the university president, Graham Spanier, was also subpoenaed to testify. When the three men testified, Cynthia Baldwin, who was general counsel for Penn State, appeared with each before the grand jury. In October 2012, Baldwin herself was subpoenaed to testify before the grand jury. Fina questioned Baldwin in front of that grand

jury.[1] Fina's actions during that testimony led eventually to the disciplinary charge and sanction that we affirm by our *per curiam* order today.

The Disciplinary Board found that Fina violated Rule of Professional Conduct 3.10. That provision states:

> A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.
>
> EXPLANATORY COMMENT
> [1] It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6, the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

Pa.R.P.C. 3.10 and Comment. The Hearing Committee concluded that, because Fina's name was not listed on the subpoena issued to Baldwin, Fina had not committed the threshold act of subpoenaing an attorney. Report and Recommendation of the Hearing Committee ("Committee Report"), 12/28/2018, at 16. The Disciplinary Board, however, rejected the committee's interpretation of Rule 3.10. Report and Recommendations of the Disciplinary Board ("Board Report"), 6/6/2019, at 23-25. Instead, the Board stated that the reference to "a public prosecutor" in the Rule encompassed the OAG as the prosecuting body. The Board reasoned:

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[1] A more complete account of the factual background of this case can be found at *ODC v. Baldwin*, 2587 DD3, slip op. at 4-15.

> To interpret the rule otherwise would be to render it meaningless. A prosecutor who sought to avoid the "prior judicial approval" requirement of [Rule 3.10] simply could have another lawyer in the prosecutor's office issue the subpoena under that lawyer's name, then the prosecutor could omit the required hearing to obtain judicial approval of the attorney/witness's testimony, but somehow escape charges of misconduct under [Rule 3.10] because his or her name was not on the face of the subpoena.

Id. at 24-25.

Fina urges this Court to reject the Board's reasoning and adopt the Hearing Committee's position instead. *See, e.g.*, Brief for Respondent at 24. Today, we decline to do so. The Hearing Committee's interpretation of the Rule is untenable, as it would provide an easy opportunity for a prosecutor to avoid the consequences of Rule 3.10 by the simple artifice of asking another attorney in the office to issue the subpoena. The Board's rationale is straightforward and unavoidable.

Turning to the conduct that led to this disciplinary action, I emphasize that the prosecutor has a special and distinctive role in our system of justice. Unlike other lawyers, the prosecutor is more than a zealous advocate for a client. The prosecutor bears as well the high and non-delegable duty of ensuring a fair process for the defendant and of comporting himself or herself always in a manner consistent with a position of public trust. We had recent occasion to repeat these principles, as follows:

> We have long understood that the prosecutor's role is threefold; she serves as an "officer of the court," as an "administrator of justice," and as an "advocate." *Commonwealth v. Starks*, 387 A.2d 829, 831 (Pa. 1978) (quoting CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a) (Am. Bar Ass'n 1971)); *see Appeal of Nicely*, 18 A. 737, 738 (Pa. 1889) (describing a prosecutor as an officer of the court who is responsible for seeking "equal and impartial justice" on behalf of the Commonwealth).
>
> As an officer of the court, the prosecutor has the responsibility to serve the public interest and to "seek justice within the bounds of the law, not merely to convict." *Starks*, 387 A.2d at 831. Because it is her duty both to respect the rights of the defendant and to enforce the interests of the public, the prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). . . .

> As an "administrator of justice," the prosecutor has the power to decide whether to initiate formal criminal proceedings, to select those criminal charges which will be filed against the accused, to negotiate plea bargains, to withdraw charges where appropriate, and, ultimately, to prosecute or dismiss charges at trial. . . . The extent of the powers enjoyed by the prosecutor was discussed most eloquently by United States Attorney General (and later Supreme Court Justice) Robert H. Jackson. In his historic address to the nation's United States Attorneys, gathered in 1940 at the Department of Justice in Washington, D.C., Jackson observed that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous." Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940).

Commonwealth v. Clancy, 192 A.3d 44, 52-53 (Pa. 2018) (footnotes omitted, citations modified).

The prosecutor's obligation to shoulder these responsibilities with conscientiousness and fidelity is especially acute in the grand jury setting, where the one-sided nature of the proceeding gives the Commonwealth a unique advantage. We recently observed:

> The need for safeguards on the grand jury is enhanced by the fact that it is not bound by the rules of evidence that normally protect the publicly accused from baseless or unduly prejudicial information. The grand jury can hear any rumor, tip, hearsay, or innuendo it wishes, in secret, with no opportunity for cross-examination. The grand jury is not required to hear or consider evidence which would exonerate a target of an investigation, and the fairness of its methods is unreviewable.

In re Fortieth Statewide Investigating Grand Jury, 190 A.3d 560, 569 (Pa. 2018) (citing *In re Grand Jury Proceedings, Special Grand Jury 89-2,* 813 F.Supp. 1451, 1463 (D. Colo. 1993)) (citations omitted).

Mindful of these important principles and realities, this Court adopted Rule 3.10, which cabins the otherwise largely unfettered power of the prosecutor in a grand jury. As evidenced by this Court's Rule of Professional Conduct 1.6 (Confidentiality of Information) and the General Assembly's enactments of 42 Pa.C.S. §§ 5928 (confidential communication to an attorney in civil matters) and 5916 (confidential communication to

an attorney in criminal matters), the law of this Commonwealth enshrines and evinces a strong policy disfavoring the disclosure by attorneys of information received from their clients. Hence, Rule 3.10 requires prior judicial approval before an attorney can be summoned to appear before a grand jury and to provide testimony there concerning a client.[2] The rule provides an important check against the prosecutor's power to haul an attorney before a grand jury and force that attorney to testify against a client and disclose potentially confidential information. That check is a neutral judge, whose prior approval the prosecutor must seek and obtain. And such approval is not granted until the judge has first considered whether the testimony would violate confidentiality, whether it is relevant, whether the subpoena is unreasonable or oppressive, whether the intent of the subpoena is to harass the attorney or client, and whether there are alternative means to obtain the information sought. *See* Pa.R.P.C. 3.10, Cmt.

Fina's conduct denied a neutral judge the opportunity to perform this vital check on prosecutorial power. Fina specifically told the supervising judge that he would not question Baldwin in any way that would invade attorney-client privilege. *See* N.T., 10/22/2012, at 10-11 ("What I would suggest is that we need not address the privilege issue this week before her testimony, that we are not going to ask questions about . . . Mr. Schultz, Mr. Curley, their testimony before the grand jury, and any preparation for or follow-up they had with Counsel Baldwin."). Fina made those representations despite knowing that successor counsel for Curley and Schultz maintained that there was an attorney-client relationship between their clients and Baldwin and that they were not waiving any privilege. *See* ODC Exhibits 6 & 7. Fina made those representations despite knowing that Penn State, while waiving its own attorney-client privilege, disclaimed any

[2] While Fina has maintained that Baldwin did not represent any of the three administrators about whom she provided grand jury testimony, we answered the question of representation to the contrary in *ODC v. Baldwin*, 2587 DD3, slip op. at 23-31.

waiver of privilege that the administrators might have. *See* ODC Exhibit 8 ("We have waived the University's privilege . . . with two critical exceptions: . . . (2) any communications between . . . Baldwin and Messrs. Schultz and Curley. . . ."); N.T., 10/22/2012, at 6 ("[I]ssues have legitimately arisen with regard to the substance and perception of the representation by . . . Baldwin of Mr. Schultz and Curley that have us believing that the most prudent course is for the Court to make an ultimate determination as to whether that aspect of the privilege should be waived."). Fina made those representations despite knowing that the supervising judge was inclined to notify counsel for Curley and Schultz that they should submit a motion to have their privilege claims adjudicated. *See* N.T., 10/22/2012, at 12 (supervising judge discussing his intent to send a letter to the attorneys asserting privilege to acknowledge receipt of their assertions and indicating "that if there was a motion to be filed then I would be addressing it"). Both the Hearing Committee and the Disciplinary Board found that those representations by Fina were, in fact, misrepresentations. *See* Committee Report at 12 ¶ 44 ("These questions were contrary to the representations [Fina] made to [the supervising judge]."); Board Report at 25 ("[Fina] misled the Court as to his ultimate intentions."); *id.* at 29 ("[Fina's] misrepresentations to [the supervising judge] as to the scope of his inquiry of Ms. Baldwin's testimony are deeply disturbing . . . .").[3]

Absent Fina's misrepresentations, the supervising judge could have (and presumably would have) held a hearing to adjudicate the privilege claims.[4] Had the judge

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[3] This Court also has noted that questions posed by Fina led Baldwin to "reveal[] the contents of numerous communications between herself and Curley, Schultz and Spanier." *ODC v. Baldwin*, 2587 DD3, slip op. at 14; *see also id.* at 65 ("Fina's questioning of [Baldwin] focused almost exclusively on implicating Curley, Schultz and Spanier for their efforts to avoid the disclosure of incriminating documents . . . .").

