

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF  
FRANK GERALD FINA

VS. DOCKET NO. 20-000-118449

**MEMORANDUM ORDER AND OPINION**

THIS MATTER came before the Virginia State Bar Disciplinary Board (“Board”) for a hearing via video conference on September 25, 2020, on the Amended Rule to Show Cause and Order of Summary Suspension and Notice of Hearing entered on August 31, 2020 (the “Rule to Show Cause”) to which was appended the Order of Suspension entered by the Supreme Court of Pennsylvania Western District on February 19, 2020, suspending for one year and one day effective February 19, 2020, the right of Respondent Frank G. Fina (“Respondent”) to practice law in the Commonwealth of Pennsylvania.

The hearing was held before a panel of the Board consisting of Sandra L. Havrilak, Acting Chair; David J. Gogal; Donita M. King; Alexander Simon; and, Reba H. Davis, Lay Member (collectively, the “Board Panel”). The Virginia State Bar (“Bar”) was represented by Elizabeth K. Shoenfeld, Senior Assistant Bar Counsel (“Senior Assistant Bar Counsel”). The Respondent was represented by Bernard Joseph DiMuro, who on behalf of Respondent filed a seventy-three-page Answer to Order to Show Cause.

At the onset of the hearing, the Chair stated the following:

On March 12, 2020, the Governor of Virginia declared a state of emergency regarding the novel coronavirus (COVID-19) pursuant to Executive Order 51. The state of emergency has been in place since March 12, 2020 and continues indefinitely, until revised or lifted by the Governor. Therefore, because COVID-19 has rendered it unsafe for public bodies to assemble in person, the Virginia State Bar Disciplinary Board is meeting via teleconference, with access provided to the public to observe. In addition, the meeting will be recorded, will be available for viewing on the Virginia State Bar’s website, and it will otherwise comply with Virginia’s Freedom of Information Act regarding electronic

meetings, found in the Virginia Code, Section 2.2-3708.2, as supplemented by Section 4-0.01.g of Virginia House Bill 29, Chapter 1283 (2020).

The court reporter, after having been duly sworn, reported the hearing and transcribed the proceeding.

The Chair polled the members of the Board Panel as to whether any of them was conscious of any personal or financial interest or bias which would preclude any of them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative. All legal notices of the date and place were timely sent by the Clerk of the Disciplinary System (“Clerk”) in the manner prescribed by Part 6, § IV, ¶ 13-12(C) of the *Rules of the Supreme Court of Virginia* (the “*Rules*”).

In accordance with Part 6, § IV, ¶ 13-24 of the *Rules*, the purpose of the hearing was to provide the Respondent with an opportunity to show cause, if any, by clear and convincing evidence, as to why the same discipline that was imposed upon him by the Supreme Court of Pennsylvania should not be imposed by the Board. The Board took Judicial Notice of the Rule to Show Cause, which included as an attachment the Order of Suspension of the Supreme Court of Pennsylvania, suspending Respondent from practicing law in the Commonwealth of Pennsylvania one year and a day and received them into evidence, along with the Concurring Statement of Justice Wecht, the Concurring and Dissenting Statement of Justice Dougherty, and the Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania. The Board received into evidence the Bar’s Exhibits 1-7 and the Respondent’s Exhibits 1-27, though Respondent’s Exhibits 13, 14, and 20 were not received as expert opinions. The Respondent testified on his own behalf and also called as a witness his Pennsylvania counsel, Dennis McAndrews and Joseph McGettigan. No other witnesses testified on behalf of the Respondent or the Bar.

By Order dated February 19, 2020 the Pennsylvania Supreme Court suspended Respondent from the practice of law in Pennsylvania for a year and a day for an asserted violation of *Pennsylvania Rule of Professional Conduct* (“Pa. RPC”) 3.10, which states in its entirety:

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.

Paragraph 13-24 sets forth the following four grounds under which the Board may decline to impose reciprocal discipline or may impose lesser discipline than that which was imposed by the original jurisdiction:

1. The record of the proceedings in Pennsylvania clearly shows that such proceedings were so lacking in notice or opportunity to be heard as to constitute a denial of due process;
2. The imposition by the Board of the same or equivalent discipline upon the same proof would result in an injustice;
3. The same conduct would not be grounds for disciplinary action or for the same or equivalent discipline in Virginia; or,
4. The misconduct found in the original Jurisdiction would warrant the imposition of substantially lesser discipline in Virginia.

Respondent asserted that all four of the above exceptions, individually and collectively, applied to this matter and warranted relief from the Board in the form of dismissal or lesser discipline. The Board finds, by clear and convincing evidence, that grounds 2, 3 and 4 exist, warranting dismissal of the Rule to Show Cause and Order of

Summary Suspension based on its finding that none of the elements of Respondent's purported violation of the *Pennsylvania Rules of Professional Conduct* exist in the record of this matter.