[4] A safer course for a supervising judge in this position would have been to resolve the privilege claims regardless of the representations of the prosecutor.

found that privilege applied, Baldwin would not have been permitted to testify, eliminating the issues that arose later, issues that caused criminal charges to be quashed.[5] Instead, had the judge found that no privilege existed, the issue could have been subject to an interlocutory appeal. With the privilege concerns conclusively litigated, any permitted testimony and resulting indictments would have been insulated from reversal on this basis. This unfortunate circumstance demonstrates that adherence to Rule 3.10 protects not just the attorney-client relationship, but the prosecution as well.

Fina failed to comply with Rule 3.10. The supervising judge, therefore, lacked the information necessary to provide prior approval for Baldwin's testimony. After Baldwin testified, the grand jury indicted Spanier and issued additional indictments against Curley and Schultz. To state it plain, instead of Baldwin serving as a shield for her former clients, her testimony was elicited and used by Fina as a sword against them, to devastating effect. This subversion of the attorney-client privilege is precisely what Rule 3.10 is designed to prevent.

On this appeal, Fina has chosen now to offer us several arguments as to why, to his mind, it was permissible for him to call Baldwin to testify concerning the Penn State administrators. These claims include arguments that there was no privilege, or that the crime-fraud exception to confidentiality applied, or that any applicable privilege had been waived. But Fina's arguments before us are not only unavailing on their merits; that he ventures them now serves in and of itself to remind us why his conduct was so problematic in the first instance: issues regarding privilege should have been raised and litigated before Baldwin testified. This is why Rule 3.10 exists. Instead, Fina chose to mislead the supervising judge, causing that jurist to believe such resolution was

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[5] *See Commonwealth v. Schultz*, 133 A.3d 294, 325-28 (Pa. Super. 2016); *Commonwealth v. Spanier*, 132 A.3d 481, 498 (Pa. Super. 2016); *Commonwealth v. Curley*, 131 A.3d 994, 1007 (Pa. Super. 2016).

unnecessary because Fina undertook to refrain from inquiry into areas of potential privilege. Fina promptly reneged on those assurances. This conduct fell far below the ethical standard we rightly demand of a prosecutor in this type of situation.

Fina violated Rule 3.10. Suspension for a year and a day is manifestly appropriate.

Justice Donohue joins this concurring statement.

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v.	:	
	:	(Snyder County)
FRANK G. FINA,	:	
Respondent	:	ARGUED: November 20, 2019

CONCURRING AND DISSENTING STATEMENT

JUSTICE DOUGHERTY **DECIDED: FEBRUARY 19, 2020**

I agree with the learned Majority that respondent Frank G. Fina violated Pa.R.P.C. 3.10. I respectfully disagree, however, that the present circumstances warrant as severe a sanction as the recommended suspension of one year and one day. *See, e.g.*, *Office of Disciplinary Counsel v. Cynthia Baldwin*, __ A.3d __, 2587 DD3 (Pa. February 19, 2020) (imposing disciplinary sanction of public reprimand for multiple rule violations after balancing attorney's lack of prior disciplinary history against her lack of remorse). I therefore dissent from the Court's order.

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	:	No. 166 DB 2017
v.	:	Attorney Registration No. 71711
FRANK G. FINA Respondent	:	(Snyder County)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

On January 10, 2018, Petitioner, Office of Disciplinary Counsel, filed a Petition for Discipline against Respondent, Frank G. Fina. The Petition charged Respondent with violation of Rule of Professional Conduct ("RPC") 3.10 based on allegations that Respondent, in his capacity as a prosecutor, failed to obtain prior judicial approval following a hearing for the grand jury testimony of an attorney-witness subpoenaed to provide evidence concerning a person that the attorney/witness had represented. Following the parties' stipulation to a one-time twenty-day extension,

Respondent filed an Answer to Petition for Discipline on February 21, 2018. Respondent filed Motions to Dismiss and Stay, which were denied by the Board on February 27, 2018.

Following the referral of the Petition to a District I Hearing Committee ("Committee"), Chair Arthur S. Novello, Esquire, held a prehearing conference on April 17, 2018. The Committee conducted a hearing on June 14, 2018, at which time Petitioner presented its expert witness and submitted Exhibits ODC-1 through ODC-26 and ODC-36 through ODC-39, which were admitted into evidence. On July 27, 2018 and August 1, 2018, Respondent, represented by counsel, presented his case, including his testimony, expert testimony, and the testimony of three fact witnesses. Respondent submitted Exhibits R-1 through R-18, which were admitted into evidence.

On September 4, 2018, Petitioner filed a Brief to the Committee and requested that the Committee conclude that Respondent violated RPC 3.10. Petitioner did not request a specific form of discipline. On October 15, 2018, Respondent filed a Brief to the Committee and requested that the Committee conclude that Petitioner did not meet its burden of proof.

On December 28, 2018, the Committee filed a Report, concluding that Petitioner failed to meet its burden of proof and recommending that the Petition for Discipline be dismissed.

On January 10, 2019, Petitioner filed a Brief on Exceptions and requested oral argument before the Board. Petitioner requested that the Board reverse the decision of the Committee and recommend to the Court that Respondent receive public discipline in the form of a Public Censure. On January 17, 2019, Respondent filed a Brief on Exceptions and requested oral argument before the Board. Respondent requested that the Board uphold the Committee's recommendation to dismiss, but took exception to

several narrow factual findings made by the Committee. On February 6, 2019, Petitioner filed a Brief Opposing Respondent's Exceptions. On February 8, 2019, Respondent filed a Brief in Opposition to Exceptions filed by Petitioner. On March 25, 2019, a three-member panel of the Board held oral argument. The Board adjudicated this matter at the meeting on April 10, 2019.

II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is situated at Pennsylvania Judicial Center, Suite 2700, P.O. Box 62485, Harrisburg, Pennsylvania 17106 is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and duty to investigate all matters involving alleged misconduct of any attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules.

2. Respondent is Frank G. Fina, born in 1965 and admitted to the practice of law in the Commonwealth in 1994. His registered attorney address is 1000 Germantown Pike, Plymouth Meeting, PA 19462.

3. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

4. Respondent has no prior record of professional discipline.

5. In 2002, Respondent began working for the Pennsylvania Office of Attorney General ("OAG") as an entry-level prosecutor in the law division. In 2005, Respondent became Chief of Criminal Prosecutions, and at all times relevant to these

proceedings, Respondent acted in his official capacity as Chief of Criminal Prosecutions. N.T. 7/27/18 at 590-93, 713; 647- 49, 651.

6. During the course of his career with OAG, Respondent did "quite a bit of grand jury work," subpoenaed witnesses on hundreds of occasions and appeared in front of grand juries on more than one hundred occasions. N.T. 7/27/18 at 652, 655-56.

7. In 2009, OAG became involved in the investigation of Gerald Sandusky, former defensive coordinator of the Pennsylvania State University ("Penn State") football team, involving allegations of child molestation, and convened a statewide investigating grand jury ("grand jury"). Petition for Discipline ("Pet for Dis.") at 4, 5; Answer to Petition ("Ans.") at 4, 5; N.T. 7/27/18 at 589, 664.