## **FACTS ESTABLISHED IN THE RECORD**

### A. BACKGROUND OF OAG INVESTIGATION

1. Frank Fina was at all times relevant to the underlying events a member in good standing of the Bar of the Commonwealth of Pennsylvania and employed by the Office of the Attorney General of the Commonwealth of Pennsylvania (OAG) as Chief Deputy Attorney General (CDAG). Respondent was acting in his official capacity as CDAG, and the act at issue per the Office of Disciplinary Counsel's (ODC) Petition for Discipline ("Petition") occurred while Respondent was acting in the course of his duties.<sup>1</sup> Prior to the discipline in question, Respondent was never subject to discipline of any type by any jurisdiction or bar.<sup>2</sup>

2. In 2009, the OAG began an investigation into allegations of serial child molestation by Jerry Sandusky, a retired assistant coach of the football team of the Pennsylvania State University ("Penn State").<sup>3</sup>

3. In 2011, the investigation of Sandusky was still ongoing and aided by the use of the Statewide Investigating Grand Jury ("SWIGJ" or "grand jury"). By then, the investigation included inquiry not only into Sandusky's behavior, but into who else was aware of Sandusky's transgressions.<sup>4</sup>

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<sup>1</sup> Resp. Ex. 5 at FINA 000493-498; Resp. Ex. 18 at FINA 001742.

<sup>2</sup> *In the Matter of Frank G. Fina*, Memorandum Opinion No. 20-mc-103 (D. Del. July 20, 2020), at p. 15; Resp. Ex. 19, Report and Recommendation of Disciplinary Board, July 6, 2019, at FINA 0001757.

<sup>3</sup> *Id.* at FINA 000497-498.

<sup>4</sup> *Id.* at FINA 000503.

4. Because much of Sandusky's abuse took place on the Penn State campus, the investigation began to inquire of Penn State employees and to seek any evidence of Sandusky's conduct.<sup>5</sup>

5. In 2011, Respondent was directly supervising the OAG's use of the SWIGJ in the Sandusky inquiry. He reported to the Executive Deputy Attorney General of the Criminal Division, Richard Sheetz. Sheetz in turn reported to the First Deputy Attorney General, William Conley, who reported to the Attorney General, Linda Kelly.<sup>6</sup>

#### B. THE SWIGJ SUBPOENAS THREE PENN STATE ADMINISTRATORS

1. The SWIGJ issued subpoenas for the January 2011 appearance of Gary Schultz, a retired Penn State Senior Vice President; Timothy Curley, the Penn State Athletic Director; and Joseph Paterno, the head football coach.<sup>7</sup> The OAG served the subpoenas for Curley, Schultz, and later Penn State's President Graham Spanier at Penn State through Ms. Cynthia Baldwin, General Counsel of Penn State.<sup>8</sup>

2. Simultaneously, the SWIGJ also issued and served a subpoena *duces tecum* to the University for any and all documents and materials related to Sandusky.<sup>9</sup>

3. Spanier directed Baldwin to accompany Schultz and Curley as Penn State General Counsel to their appearances before the SWIGJ. Paterno elected to be represented by separate counsel.<sup>10</sup>

4. Baldwin advised Schultz and Curley of President Spanier's direction. She then advised them that she represented them only in their capacity as University

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<sup>5</sup> *Id.* at FINA 000436-437.

<sup>6</sup> *Id.* at FINA 000500.

<sup>7</sup> *Id.* at FINA 000503.

<sup>8</sup> *See generally* Resp. 8; Resp. Ex. 5 at FINA 000439, 475 and 1298.

<sup>9</sup> Resp. Ex. 5 at FINA 000436-437.

<sup>10</sup> Resp. Ex. 5 at FINA 000437-440; Resp. Ex. 8 at FINA 1298.

officials, not as individuals. She further advised them that they could select an attorney of their own if they wished, that they enjoyed no confidentiality as to the conversations that they had with her, and that Penn State was her client.<sup>11</sup>

5. Curley and Schultz, who had long known Baldwin, understood and accepted those facts, and Baldwin accompanied them before the SWIGJ.<sup>12</sup>

6. After Curley and Schultz testified before the SWIGJ in January of 2011, President Spanier was subpoenaed to appear before the SWIGJ, as well. Ms. Baldwin also advised Spanier of the role of University counsel and the lack of confidentiality of their communications. Spanier nonetheless ordered Baldwin to accompany him before the grand jury, which she did, as University counsel, when he testified in April of 2011.<sup>13</sup>

7. Curley, Schultz, and Spanier were also aware that Penn State held the attorney-client privilege.<sup>14</sup>

8. “[I]n all matters related to their appearances before the grand jury, including preparation for such appearances, Ms. Baldwin represented each Defendant [Curley, Schultz, and Spanier] in his capacity as an agent of the University conducting University business, not in an individual, personal capacity.”<sup>15</sup>

9. Curley, Schultz, and Spanier were informed that Ms. Baldwin was General Counsel of the University and that she was acting in that capacity when she

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<sup>11</sup> Resp. Ex. 5 at FINA 000440, 441 and 463.