8. In 2009, the Sandusky grand jury investigation came under Respondent's supervision, with assistance from Jonelle Eshbach, Esquire, the "point person" who reported to Respondent. N.T. 7/27/18 at 656, 660-65.

9. In December 2010, the investigation was still ongoing and aided by the use of the grand jury. By then, the investigation included inquiry into who else, if anyone, other than the victims, was aware of Sandusky's actions. N.T. 7/27/18 at 682-84.

10. The investigation began to inquire of Penn State employees, including high ranking officials, and to seek documentation of Sandusky's conduct. N.T. 7/27/18 at 396-98, 684.

11. In December 2010, OAG, through Respondent and Ms. Eshbach, contacted Cynthia Baldwin, Penn State General Counsel, to inform her that subpoenas would be issued for Timothy Curley, Penn State Athletic Director; Gary Schultz, retired

Penn State Senior Vice President; and Joseph Paterno, Penn State's head football coach. In addition, OAG informed Ms. Baldwin that a subpoena *duces tecum* would be issued to Penn State for all documents and materials related to Sandusky. N.T. 7/27/18 at 396-400; ODC-11 at 11-12.

12. OAG delivered the subpoenas to Ms. Baldwin as General Counsel, who accepted service in early January 2011. The subpoenas sought the testimony of Curley, Schultz and Paterno as individuals, not as representatives of Penn State in their official capacities, and set forth January 12, 2011 as the return date for their testimony. N.T. 7/27/18 at 504, 506; ODC-37, 38.

13. Following service of the subpoenas, Ms. Baldwin agreed to represent Curley and Schultz in their grand jury appearance. Paterno elected to have separate counsel. N.T. 7/27/18 at 532-33.

14. On January 12, 2011, Ms. Baldwin accompanied Curley and Schultz to their appearances before the grand jury. N.T. 7/27/18 at 420, 425-26, 517-18.

15. Prior to their testimony, the Supervising Grand Jury Judge, Barry Feudale, instructed Curley and Schultz, among other things, that "Your lawyer may be present with you in the Grand Jury room during the time you're actually testifying and you may confer with her at that time...you may stop the questioning and appear before me, either alone or in this case with your counsel, and I will rule on that matter whatever it may be." ODC-26 at 9-10. Respondent was present when Judge Feudale instructed Curley and Schultz. N.T. 7/27/18 at 425.

16. At the outset of Curley's grand jury testimony, with Respondent present, Ms. Eshbach asked Curley "You have counsel with you?" to which Curley

responded, "Yes, I do." Curley was asked to "introduce her," and Curley stated, "My counsel is Cynthia Baldwin." ODC-19 at 3, 22-26.

17. At the outset of Schultz's grand jury testimony, with Respondent present, Schultz was asked to confirm that he was "accompanied today by counsel, Cynthia Baldwin; is that correct?" to which Schultz responded that the statement was correct. ODC-21 at 3.

18. In March 2011, OAG interviewed Graham Spanier, Penn State's President. After this interview, OAG subpoenaed Spanier in his individual capacity and Ms. Baldwin agreed to represent him. Spanier appeared with Ms. Baldwin for his grand jury testimony on April 13, 2011. N.T. 7/27/18 at 428-29; ODC-20.

19. On April 13, 2011, when Spanier was before Judge Feudale for the pre-testimony colloquy, Judge Feudale instructed Spanier, in the presence of Respondent, that he had "the right to stop the questioning and appear before [Judge Feudale], either alone or, of course in this case with your counsel...." ODC-25 at 31.

20. At the outset of Spanier's testimony, Respondent asked Spanier whether he was "represented by counsel today?" and Spanier identified his counsel as "Cynthia Baldwin sitting behind me." ODC-20 at 3.

21. In November 2011, OAG charged Curley and Schultz with one count each of perjury and failure to report suspected child abuse. ODC-24 at 304; ODC-22 at 999.

22. Following OAG's charges, Schultz retained criminal defense counsel, Thomas J. Farrell, Esquire. By letter dated June 1, 2012, to Charles A. DeMonaco, Esquire, Ms. Baldwin's counsel, Mr. Farrell stated that he was "concern[ed]" that OAG may attempt to interview Ms. Baldwin or obtain documents from her.

Continuing, Mr. Farrell wrote that, "Judge Baldwin, as she represented to Mr. Schultz, the grand jury supervising judge, the OAG, and the grand jury, was legal counsel to my client, Gary Schultz, during preparation for his appearance before the grand jury, during his interview and appearance in the grand jury on January 12, 2011, and through and until my retention on or about October 31, 2011. Therefore, we ask and expect that you and Judge Baldwin assert the attorney-client and work-product privileges in response to any and all requests from the OAG...and anyone else who may ask." ODC-1.

23. Following OAG's charges, Curley retained criminal defense counsel, Caroline M. Roberto, Esquire. Ms. Roberto wrote to Ms. Baldwin's counsel by letter dated June 11, 2012, stating that she "join[ed] in Mr. Farrell's concern" that OAG "may attempt to interview" Ms. Baldwin or obtain documents from her relating to Curley. Continuing, Ms. Roberto stated that Ms. Baldwin was "previous counsel to Mr. Curley, and represented such to him and to others on several occasions. Therefore, I ask that you and Justice Baldwin assert the attorney-client work product privileges in response to all requests from the Attorney General... and all others seeking information or response related to Mr. Curley." ODC-2.

24. Ms. Baldwin left her position as Penn State's General Counsel on July 31, 2012, and was replaced by Michael A. Mustokoff, Esquire. N.T. 7/27/18 at 451; ODC-10 at 2.

25. On or about October 2, 2012, OAG subpoenaed Ms. Baldwin to testify before the grand jury. The contact person listed on the subpoena was Bruce Beemer, OAG Chief of Staff. N.T. 7/27/18 at 457, 475; R-6.

26. By letter dated October 11, 2012, Ms. Roberto wrote to Judge Feudale, copy to Respondent, stating that Ms. Baldwin had represented Curley, asserting

the attorney-client and work product privileges for any communications between Ms. Baldwin and Curley, and stating that she was "willing to discuss this matter with the Court and the parties at" Judge Feudale's "earliest convenience." ODC-6.

27. On October 11, 2012, Mr. Farrell wrote to Judge Feudale, copied to Respondent, asserting that Ms. Baldwin had represented Schultz, claiming privilege, and stating Mr. Farrell's willingness to "discuss this issue with the OAG, PSU and the court..." ODC-7.

28. Respondent attended an attorney proffer meeting with Ms. Baldwin's counsel in or about mid-October 2012, and then met with Ms. Baldwin. The conversations focused on ascertaining what, if any privileges existed. N.T. 7/27/18 at 692-693, 697.

29. By letter dated October 19, 2012, to Respondent, copy to Ms. Baldwin's counsel, Mr. Mustokoff wrote:

> Dear Frank:
> You have asked for clarification of Pennsylvania State University's (the "University") position regarding the correspondence and communications of Justice Baldwin, former General Counsel, related to the above-referenced investigation. We have waived the University's privilege as to those documents with two critical exceptions:
> ***
> (2) any communications between Justice Baldwin and Messrs. Schultz and Curley. We have previously shared our concerns about the Schultz/Curley communications with you and memorialized them in our October 2, 2012 letter to Judge Feudale.
> ODC-8.

30. On October 22, 2012, Judge Feudale held a conference in his chambers. Present were Respondent on behalf of OAG, Mr. DeMonaco on behalf of Ms. Baldwin, and Mr. Mustokoff on behalf of Penn State. ODC-10.

31. Counsel for Curley and Schultz had not been invited to the meeting and were not present at the meeting. Ms. Baldwin did not tell them that she would be testifying before the grand jury. ODC-10 at 9; N.T. 7/27/18 at 554-56; Pet. for Dis. 25; Ans. 25.

32. The subject of the conference before Judge Feudale was Ms. Baldwin's proposed appearance before the grand jury and the issue of attorney-client privilege. ODC-10; N.T. 7/27/18 at 709-710.

33. Respondent acknowledged that Penn State had not given a full and complete waiver of its attorney-client privilege, stating "there was a waiver of part of that privilege." ODC-10 at 3.

34. Mr. Mustokoff stated:

> Just to put the University's position into a bit sharper focus, however, the University believes that with regard to all aspects of Former Justice Baldwin's representation of the University, that is the University's privilege.
>
> However, issues have legitimately arisen with regard to the substance and perception of the representation by Justice Baldwin of Mr. Schultz and Mr. Curley that have us believing that the most prudent course is for the court to make an ultimate determination as to whether that aspect of the privilege should be waived.
> ODC-10 at 6.

35. Respondent agreed on the record that the situation was "murky." ODC-10 at 7.

36. Mr. DeMonaco noted that counsel for Schultz and Curley had written letters asserting that Ms. Baldwin had represented Curley and Schultz and had claimed privilege for any communications between their clients and Ms. Baldwin. ODC-10 at 7.

37. All present, including Respondent, were aware that Penn State had not waived privilege for communications between Ms. Baldwin, Schultz and Curley, as related by Mr. DeMonaco:

> ...[A]nd then, of course, last week and, I think, prior to last week but memorialized last week, the University waived the privilege, as Mr. Mustokoff mentioned, for Sandusky-related matters with this exception, which included the communications between Mr. Schultz and Mr. Curley.
> ODC-10 at 8-9

38. Respondent represented to Judge Feudale that he was not recognizing any privilege claims on behalf of Schultz or Curley but recognized that claims had been made. ODC-10 at 5.

39. Respondent repeatedly represented to Judge Feudale that: his examination of Ms. Baldwin would not invade any privilege claimed by Curley or Schultz or that could be made in the future by Spanier; and, he was not seeking prior approval to use Ms. Baldwin since she was not going to be asked to provide testimony and evidence against Curley, Schultz or Spanier. ODC-10 at 5-6, 10-11, 13.

40. Respondent stated:

> It is the Commonwealth's understanding of the case law in this matter that the burden of proof in a claim of privilege in this type of situation lies solely initially with the Claimants. So it would lie with Mr. Schultz and Mr. Curley to present proof of that privilege.
>
> But at this point, your Honor, we are willing to put Miss Baldwin in the grand jury without addressing any of the issues related to the testimony of Mr. Schultz and Mr. Curley and conversations she had with them about that testimony and put that – put those matters on hold until we get a Court determination regarding the privilege and we can address that later on.
> ODC-10 at 5-6.

41. Respondent further stated:

> What I would suggest is that we need not address the privilege issue this week before [Ms. Baldwin's] testimony, that we are not going to ask her questions about, as I stated previously, Mr. Schultz, Mr. Curley, their testimony before the grand jury, and any preparation for or follow up they had with Counsel Baldwin, University Counsel Baldwin.
>
> ***
>
> But for the purpose of her testimony at least, the Commonwealth would recommend at this point that her testimony remain secret and that we address this privilege matter at a later date.
>
> We believe we are within the confines of the waiver as it currently exists from the University to proceed effectively with Miss Baldwin.
>
> There may well be claims down the road by Mr. Farrell [counsel for Schultz], Miss Roberto [counsel for Curley], and perhaps even counsel for Graham Spanier; but that is, you know, the risk that the Commonwealth is ready to bear because we believe that we are soundly within the waiver.
> ODC-10 at 10-11.

42. In response to Respondent's representations, Judge Feudale stated:

> I'm satisfied based on what [Respondent] placed on the record that [Ms. Baldwin] is clearly able to proceed on testimony with the stipulation that [Respondent] communicated that [Respondent is] not going to get into an inquiry as to her representation and what that meant with regard to Mr. Curley, Mr. Schultz, and perhaps, as [Respondent] said, also Mr. Spanier.
> ODC-10 at 12.

43. Respondent informed Judge Feudale of his belief that a motion and "some hearing and evidence" must be provided for a privilege to be found. ODC-10 at 13. Judge Feudale asked Respondent if that would be "subsequent to the testimony of Attorney Baldwin?" to which Respondent replied, "Yes, Your Honor." *Id.*

44. On October 26, 2012, Ms. Baldwin testified before the grand jury. Respondent was present for her testimony. N.T. 7/27/18 at 714.

45. At that time, Respondent questioned Ms. Baldwin about prior grand jury testimony of Curley, Schultz and Spanier, as well as Ms. Baldwin's representation of the three individuals and information that each had told her. These questions were contrary to the representations Respondent made to Judge Feudale that his examination of Ms. Baldwin would not invade any privilege claimed by Curley or Schultz or that could be made in the future by Spanier. ODC-11.

46. Before the grand jury, Respondent engaged in the following questioning:

> [Respondent]: Did they [Schultz, Curley and Spanier] ever in any way, shape or form disclose to you when you were asking them for this material anything about 1998 or 2001 and the existence of e-mails from those events?
>
> Ms. Baldwin: Never.
>
> [Respondent]: We also know that Mr. Schultz had a file regarding Jerry Sandusky in his office; and that in that file were documents related to his retirement agreement. There were drafts and other documents related to his employment and his retirement and then there were handwritten notes and e-mails pertaining to the 1998 crimes of Mr. Sandusky and the 2001 crimes of Mr. Sandusky.
>
> Again, same question, did he [Schultz] ever reveal to you the existence of that Sandusky file or any of its contents?
>
> Ms. Baldwin: Never. He told me he didn't have anything. ODC-11 at 20; ***Commonwealth v. Gary Schultz***, 133 A.3d 294, 306-307 (Pa. Super. 2016).

47. Respondent further questioned Ms. Baldwin:

> [Respondent]: Again, staying with Mr. Curley, did he get back to you at any point and tell you whether or not he had evidence or materials that would be responsive to the Subpoena 1197?
>
> Ms. Baldwin: Right. Yes.
>
> [Respondent]: What did he say?

Ms. Baldwin: No, he didn't have any materials.

[Respondent]: **And your conversations with those three gentleman**: Schultz, Spanier, and Curley, were specific, correct? They involved e-mails, paper files, any information- -

Ms. Baldwin: Anything that could – any document- documents that they had whether they be electronic or nonelectronic.

[Respondent]: Is it fair to say they assured you they would go through their e-mails and talk to their staff and find anything that was responsive?

Ms. Baldwin: They said they would check and get back to me.

[Respondent]: So Mr. Curley gets back to you and says there is nothing?

Ms. Baldwin: Correct.
ODC-11 at 17-18; ***Commonwealth v. Timothy Curley***, 131 A.3d 994, 1001 (Pa. Super. 2016) (emphasis in original Superior Court Opinion).

48. Respondent inquired of Ms. Baldwin:

[Respondent]: Okay, Now, **tell us, if you would, about your discussions with Spanier** before that interview. I'm specifically interested in, you know, what anticipation of questions he would have had going into that interview.
Ms. Baldwin: Okay. Because being interviewed by the Office of Attorney General is serious in itself, I said to him, you know, when they question you, Graham, they are going to talk about things like – they are going to use words like, sodomy and pedophile because I didn't want him to be shocked ... He said to me, you know, that is fine. I know that. No problem. That was it.

***

[Respondent] **And what was he telling you** about the 1998 investigation?

Ms. Baldwin: That he didn't know anything.

[Respondent]: [Following testimony by Ms. Baldwin that she came to understand that Curley Schultz and Spanier were having discussions among themselves] Okay. That understanding – tell us how clear it was. **Was that what**

Spanier was telling you?
Ms. Baldwin: Correct.

***

[Respondent]: Now, as I understand it, and again, I don't want to mischaracterize anything, what Spanier has been telling you through this whole period of time is that he knows nothing about the 1998 investigation of Sandusky, he didn't know anything about it at the time, 1998?

Ms. Baldwin: Correct.

[Respondent]: And that in 2001, he was told very little about that. **Can you tell us what he specifically was saying to you about those two incidents?**

Ms. Baldwin: What he was saying is basically this ... We [i.e., Spanier, Curley and Schultz] had a discussion, and I thought they handled it.

[Respondent] **Had [Spanier] ever provided you any details about his involvement in the 2001 situation?**

Ms. Baldwin: I remember that he had talked about... they had reached a decision on...what they were going to do...