<sup>12</sup> *Id.* at FINA 000439 and 440.

<sup>13</sup> *Id.* at FINA 000450 and 441.

<sup>14</sup> *Id.* at FINA 000441, 443 and 463.

<sup>15</sup> Resp. Ex. 8 at FINA 1291.

accompanied them before the Grand Jury; and, with this knowledge, they chose to forego individual counsel.<sup>16</sup>

10. Supervising Judge Barry F. Feudale informed Curley, Schultz, and Spanier of their right against self-incrimination, among other rights.<sup>17</sup>

11. Schultz and Curley both testified before the SWIGJ accompanied by General Counsel Baldwin. Unknown to her, and undiscovered at that time, Schultz and Curley misled the grand jury when they denied knowledge of Sandusky's behavior and their possession of documents responsive to the subpoena *duces tecum*. Curley and Schultz' false statements to the grand jury were discovered first, and they were charged with perjury and related offenses simultaneous to the charging of Sandusky for his serial molestation, in November of 2011.<sup>18</sup>

12. Spanier was fired as president of Penn State shortly after Curley and Schultz' arrests.

13. In early 2012, Penn State hired investigators, the Freeh Group, to examine all of the circumstances surrounding Penn State and Sandusky. Ms. Baldwin left as General Counsel as of July of 2012, but at the behest of Penn State fully cooperated with the Freeh Group, which obtained the University's permission to have total access to all of Ms. Baldwin's emails, memos, and communications with Spanier, Schultz, and Curley. Ms. Baldwin was ultimately interviewed on five (5) occasions by the Freeh Group with Penn State approval.<sup>19</sup>

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<sup>16</sup> Resp. Ex. 8 at FINA 0001299; see *also* Resp. Ex. 5 at FINA 000441; Resp. Ex. 11 at FINA 0001342-1355.

<sup>17</sup> See Resp. Ex. 11 at FINA 0001351; Resp. Ex. 8. at FINA 0001283-1284.

<sup>18</sup> Resp. Ex. 5 at FINA 000442, 000504 and 1798.

<sup>19</sup> *Id.* at FINA 000448.

14. Jerry Sandusky was tried before a jury in June of 2012. The prosecution case was presented by Respondent and Joseph McGettigan. Sandusky was convicted of forty-five (45) counts related to child molestation involving ten (10) boys victimized over a period of more than a decade.<sup>20</sup>

15. After the Sandusky trial, in July of 2012, Respondent was reassigned to other matters, and the ongoing Penn State investigation and prosecutions were overseen by the Attorney General's Chief of Staff, Bruce Beemer. However, Beemer later privately requested that Respondent assist him when Fina's schedule and circumstances permitted.<sup>21</sup>

C. MS. BALDWIN APPEARS BEFORE THE SWIGJ

1. Penn State/Freeh Group disclosed to the OAG Ms. Baldwin's notes, emails and written communications with Spanier, Schultz and Curley. Many of her notes, emails and conversations were publicly disclosed in the Freeh Report in July of 2012. These notes contained information regarding her communications with Curley, Schultz, and Spanier.<sup>22</sup>

2. Penn State waived any claim of confidentiality concerning Baldwin's communications with the Freeh Group, and Baldwin was interviewed on multiple occasions by the Freeh Group with no constraints on her authority to discuss any actions or communications she had had with anyone regarding Penn State affairs when she was General Counsel.<sup>23</sup>

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<sup>20</sup> *Id.* at FINA 000484; Resp. Ex. 6 at FINA 000625; Resp. Ex. 11 at FINA 0001342.

<sup>21</sup> Resp. Ex. 5 at FINA 000501 - 502, 484, 485.

<sup>22</sup> *Id.* at FINA 000505, 000507, 000487; Resp. Ex. 6 at FINA 000715-717; Resp. Ex. 7 at FINA 000997-1264.

<sup>23</sup> Resp. Ex. 5 at FINA 000426-558.