[Respondent]: Well, in addition to that, **did [Spanier] ever articulate,** you know, what it was he was told was seen in the shower [sic]?

Ms. Baldwin: Yeah. Horsing around. Horseplay.

[Respondent]: And that was – **are those the words or the type of words that [Spanier] used repeatedly?**

Ms. Baldwin: Those are the words that he used. Horsing around and horseplay.
ODC-11 at 22-28, 32-33, 39-40; ***Commonwealth v. Graham Spanier***, 132 A.3d 481, 488-90 (Pa. Super. 2016) (emphasis in original Superior Court Opinion).

49. At one point during Ms. Baldwin's grand jury testimony, Respondent asked Ms. Baldwin, **"Based upon what you know now, what can you tell us about Spanier's representations to you through this lengthy period of the investigation?"**

Ms. Baldwin responded, **"That he is – that he is not a person of integrity. He lied to me."** ODC-11 at 69-70 (emphasis added).

50. On October 26, 2012, the same day that Ms. Baldwin testified before the grand jury, the grand jury recommended that Spanier be charged with perjury, endangering the welfare of children, obstructing the administration of law or other governmental function, criminal conspiracy, and failure to report suspected child abuse. The Commonwealth filed a criminal complaint containing those charges on November 1, 2012. ODC-12.

51. In addition to the charges previously brought against Curley and Schultz in November 2011, the grand jury recommended additional charges be brought based on Ms. Baldwin's grand jury testimony, and on November 1, 2012, the Commonwealth charged Curley and Schultz with endangering the welfare of children, obstructing the administration of justice or other governmental function, and criminal conspiracy. ODC-12.

52. Respondent left OAG in January 2013. N.T. 8/1/18 p. 944.

53. The cases of Curley, Schultz and Spanier were assigned to the Honorable Todd Hoover of the Dauphin County Court of Common Pleas. R-5.

54. Among the pretrial claims made individually by Curley, Schultz and Spanier were allegations that they each enjoyed an attorney-client relationship with Ms. Baldwin and that her appearance before the grand jury violated that relationship. R-1 through R-3.

55. Judge Hoover held separate hearings for each defendant concerning the issue of potential violation of the attorney-client privilege. Curley, Schultz and Spanier

each testified at their own hearing and Ms. Baldwin testified at each hearing. N.T. 7/27/18 at 478-79.

56. Judge Hoover denied the defendants' motions regarding attorney-client privilege via three sealed Opinions, and he issued a published Opinion covering the claims jointly. N.T. 7/27/18 at 478-79.

57. Curley, Schultz and Spanier each appealed Judge Hoover's rulings to the Superior Court.

58. In January 2016, the Superior Court reversed Judge Hoover's findings and concluded:

> Instantly, despite Schultz invoking his privilege, despite the Rules of Professional Conduct requiring a hearing on the privilege issue prior to Ms. Baldwin's testimony, *see* Pa.R.Prof. Conduct 3.10, despite the Rules of Evidence mandating that the court determine privilege questions concerning a witness's testimony before he or she testifies, *see* Pa.R.E. 104, and despite Penn State's counsel, Mr. Mustokoff, acknowledging the issue, and [Respondent] paying lip service to the privilege concerns, Judge Feudale failed to have a hearing before Ms. Baldwin testified. We acknowledge that [Respondent] misled Judge Feudale by claiming that the Commonwealth would not inquire into matters concerning Ms. Baldwin's communications with Schultz, Curley, and Spanier.
>
> ***
>
> [Respondent] stated that the Commonwealth assumed the risk of proceeding without a clear determination of the privilege concerns at play, which is precisely the risk that has now borne fruit in the form of a challenge to the charges flowing in part from such foul blows. Since the obstruction of justice and related conspiracy charges in this matter relied extensively on a presentment from an investigating grand jury privy to impermissible privileged communications, we quash the counts of obstruction of justice and the related conspiracy charge. ***Schultz***, 133 A.3d at 327; *accord* ***Spanier***, 132 A.3d at 498; ***Curley***, 131 A. 3d at 1007.

59. The Commonwealth did not appeal the Superior Court's Opinions. N.T. 8/1/18 at 998-99, 1003-05.

60. The cases against Curley, Spanier and Schultz were remanded to the trial court.

61. In March 2017, Curley and Schultz pleaded guilty to endangering the welfare of children.

62. In March 2017, Spanier proceeded to trial and was convicted of endangering the welfare of children. Spanier continues to appeal his conviction.

63. At the disciplinary hearing, Respondent testified that at the conference with Judge Feudale on October 22, 2012, he voiced his agreement with Mr. Mustokoff that the question of the attorney/client privilege was "arguable." N.T. 8/1/18 at 935.

64. At the disciplinary hearing, Respondent conceded that "the supervising judge is the judge...he could have had a hearing. He could have brought everybody in. He could have done that," but that Respondent "made the recommendation not to alert [counsel for Curley and Schultz] and not to bring them in." N.T. 8/1/18 at 925-26.

65. Respondent testified that "the person that's supposed to decide if there's a privilege is Judge Feudale." N.T. 8/1/18 at 926.

66. Respondent testified that at the conference with Judge Feudale, he did not "raise any of the [] defenses" he was raising at the disciplinary hearing such as "crime-fraud, waiver, the Freeh report, [Curley, Schultz and Spanier] were only fact witnesses, Baldwin gave Upjohn warnings." N.T. 8/1/18 at 932-33.

67. At the disciplinary hearing, Ms. Baldwin testified that prior to her grand jury testimony, she knew she was going to be asked "about Curley, Schultz and Spanier." N.T. 7/27/18 at 565.

68. Petitioner presented the expert testimony of Lawrence J. Fox, Esquire.

69. Respondent presented the expert testimony of the Honorable Ronald Castille, Chief Justice of the Supreme Court of Pennsylvania (retired).

70. Respondent presented the testimony of Richard Sheetz, OAG Executive Deputy Attorney General at all times relevant and Respondent's direct supervisor.

71. Respondent presented the testimony of Amy Zapp, OAG Chief Deputy Attorney General at all times relevant.

72. Ms. Zapp provided character evidence on behalf of Respondent.

73. Ms. Zapp testified that Respondent worked for her for a period of time when she was OAG Chief of Appeals. She found the quality of his work to be excellent, and she relied on him and had a high regard for his work. N.T. 8/1/18 at 985-987.

74. Respondent described himself as a "worker bee," failed to acknowledge responsibility for his actions and did not express remorse. N.T. 7/27/18 at 625, 676-77, 679; 8/1/18 at 949.

III. CONCLUSIONS OF LAW

By his conduct as set forth above, Respondent violated the following Rule of Professional Conduct:

1. RPC 3.10 – A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.

IV. DISCUSSION

This matter is before the Board for consideration following the issuance of a Report and Recommendation by the Committee and the parties' exceptions thereto. Petitioner initiated disciplinary proceedings against Respondent by way of a Petition for Discipline filed on January 10, 2018, which charged Respondent with violating Rule of Professional Conduct 3.10. Petitioner has the burden of proving ethical misconduct by a preponderance of clear and satisfactory evidence. ***Office of Disciplinary Counsel v. John Grigsby***, 425 A.2d 730, 732 (Pa. 1981). Based on the evidentiary record, and for the reasons stated herein, we conclude that Petitioner met its burden of proof and we recommend that Respondent be suspended from the practice of law for a period of one year and one day.

The facts establish that in 2009, OAG was investigating claims of child molestation by former Penn State assistant football coach, Jerry Sandusky, and convened an investigating grand jury. Respondent was the Chief of Criminal Prosecutions

overseeing the investigation and remained involved in some capacity at all times relevant to the instant disciplinary proceeding.

In early January 2011, OAG subpoenaed Curley, Shultz, and Paterno to appear before the grand jury on January 12, 2011. OAG also issued a subpoena to Penn State seeking records pertaining to Sandusky. Ms. Baldwin accepted service of the subpoenas and agreed to represent Curley and Schultz in their appearances before the grand jury. On January 12, 2011, Ms. Baldwin accompanied Curley and Shultz to their grand jury appearances, was present during the colloquy before Judge Feudale, and represented them in their appearances before the grand jury. Respondent was present when Judge Feudale informed Curley and Schultz of their right to counsel and was present when Curley and Schultz each acknowledged on the record that Ms. Baldwin was their counsel.