3. By the fall of 2012, questions arose at the OAG as to whether General Counsel Baldwin had knowledge of or had even facilitated the concealment and false statements of Spanier, Schultz, and Curley.<sup>24</sup>

4. A SWIGJ subpoena was issued to Ms. Baldwin, authorized by Bruce Beemer on behalf of the OAG, as evidenced by Beemer's name and phone number on the subpoena, and approved by Judge Feudale, as evidenced by the judge's signature on the subpoena, and subsequently confirmed by the Judge's affidavit submitted to the hearing panel.<sup>25</sup>

5. OAG staff, including Respondent, met with Baldwin's counsel and then Baldwin herself, accompanied by counsel.<sup>26</sup>

6. At the meeting, Ms. Baldwin stated that she had advised Spanier, Schultz, and Curley that she represented only Penn State at all times, and not any of them personally at any time, and OAG investigators concluded that Ms. Baldwin had been misled by Spanier, Schultz, and Curley, rather than been a part of their deception.<sup>27</sup>

7. On October 22, 2012, the OAG participated in a hearing before Judge Feudale. Present were Respondent, Ms. Baldwin's counsel, Charles DeMonaco, and counsel for Penn State, Michael Mustokoff.<sup>28</sup>

8. On behalf of Penn State, Mustokoff waived all claims of attorney-client privilege as regards Ms. Baldwin's ability to testify about any and all actions and communications she had engaged in while she served as General Counsel to Penn State.<sup>29</sup>

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<sup>24</sup> *Id.* at FINA 000505.

<sup>25</sup> *Id.* at FINA 000580 - 582; Resp. Ex. 9 at FINA 0001318.

<sup>26</sup> Resp. Ex. 5 at FINA 000505-506.

<sup>27</sup> *Id.* at FINA 000439 - 440.

<sup>28</sup> *Id.* at FINA 000509.

<sup>29</sup> *Id.* at FINA 000506.

9. Respondent explained to Judge Feudale, Mr. Mustokoff, and Mr. DeMonaco the nature and extent of the inquiry that the OAG proposed to undertake of Ms. Baldwin before the grand jury:

As this Court is aware, a great many of our questions to Justice Baldwin involved her representation of the University and her role and information about the investigative efforts of the grand jury and the compliance with those investigative efforts.<sup>30</sup>

10. Respondent then discussed Penn State's consistent previous waiver of its corporate privilege concerning Ms. Baldwin's testimony:

It was a waiver focused upon the issues of Gerald Sandusky, his relationship with the University, any conduct of his that was known by the University, and it extended to the contacts between the University and this grand jury and investigators, again, looking into Gerald Sandusky, his personal conduct, his-any alleged misconduct and indeed also the acts of the University in compliance or noncompliance with the investigative efforts. All of those issues were open to us to discuss with Ms. Baldwin.

I don't believe they [Mr. Schultz and Mr. Curley] attempt to extend the privilege to any actions that Baldwin took as University counsel in fulfilling subpoenas and the contacts that may have occurred between her and those two gentlemen in the fulfillment of subpoenas that were issued to the University. So we want to have clarity before she testifies as to the parameters of her allowable testimony and hopefully having her testify in a way that does not step on or interfere with any privilege.

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But, at this point, your Honor, we are willing to put Miss Baldwin in the grand jury without [her] addressing any of the issues related to the [grand jury] 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

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<sup>30</sup> Resp. Ex. 2 at FINA 0009.

we get a Court determination regarding the privilege and we can address that later on.<sup>31</sup>

Mr. Mustokoff responded:

Speaking for the University, Your Honor, this is Michael Mustokoff, we agree with everything that was stated by Mr. Fina on behalf of the Commonwealth. 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.<sup>32</sup>

11. Before she testified at the SWIGJ, Baldwin had received a full and complete waiver of any privilege that existed or might have existed as regards the University and/or its officials regarding Sandusky.<sup>33</sup>

12. Both Ms. Baldwin and Respondent had appeared before Judge Feudale on multiple occasions over the course of many months regarding grand jury matters. In every appearance Baldwin solely represented the University.<sup>34</sup>

13. Judge Feudale determined that the correspondence from attorneys for Schultz and Curley was not cognizable in the context of a secret grand jury proceeding.<sup>35</sup>

14. Judge Feudale authorized the testimony of Baldwin before she testified, wrote an opinion to that effect, and near the time of the hearing before the Hearing Committee provided an affidavit confirming his approval and authorization of Ms. Baldwin's testimony.<sup>36</sup> Also, as set forth in his affidavit submitted in this matter, Judge

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<sup>31</sup> *Id.* at FINA 0009-00010.

<sup>32</sup> *Id.* at FINA 00010.

<sup>33</sup> Resp. Ex. 5 at FINA 000506-507.

<sup>34</sup> Resp. Ex. 5 at FINA 000438, 509.

<sup>35</sup> Resp. Ex. 5 at FINA 000509; Resp. Ex. 2 at FINA 00010.

<sup>36</sup> *See* Resp. Ex. 11 at FINA 1340 (“On October 22, 2012, I authorized the testimony of former General Counsel Baldwin without further hearing and without formal notice to former Penn State University Officials Graham Spanier, Timothy Curley and Gary Schultz.”); *see also* Resp. Ex. 6 at FINA 000581 (“A careful review of the testimony of attorney Baldwin before the grand jury (as structured/based on the earlier colloquy) reflects that

Feudale stated that “at the hearing Mr. Fina outlined the areas of inquiry which he would explore during Ms. Baldwin's testimony. He also outlined those areas which he would avoid. I authorized the issuance of the subpoena commanding Ms. Baldwin to appear before the SWIGJ, and it bears my signature, and references Mr. Beemer.” Thereafter, Judge Feudale states that he closely reviewed

the record of the hearing of October 22, 2012... as well the record of the hearing on October 26, which reflected Mr. Fina's question to Ms. Baldwin with Mr. Beemer at his side... My review of the record of those dates reveals that it is consistent with my recollection of the events at issue; that is, that in posing questions to Ms. Baldwin on October 26, Mr. Fina strictly adhered to the outline he had stated to me on October 22.... In preparing this ... affidavit, I considered the implication made by some, and entirely unsupported by the record, that in his questioning of Ms. Baldwin before the Grand Jury Mr. Fina deviated from his representations to me. Any such allegation is false and without support in fact or law.<sup>37</sup>

15. On October 26, 2012, Ms. Baldwin testified before the SWIGJ as approved by Judge Feudale. Present for Baldwin's testimony were Respondent and his then supervisor, Bruce Beemer.<sup>38</sup>

16. After Ms. Baldwin's testimony on October 26, 2012, former Penn State President Spanier was charged with offenses related to his concealment of Sandusky's crimes and his false testimony before the grand jury, and additional charges were lodged against Curley and Schultz.<sup>39</sup>

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Baldwin's testimony did not (in this court[']s view) violate any attorney-client or work product privilege.”); *see also* Resp. Ex. 8 at FINA 1309.

<sup>37</sup> Resp. Ex. 26 at FINA 1947-48.

<sup>38</sup> Resp. Ex. 5 at FINA 000511.

<sup>39</sup> Resp. Ex. 6 at FINA 000630.

17. Respondent left the OAG in January of 2013.<sup>40</sup> He had no further involvement in the pending cases.

D. JUDGE FEUDALE APPROVES FINA'S ACTIONS

1. On April 9, 2013, Judge Feudale, the supervising judge of the grand jury issued an Opinion in response to Defendants' Spanier, Schultz, and Curley's Joint Motion to Quash the Grand Jury Presentment As Defective for Relying on Attorney- Client Privileged Communication and Work Product. The Court denied the defendants' motions and found no basis for their claims of individual privilege. The Court specifically stated, "A careful review of the testimony of attorney Baldwin before the grand jury (as structure/based upon the earlier colloquy) reflects that Baldwin's testimony did not (in this court's view) violate any attorney-client or work product privilege."<sup>41</sup>

E. JUDGE HOOVER APPROVES FINA'S ACTIONS

1. The cases of Spanier, Schultz, and Curley were assigned to the Honorable Todd Hoover of the Dauphin County Court of Common Pleas, and extensive pre-trial litigation followed.<sup>42</sup>

2. Among the pre-trial claims made individually by Spanier, Schultz, and Curley were allegations that they each enjoyed an individual attorney-client relationship with Baldwin, and that her appearance before the SWIGJ had violated that confidential relationship.<sup>43</sup>

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<sup>40</sup> *Id.* at FINA 000704.

<sup>41</sup> Resp. Ex. 11 at FINA 0001353.

<sup>42</sup> Resp. Ex. 8 at FINA 0001265-1317.

<sup>43</sup> *See generally* Resp. Exs. 22-24.

3. Judge Hoover held separate sealed hearings for each defendant, with Spanier, Schultz, and Curley each testifying at their own hearing and each followed by Ms. Baldwin's testimony.<sup>44</sup>

4. After hearing the testimony of Spanier, Schultz, and Curley, and from Ms. Baldwin three times, Judge Hoover denied the defendants' motions regarding attorney-client privilege via three sealed Opinions, and he issued a published Opinion covering the claims jointly. The trial court found as follows:

The evidence fails to establish that Ms. Baldwin represented defendants in their individual capacities, but instead, demonstrates that Ms. Baldwin represented each defendant in his role as an official of the University conducting University business. In reaching this conclusion, we rely in part upon evidence presented at the November 20 and 21st, 2014 hearings, but for the reasons set forth above, we do not cite that testimony in this opinion.<sup>45</sup>

5. On the allegations of prosecutorial misconduct alleged by Spanier, Schultz and Curley, Judge Hoover specifically stated, "we find no prosecutorial misconduct based upon a claim that the Commonwealth interfered with the Defendants' constitutional rights, or that defects existed in the grand jury proceedings with respect to Ms. Baldwin's representation of Defendants before the grand jury."<sup>46</sup>

6. Judge Hoover also issued three [previously] sealed Opinions addressing the defendants' claims individually. In those Opinions, he found the defendants not credible. He found Ms. Baldwin credible. He ruled that none of the defendants had an individual attorney-client relationship with Baldwin.<sup>47</sup>

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<sup>44</sup> Resp. Ex. 5 at FINA 000457.