In March 2011, OAG interviewed Spanier, who was accompanied by Ms. Baldwin. Soon thereafter, OAG subpoenaed Spanier and he appeared before the grand jury on April 13, 2011, represented by Ms. Baldwin. Respondent was present when Spanier confirmed on the record that Ms. Baldwin was his counsel.

In November 2011, OAG charged Curley and Schultz with perjury and failure to report suspected child abuse. At that time, Curley and Schultz separately retained criminal defense counsel. At some point, Ms. Baldwin retained personal counsel, Charles DeMonaco, Esquire. In June 2012, counsel for Curley and Schultz each wrote separately to Mr. DeMonaco, informing him of their concerns that OAG would attempt to interview Ms. Baldwin and advising Mr. DeMonaco that they asked and expected Ms. Baldwin to assert attorney-client and work-product privileges in response to any such

requests from OAG. Ms. Baldwin left her position as Penn State's General Counsel in the summer of 2012 and was replaced by Michael Mustokoff, Esquire.

On or about October 2, 2012, OAG subpoenaed Ms. Baldwin to testify before the grand jury. On October 11, 2012, counsel for Curley and Schultz separately wrote to Judge Feudale, stating that Ms. Baldwin had represented Curley and Shultz, asserting the attorney-client and work product privileges and stating their willingness to discuss the issue with the court, OAG and Penn State. At some point in mid-October 2012, Respondent attended an attorney proffer meeting with Ms. Baldwin's counsel, at which conversation focused on the issue of privilege regarding Ms. Baldwin's representation of Curley, Schultz and Spanier. On October 19, 2012, Mr. Mustokoff wrote to Respondent stating that Penn State waived its privilege as to certain communications, with the exception of any communications between Ms. Baldwin and Curley and Schultz.

On October 22, 2012, Judge Feudale held an in-chambers conference. The purpose of the conference was to discuss the privilege issues related to Ms. Baldwin's proposed testimony before the grand jury, as raised in letters by counsel for Curley and Schultz. Respondent represented OAG, Mr. DeMonaco represented Ms. Baldwin, and Mr. Mustokoff represented Penn State. Counsel for Curley and Shultz were not present and had not been invited to the conference. Ms. Baldwin had not told counsel for Curley and Schultz that she would be testifying before the grand jury. During the conference, Respondent acknowledged that although Penn State had waived attorney-client privilege as to Ms. Baldwin's representation, the issues of attorney-client privilege as to Ms. Baldwin's representation of Curley and Schultz were unresolved. He agreed with Mr. Mustokoff's statement that the application of the attorney-client privilege was "murky" and that the issue should be decided by Judge Feudale.

During the conference, Respondent repeatedly represented to Judge Feudale that his examination of Ms. Baldwin would not invade any privilege claimed by Curley and Schultz and potentially by Spanier (who at that time was not charged with any crimes), and Respondent was not seeking prior approval to use Ms. Baldwin since she was not going to be asked to provide testimony against Curley, Schultz or Spanier. On at least four occasions during the conference, Respondent informed Judge Feudale that the privilege issues could be put "on hold" until a Court determination regarding the privilege, which could be addressed at a "later date." Respondent indicated that he believed that "a motion and some hearing and evidence must be provided for the privilege to be found in this case." Judge Feudale then asked Respondent, "And that would be subsequent to the testimony of Attorney Baldwin?" Respondent answered in the affirmative. Respondent expressed his concern for keeping Ms. Baldwin's grand jury testimony a secret.

At the end of the conference, Judge Feudale stated that ***based on Respondent's stipulation that Respondent would not inquire as to Ms. Baldwin's representation with regard to Curley, Schultz and/or Spanier,*** he would permit Ms. Baldwin's testimony as to the narrow focus of the response of Penn State's Office of General Counsel to the various subpoenas and court orders.

On October 26, 2012, Ms. Baldwin testified before the grand jury. Contrary to Respondent's representations and assurances to Judge Feudale at the conference held four days prior, he questioned Ms. Baldwin about the prior grand jury testimony of Curley, Schultz and Spanier, and about her representation of the three individuals and information that each had told her. That same day, OAG charged Curley and Schultz with additional charges of endangering the welfare of children, obstruction of justice, and

conspiracy and charged Spanier with failure to report suspected child abuse, perjury, obstruction of justice, endangering the welfare of children, and conspiracy. Ultimately, following litigation of motions to quash filed by Curley, Schultz and Spanier, the Superior Court quashed the charge of obstruction of justice and the related conspiracy charge as to each defendant, holding that Ms. Baldwin was incompetent to testify as to Curley's, Schultz's and Spanier's communications with her.

The Committee, considering these facts, issued a Report and concluded that Petitioner failed to prove that Respondent violated RPC 3.10. Specifically, the Committee concluded that Petitioner failed to establish what it considered to be the critical element of the rule's language: that Respondent issued the subpoena for Ms. Baldwin's appearance before the grand jury. Since the subpoena to Ms. Baldwin bore the name of Bruce Beemer, Respondent's supervisor at OAG, and not Respondent's name, the Committee reasoned that Petitioner did not satisfy the first element and could not make out a violation of RPC 3.10, and therefore recommended to the Board that the Petition for Discipline be dismissed.

Both parties filed exceptions to the Committee's Report and exceptions in opposition to the other party's exceptions. Petitioner contends that the Committee erroneously found that no violation existed, based on its faulty premise that the subpoena issued to Ms. Baldwin did not have Respondent's name on it. Respondent contends that the Committee correctly determined that he did not violate RPC 3.10, but objects to several factual findings that he argues should be reversed as irrelevant and inaccurate.

RPC 3.10 pertains to the issuance of subpoenas to lawyers and states:

> A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating

> criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.

Additionally, Comment [1] to RPC 3.10 provides:

> It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6, the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceedings; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

Petitioner contends that the core requirement of RPC 3.10 is not the issuance of the subpoena but whether there is prior judicial approval for the attorney/witness's testimony, following a hearing that considers the five factors listed in the rule. Upon review, the Board agrees with Petitioner's interpretation of RPC 3.10. The purpose of the rule is to deter prosecutors from invading the attorney-client and work product privileges, as well as lawyer-client confidentiality, without prior judicial approval. The court must make the determination on privilege questions prior to the witness's testimony; it is not the prosecutor's decision.

In our view, OAG is the prosecutor referred to in the rule. OAG, as the prosecutorial body and through its representatives, issued the subpoena to Ms. Baldwin, and Respondent, as OAG's representative, appeared at the October 22, 2012 conference before Judge Feudale and questioned Ms. Baldwin at her October 26, 2012 grand jury appearance. The language of RPC 3.10 does not require that the prior judicial approval for a lawyer to testify be secured by the same prosecutor who issued the subpoena. To

interpret the rule otherwise would be to render it meaningless. A prosecutor who sought to avoid the "prior judicial approval" requirement of RPC 3.10 simply could have another lawyer in the prosecutor's office issue the subpoena under that lawyer's name, then the prosecutor could omit the required hearing to obtain judicial approval of the attorney/witness's testimony, but somehow escape charges of misconduct under RPC 3.10 because his or her name was not on the face of the subpoena. We find this to be an absurd result and not intended by the rule. For the purposes of the instant matter, it is of no moment that Respondent did not personally issue the subpoena under his name; the record supports the conclusion that he represented OAG at all relevant times.

We next consider the issue of "prior judicial approval," which must be obtained by means of a hearing at which the prosecutor must show that he or she is not going to elicit privileged information and, among other hurdles, that the testimony is vital to the prosecutor's case. The record demonstrates that Respondent did not receive prior judicial approval after a requisite hearing to permit Ms. Baldwin to reveal confidential information regarding Curley, Schultz and Spanier, whom she had represented. Respondent misled the Court as to his ultimate intentions. The Court relied upon these misrepresentations in deferring any hearing on the privilege issues. Respondent's actions are an egregious violation of RPC 3.10.