<sup>45</sup> *Id.*

<sup>46</sup> See Resp. Ex. 8 at FINA 0001442-1443.

<sup>47</sup> See Resp. Exs. 22-24.

7. In his Opinion regarding defendant Curley, Judge Hoover specifically noted that Curley had admitted in sworn testimony that which Justice Baldwin had asserted as regards all three Administrators, that is, “Mr. Curley also acknowledged an understanding that Ms. Baldwin's role was not to act as his private counsel, but to act as general counsel to the University.”<sup>48</sup>

8. Defendants Spanier, Schultz, and Curley appealed Judge Hoover's ruling to the Superior Court.

9. In January of 2016, the Superior Court reversed Judge Hoover's ruling and dismissed a number of the charges against the defendants.<sup>49</sup>

10. In a footnote in its Opinion, the Superior Court offered a criticism of Respondent,<sup>50</sup> which appears to have been the inducement for the filing of the Petition against Respondent. The Superior Court characterized Respondent's commitment to Judge Feudale as “claiming that the Commonwealth would not inquire into matters concerning Ms. Baldwin's communications with Schulz, Curley and Spanier” when in fact the transcript of the hearing and Judge Feudale's own understanding of the commitment was that the Commonwealth would not ask her questions about “...their testimony before the grand jury or any preparation or follow up they had with ...University Counsel Baldwin.”<sup>51</sup>

11. The professional staff of the OAG, assigning error to the Superior Court's ruling, prepared an appeal to the Supreme Court of Pennsylvania.<sup>52</sup>

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<sup>48</sup> Resp. Ex. 8 at FINA 0001870-1871; *See also* Resp. Ex. 5 at FINA 0001474-1475.

<sup>49</sup> *Commonwealth v. Spanier*, 132 A.3d 481 (Pa. Super. 2016); *Commonwealth v. Schultz*, 133 A.3d 294 (Pa. Super. 2016); and *Commonwealth v. Curley*, 131 A.3d 994 (Pa. Super. 2016).

<sup>50</sup> *See* Resp. Ex. 6 at FINA 000805, 000735.

<sup>51</sup> Resp. Ex. 18.

<sup>52</sup> Resp. Ex. 6 at FINA 000734 and 000806; *see also* Resp. Ex. 13.

12. The OAG professional staff had finalized its appeal and was prepared to file it, but on the last day to timely file an appeal of the Superior Court's Order, Solicitor General Bruce Castor directed that the appeal not be filed, and it was not.<sup>53</sup>

13. The cases against Spanier, Schultz, and Curley were remanded to the trial court in truncated form. (Supreme Court Order of 1/22/16).

14. In January of 2016, two of Spanier's supporters, Wendy K. Silverwood and Janet Parkhill Kudravetz, sent a complaint about Respondent to the ODC.<sup>54</sup> The ODC's Petition thus was not initiated by a court, judge, or lawyer, or even those whose privilege was purportedly violated.

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

16. In March of 2017, former Penn State president Spanier proceeded to trial and was convicted of endangering the welfare of children. In June of 2017, he was sentenced to four (4) to (12) months imprisonment. Spanier appealed his conviction and his direct appeals were all denied. An order for retrial by a Federal Magistrate Judge is pending before the 3rd Circuit Court of Appeals.

### **DISCIPLINARY PROCESS PROCEEDINGS**

#### **A. THE INITIAL PROCEEDINGS BEFORE THE HEARING COMMISSION**

On January 6, 2018, the Pennsylvania Office of Disciplinary Counsel ("ODC") filed a Petition alleging that Respondent Frank Fina had violated Pa. RPC 3.10 allegedly because Respondent purportedly issued a subpoena without judicial approval to an attorney to inquire about matters concerning a person the attorney was, or had been,

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<sup>53</sup> Resp. Ex. 6 at FINA 000733 and 000741-742.

<sup>54</sup> Resp. Ex. 6 at FINA 000583, 000591.



representing. The Petition was filed more than five (5) years after the alleged violation. The Petition recommended public censure as the sanction to be imposed. Respondent Fina denied the alleged violation and sought a hearing, which was granted.