An in-chambers conference was held before Judge Feudale with Respondent, Ms. Baldwin's counsel and Penn State's counsel, participating. The result of the conference was that Judge Feudale approved Ms. Baldwin's testimony ***only*** as regards her representation of Penn State and her role as General Counsel in complying with the investigative efforts of the grand jury. The reason that Judge Feudale approved Ms. Baldwin's testimony in a narrow area was based on Respondent's oft-repeated

representations and assurances that Respondent: (a) would respect the privilege concerns that all participants agreed existed; and (b) specifically would not ask questions that could invade the privilege between Ms. Baldwin and Curley, Schultz or Spanier. Respondent stated, "[w]e are willing to put Miss Baldwin in the grand jury without addressing any of the issues related to the testimony of Mr. Schultz and Mr. Curley and conversations she had with them about that testimony...until we get a court determination regarding that privilege..." ODC-10 at 6. Judge Feudale did not approve Ms. Baldwin's testimony as to her representation of Curley, Schultz and Spanier. These actions of the Judge were based upon the representations of Respondent.

During the conference, Respondent was at all times aware: (a) that Ms. Baldwin had represented Curley, Shultz and Spanier during their grand jury testimony (even if he was not fully cognizant of the scope of that representation); (b) that Penn State had not waived any privilege as to Curley and Schultz (Spanier was not criminally charged at this point); (c) that Curley and Schultz has raised claims of privilege and that Spanier potentially could raise a claim; and (d) that counsel for Curley and Schultz were not at the conference and had not been asked to attend (though they had submitted letters to Judge Feudale stating their concerns with privilege issues).

Respondent acknowledged on the record at the conference his agreement with Mr. Mustokoff's statement that the question of attorney-client privilege was "murky." He stated on at least four occasions that the issues of privilege raised by counsel for Curly and Schultz could be determined subsequent to Ms. Baldwin's testimony. Respondent made clear that he was determined to go forward with Ms. Baldwin's testimony and he wanted to keep it secret, and further stated on the record that the risk of going forward

was "the risk that the Commonwealth is ready to bear." ODC-10 at 11. Respondent concealed his true intentions and misled the Court.

The record of the conference demonstrates that the requirement of a hearing to gain the necessary judicial approval for Ms. Baldwin's testimony was sidestepped in a purposeful manner by Respondent. Respondent repeatedly represented to the Court that he would avoid certain subjects in his questioning of Ms. Baldwin. Contrary to the rule's provisions, Respondent deliberately avoided the hearing required by Rule 3.10. In fact, the record confirms that he actively sought to have no hearing. Respondent was successful in convincing the Court that a hearing was not necessary. Respondent then proceeded to do exactly what he had represented to the Court that he would not do. Four days later, Ms. Baldwin appeared before the grand jury and Respondent proceeded to question her extensively about the very subjects he represented to Judge Feudale he would avoid. These actions are reprehensible. Respondent's questions elicited: (a) attorney-client privileged communications between Ms. Baldwin and Curley, Schultz and Spanier; and (b) confidential information pertaining to Ms. Baldwin's representation of them. Respondent continually asked Ms. Baldwin to disclose the substance of her discussions with Curley, Schultz and Spanier, what they assured her, what they knew, what they had told her, what they revealed, whether they were aware of certain information, what they asked her, what their reactions were, and what Ms. Baldwin advised them. Respondent's questioning was calculated to demonstrate that Ms. Baldwin's clients lied. These actions are inexcusable. The events that occurred that day in the grand jury room were precisely what RPC 3.10 seeks to prevent. Respondent turned Ms. Baldwin into a witness for the prosecution against her clients. Based on Ms. Baldwin's testimony, criminal charges were issued against Spanier

and additional criminal charges were issued against Curley and Schultz. Such actions cannot go unpunished, particularly when undertaken by a prosecutor serving the public interest.

Having reviewed the record and having considered the parties' arguments, we conclude that Respondent violated RPC 3.10. Respondent's exceptions are without substance. This matter is ripe for the determination of discipline. The only issue is the severity of the discipline to be imposed.

In looking at the general considerations governing the imposition of final discipline, it is well-established that each case must be decided individually on its own unique facts and circumstances. ***Office of Disciplinary Counsel v. Robert Lucarini***, 472 A.2d 186 (Pa. 1983). In order to "strive for consistency so that similar misconduct is not punished in radically different ways," ***Office of Disciplinary Counsel v Anthony Cappuccio***, 48 A.3d 1231, 1238 (Pa. 2012) (quoting ***Lucarini***, 472 A.2d at 190), the Board is guided by precedent for the purpose of measuring "the respondent's conduct against other similar transgressions." ***In re Anonymous No. 56 DB 94***, 28 Pa. D. & C. 4th 398 (1995). The Board is mindful when adjudicating each case that the primary purpose of the lawyer discipline system in Pennsylvania is to protect the public, preserve the integrity of the courts, and deter unethical conduct. ***Office of Disciplinary Counsel v. Akim Czmus***, 889 A.2d 117 (Pa. 2005). The actions of Respondent violated the public's trust, undermined the integrity of the Court and were unethical.

The record before us also reveals several aggravating factors. Significantly, at the time of his misconduct, Respondent served as a public official. As a prosecutor, Respondent served as a "minister of justice," whose "duty to seek justice trumps his [] role as an advocate to win cases." ***Commonwealth v. David Chmiel***, 173 A.3d 617, 631

(Pa. 2017). Respondent's position as a prosecutor is an aggravating factor in the Board's assessment of discipline. In ***Cappuccio,*** 48 A.3d at 1240, the Supreme Court held that lawyers who commit misconduct while in a public position bring disrepute upon the bar, and "[t]he fact that a lawyer holds a public office, or serves in a public capacity, as here, is a factor that properly may be viewed as aggravating the misconduct in an attorney disciplinary matter." The Court reasoned that many attorneys hold positions of trust with respect to individual clients, but "[t]hat trust is not the same as the broader public trust reposed in judges, prosecutors and the like." ***Id.*** Respondent betrayed the faith and trust of the public by engaging in misconduct in his official capacity. This factor weighs heavily in the assessment of discipline. In ***Office of Disciplinary Counsel v. Brian J. Preski,***134 A.3d 1027, 1033 (Pa. 2016), the Court stated, "If anything, the transgressions of a lawyer who is also a public servant are even more injurious to the reputation of the bar because they bring dishonor both to the profession and to our democratic institutions." Respondent's actions dishonor the profession and his office.

Respondent's misrepresentations to Judge Feudale as to the scope of his inquiry of Ms. Baldwin's testimony are deeply disturbing and a significant aggravating factor. There are innumerable portions of Respondent's examination of Ms. Baldwin that sought detailed attorney-client communications. Respondent's actions can be seen as nothing but intentional and calculated. The examination of Ms. Baldwin did not consist of a question or two that inadvertently strayed into prohibited territory; instead, Respondent's examination constituted a full-fledged inquiry designed to elicit confidential information that had not been approved by Judge Feudale. These actions are inexcusable. The public deserves more from its public servants. The profession expects and demands better.

Importantly, Respondent failed to demonstrate regret or remorse for his actions. To the contrary, he attempted to persuade the Committee, despite the weight of the evidence, including his own testimony that pointed otherwise, that Penn State waived privilege as to Curley and Schultz (a privilege that was not theirs to waive) and that Respondent did not deceive Judge Feudale in any way. Respondent deflected responsibility by describing himself as a "worker bee" in the OAG system, although there is no evidence that anyone at OAG instructed him to put Ms. Baldwin into the grand jury without the requisite RPC 3.10 hearing. He failed to acknowledge that as a prosecutor he bore a special responsibility to ensure justice, and utterly failed to acknowledge the ramifications of his misconduct. In previous matters, the Board has found that deflecting responsibility and displaying a lack of sincere remorse constitute aggravating factors. ***Office of Disciplinary Counsel v. Robert Philip Tuerk***, No. 51 DB 2014 (D. Bd. Rpt. 7/20/2015) (S. Ct. Order 10/15/2015). The failure of Respondent to show any remorse demands the imposition of a sanction which conveys to him the severity of his transgressions.