On June 14, 2018; July 27, 2018; and August 1, 2018, the hearing on the Petition was held before a three-person Hearing Committee.<sup>55</sup> At that hearing, the ODC called one witness, Lawrence Fox, Esquire, who served as its expert witness, not a fact witness.<sup>56</sup>

The following fact witnesses testified on behalf of Respondent: Richard H. Sheetz, former Executive Deputy Attorney General of Pennsylvania; Amy Zapp, Chief Deputy Attorney General; Cynthia Baldwin, former Vice President and General Counsel for Penn State; and Mr. Fina himself.

Respondent provided live testimony under oath from Ms. (formerly Justice) Baldwin, the attorney with whom Respondent is alleged to have violated Rule 3.10. Under oath, Ms. Baldwin denied taking any act in violation of Rule 3.10 and explained the propriety of her actions.<sup>57</sup>

Respondent also produced at the hearing Richard Sheetz, the Executive Deputy Attorney General (EDAG) at all times relevant herein, and Fina's direct supervisor, who provided live testimony under oath of the propriety of his actions at issue here. EDAG Sheetz had over 20 years of grand jury experience at the OAG.<sup>58</sup>

Respondent produced at the hearing Amy Zapp, a Chief Deputy Attorney General at all times relevant herein, who drafted the Petition for allowance of Appeal to the Supreme Court

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<sup>55</sup> Resp. Ex. 4 at FINA 00035-000425.

<sup>56</sup> *Id.*

<sup>57</sup> Resp. Ex. 5 at FINA 000433-000477.

<sup>58</sup> *Id.* at FINA 000480-000481.

regarding the Superior Court's Order in Spanier, Schultz, and Curley. CDAG Zapp had over 35 years' experience in grand jury and appellate matters at the OAG.<sup>59</sup>

Respondent provided live testimony from Ronald Castille, Chief Justice *Emeritus* of the Pennsylvania Supreme Court.<sup>60</sup> Chief Justice Castille was an Associate Justice for fifteen (15) years, and the Chief Justice for six (6) years. Prior to that, Chief Justice Castille had been an Assistant District Attorney and the elected District Attorney of Philadelphia for a total of nineteen (19) years, during which he participated in or oversaw grand jury investigations.<sup>61</sup> During his tenure, Chief Justice Castille was in charge of any allegations of misconduct where the Disciplinary Board sought to discipline attorneys in the Commonwealth.<sup>62</sup> During his tenure, Chief Justice Castille selected those judges who would be the supervising judges of the statewide investigating grand juries. He selected Judge Feudale to serve as the Supervising Judge of the SWIGJ.<sup>63</sup>

Chief Justice Castille reviewed the substantive relevant documents in this matter.<sup>64</sup> Further, he interviewed the Respondent and Justice Baldwin.<sup>65</sup>

Chief Justice Castille opined that, based on his 21 years of experience as a Justice on the Pennsylvania Supreme Court, including 6 years as Chief Justice, and his extensive knowledge of Grand Jury practice and criminal law, Respondent's action were appropriate and there was no violation of Rule 3.10.

Respondent also introduced at the hearing the sworn statement of former Supervising Judge Barry Feudale who authorized the testimony of Justice Baldwin before

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<sup>59</sup> Resp. Ex. 6 at FINA 000729.

<sup>60</sup> *Id.* at FINA 000773-000837.

<sup>61</sup> *Id.* at FINA 000775-000780.

<sup>62</sup> *Id.* at FINA 000781.

<sup>63</sup> *Id.* at FINA 000783-000784.

<sup>64</sup> *Id.* at FINA 000786-000787.

<sup>65</sup> *Id.* at FINA 000789; Resp. Ex. 4, at FINA 000291.

she testified, wrote an opinion to that effect, and near the time of the instant hearing provided an affidavit confirming his approval and authorization of Justice Baldwin's testimony.<sup>66</sup>

The Hearing Committee issued its Report and Recommendation on December 28, 2018, finding that the ODC failed to meet its burden and that Respondent did not violate Pennsylvania Pa. RPC 3.10.

The Hearing Committee held:

To satisfy the first element of the Rule 3.10, the ODC must prove that Respondent subpoenaed an attorney. The subpoena at issue does not bear Respondent's name as the requesting Deputy Attorney General, but that of his superior, Bruce Beemer. The ODC did not offer any evidence that Respondent issued the subpoena to Ms. Baldwin or even caused it to be issued. Under Rule 3.10, the forbidden action is subpoenaing an attorney without prior judicial approval. *See Bay/son v. Disciplinary Bd of Supreme Court of Pennsylvania*, 975 F.2d 102, 109 (3d Cir. 1992) (noting repeatedly that Rule 3.10 requires pre-service judicial approval of grand jury subpoenas). Here, there is no proof that Respondent committed the action of subpoenaing Ms. Baldwin. Nor is there proof that Rule 3.10 is nevertheless applicable to Respondent despite the fact that he did not issue the subpoena. Without such proof, the ODC cannot make out a violation of Rule 3.10.<sup>67</sup>

## B. PROCEEDINGS BEFORE THE DISCIPLINARY BOARD

On January 10, 2019, the ODC filed with the Disciplinary Board a Brief on Exceptions to the Report of the Hearing Committee, advocating for a complete reversal of the Hearing Committee's Report and Recommendation and arguing that Respondent violated Pennsylvania Rule of Professional Conduct 3.10.