Mitigating factors are present. Respondent has practiced law in Pennsylvania since 1994 and has no prior discipline. Respondent presented character evidence from Amy Zapp, Esquire, OAG Chief Deputy Attorney General. Respondent worked for Ms. Zapp for a period of time when she was Chief of Appeals, during which he supervised the grand jury unit and handled capital appeals. Ms. Zapp testified that Respondent's work quality was excellent, he was reliable, and she has high regard for his work.

Our review of prior Pennsylvania disciplinary cases resulting in discipline of a prosecutor did not reveal any similar situations. In all of the matters we reviewed, the Court imposed public discipline.

In three prior matters, respondents engaged in criminal conduct while serving as prosecutors. In ***Cappuccio***, the respondent served as a Chief Deputy District Attorney in Bucks County. While serving in that capacity, Cappuccio engaged in criminal acts that resulted in his entering a guilty plea in Bucks County to offenses including three counts of endangering the welfare of children; one count of criminal use of a communication facility; three counts of corruption of minors; and three counts of furnishing liquor or malt or brewed beverages to minors. The Supreme Court disbarred Cappuccio, retroactive to the date of his temporary suspension, after considering the aggravating factor of his position as a prosecutor and the fact that his misconduct occurred over an extended period of time and involved three minor victims.

In the matter of ***Office of Disciplinary Counsel v. Mark Peter Pazuhanich***, No. 15 DB 2005 (D. Bd. Rpt. 8/11/2006) (S. Ct. Order 11/17/2006), Pazuhanich, a two-term District Attorney of Monroe County recently elected to the trial bench, was arrested because he was observed fondling a ten-year old girl at a concert. Pazuhanich pleaded *nolo contendere* to indecent assault; endangering the welfare of children; corruption of minors; and public drunkenness. The Board found Pazuhanich's position as an elected official in a powerful law enforcement position at the time the criminal conduct occurred aggravated the final discipline. The Court disbarred Pazuhanich, retroactive to the date of his temporary suspension.

In the matter of ***Office of Disciplinary Counsel v. Ernest D. Preate, Jr.***, 731 A.2d 129 (Pa. 1999), while serving as District Attorney of Lackawanna County, Preate

solicited, either indirectly or directly, illegal cash contributions from owner-operators of video poker gambling machines. In order to conceal the illegal cash contributions, Preate, while serving as either the District Attorney or the Attorney General of Pennsylvania, caused false and materially misleading campaign finance reports to be filed under oath with the Commonwealth of Pennsylvania Bureau of Elections. Preate pled guilty to one count of mail fraud. He presented character evidence in mitigation of discipline. The Court imposed a suspension for a period of five years, retroactive to the date of the temporary suspension.

We note three matters where prosecutors engaged in serious misconduct, albeit not criminal conduct. In each situation, the prosecutors were suspended or disbarred. In a recent matter, the Court imposed a suspension for a period of one year and one day on the former District Attorney of Centre County. ***Office of Disciplinary Counsel v. Stacy Parks Miller***, No. 32 DB 2017 (D. Bd. Rpt. 12/6/2018) (S. Ct. Order 2/8/2019). During her tenure as District Attorney, Miller committed professional misconduct by engaging in improper *ex parte* communications with members of the judiciary during pending matters, which created the appearance of impropriety in the judicial system and in fact influenced a judge. Additionally, Miller engaged in deceitful conduct in creating, disseminating and using a fictitious Facebook page intended to "friend" establishments known for selling illegal bath salts. The Board found that Miller's status as the top law enforcement official in Centre County significantly aggravated her situation, namely, she ignored her duty to conduct herself with the highest degree of integrity and honesty, and failed to protect the rights of all citizens of her county. Miller's actions subjected the District Attorney's office and Centre County to public scrutiny and

suspicion. The Board further noted Miller's lack of remorse for her actions. The case is not unlike the matter presently before us.

The matter of ***Office of Disciplinary Counsel v. James Paul Carbone***, No. 71 DB 2014 (D. Bd. Rpt. 6/17/2015) (S. Ct. Order 8/12/2015) involved an overzealous prosecutor. Carbone, while serving as an assistant district attorney in Venango County, engaged in misconduct in three separate matters. This conduct included interviewing a witness in violation of a court order; making misrepresentations to the court; utilizing intemperate language and making a profane hand gesture during a closing argument; yelling and pointing at a defendant and his counsel during closing argument; misrepresenting evidence during an opening statement; and discussing a case with a represented defendant. The Board found aggravating factors in that Carbone's position as a prosecutor harmed the public's confidence in the integrity of the legal system. In addition, Carbone failed to participate in his disciplinary proceeding. The Board recommended that Carbone be disbarred, and the Court ordered his disbarment.

The Court imposed a three-year period of suspension in the matter of ***Office of Disciplinary Counsel v. John T. Olshock***, No. 28 DB 2002 (D. Bd. Rpt. 7/30/2003) (S. Ct. Order 10/24/2003). Olshock maintained a private practice of law and was the part-time First Assistant District Attorney for Washington County at the time of his misconduct, which involved misappropriation of estate monies related to a case in his private practice. The Board considered as an aggravating factor Olshock's position as a prosecutor, noting that even though his misconduct did not occur during the exercise of his public duties, his position demanded integrity, as he was entrusted with the protection of the public. The Board found mitigating factors related to his character evidence and his lack of prior disciplinary history.

Finally, the Court imposed a Public Censure in the matter of ***Office of Disciplinary Counsel v. Charles J. Aliano***, No. 25 DB 2003 (D. Bd. Rpt. 8/31/2005) (S. Ct. Order 12/1/2005). At the time of Aliano's misconduct, he was the part-time District Attorney in Susquehanna County and maintained a private practice of law. Aliano represented a client in his private practice, and a short time after being retained, the client's husband was charged with Driving Under the Influence. Aliano remained actively involved in the institution and disposition of criminal charges against the husband, violating the conflict of interest provisions of the Rules of Professional Conduct. The Board found that Aliano used his position as District Attorney to impact the outcome of the case and to get more serious charges against his client's husband dismissed. In considering the matter, the Board found that Aliano abused his position as a public official.

Upon our review, the misconduct in ***Cappuccio***, ***Pazuhanich***, ***Preate***, ***Carbone***, and ***Olshock*** is more egregious than the instant Respondent's conduct. Unlike the respondents in several of those cases, the instant Respondent has not been criminally convicted and did not misappropriate client funds, nor does his misconduct rise to the same level of multiple instances of prosecutorial misconduct as in ***Carbone***. However, we conclude that Respondent's conduct, while differing in kind from the conduct in ***Miller***, is similar in degree of discipline to be imposed. Both Respondent and Miller used their positions as prosecutors to gain advantages over defendants and impact outcomes in favor of their offices. By all accounts, Respondent was an experienced and savvy prosecutor who understood the grand jury system, having subpoenaed witnesses on "hundreds" of occasions and having appeared in front of grand juries on "more than one hundred" occasions. Respondent used his extensive knowledge to take actions calculated to avoid a required hearing in order to gain access to privileged

communications, information to which he would not otherwise be privy. In doing so, Respondent failed to adhere to the requirements of RPC 3.10 and abdicated his responsibility as a prosecutor to ensure justice. After hearing Ms. Baldwin's testimony that revealed privileged information about her clients, that very day, the grand jury recommended charges against Curley, Schultz and Spanier. Respondent's misconduct ultimately resulted in serious criminal charges being quashed against three individuals, allowing those individuals to escape prosecution.

We do not take our responsibility in evaluating the actions of Respondent lightly. Those actions undermine the public trust and bring shame to the profession. Through it all, Respondent fails to recognize the severity of his transgressions and refuses to show any remorse for his actions. Considering the serious nature of his actions and the weighty aggravating factors, Respondent's misconduct warrants a suspension of one year and one day.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Frank G. Fina, be Suspended for One Year and One Day from the practice of law in this Commonwealth.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: */S/James C. Haggerty*
James C. Haggerty, Vice-Chair

Date June 6, 2019

Members Goodrich and Rafferty recused.