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<sup>66</sup> See Resp. Ex. 8 ("On October 22, 2012, I authorized the testimony of former General Counsel Baldwin without further hearing and without formal notice to former Penn State University Officials Graham Spanier, Timothy Curley and Gary Schultz."); see also Resp. Ex. 6 at FINA 000580-582; see also Resp. Ex. 11 at FINA 0001342-1357 ("A careful review of the testimony of attorney Baldwin before the grand jury (as structured/based on the earlier colloquy) reflects that Baldwin's testimony did not (in this court[']s view) violate any attorney-client or work product privilege."); see also Resp. Ex. 8 at FINA 0001265-1317.

<sup>67</sup> Resp. Ex. 18 at 16.

On March 25, 2019, oral argument took place before a three-person panel of the Disciplinary Board. The Disciplinary Board made no record of the arguments.

On June 6, 2019, the full Disciplinary Board issued its Report and Recommendations, reversing the conclusions of the Hearing Committee, instead determining that Respondent had violated Pa. RPC 3.10, and recommending a one year and one day suspension as a sanction.<sup>68</sup>

C. PROCEEDING BEFORE THE PENNSYLVANIA SUPREME COURT

Respondent subsequently petitioned the Pennsylvania Supreme Court to allow argument on exceptions to the Board's Report and Recommendations. After briefing, that argument took place on November 20, 2019. Fina contended the Pennsylvania Disciplinary Board completely ignored the Hearing Committee's evidentiary record, findings of fact, applicable law, and well-reasoned conclusions of law, when it determined that Respondent should be suspended.

On February 19, 2020, the Pennsylvania Supreme Court issued an Order directing the suspension of Respondent for one year and one day. The Supreme Court did not issue a majority opinion or any specific basis for its finding of a violation of R.P.C. 3.10.

D. THE UNITED STATES DISTRICT COURT FOR DELAWARE DECLINED TO ENTER A RECIPROCAL SUSPENSION

Recently, the United States District Court for the District of Delaware, No. 20-mc-103 (*per curiam*), pursuant to Local Rule 83.6(b), ordered Respondent to show cause as to why it should not impose reciprocal discipline identical to that imposed by the Pennsylvania Supreme

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<sup>68</sup> Resp. Ex. 18 at FINA 0001736-1752.

Court.<sup>69</sup> The Local Rule 83.6(b)(5) instructs that the Court must impose identical discipline unless it finds that:

- (A) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
- (B) There was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject, or
- (C) The imposition of the same discipline by this Court would result in grave injustice; or
- (D) The misconduct established is deemed by this Court to warrant different discipline.<sup>70</sup>

The District Court cited to the United States Supreme Court which has instructed that a district court's review of such matters should entail “an intrinsic consideration of the record.” *Selling v. Radford*, 243 U.S. 51 (1917). Moreover, “a District Court should look at the state record as a whole and determine whether different discipline should be imposed.” *In re Surrick*, 338 F.3d 224, 231- 232 (3d Cir. 2003). The discipline imposed by the state is the starting point of the inquiry, but the Court has a duty “to determine for [itself an attorney's] right to continue to be a member of this Bar.” *Selling*, 234 U.S. at 50.

In analyzing the four exceptions to the requirement of instituting the same result as the Pennsylvania Supreme Court, after giving a detailed review of the record, the District Court found that the fourth exception (*i.e.* “substantially different discipline”) exception applied.

The Court stated that [s]everal factors dictate that Respondent’s actions warrant substantially different discipline in Delaware than he received in Pennsylvania. To start, the District of Delaware does not have a direct corollary to RPC 3.10. Attorneys admitted or

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<sup>69</sup> See *Office of Disciplinary v. Fina*, 225 A.3d 568 (Pa. 2020)(*per curiam*).

<sup>70</sup> D. Del. LR 83.6(b)(5).

authorized to practice before that Court must abide by the Model Rules of Professional Conduct of the American Bar Association (“Model Rules”).<sup>71</sup> Although the Model Rules bar attorneys from making misrepresentations to the Court and impose special duties on prosecutors when they “subpoena a lawyer in a grand jury... to present evidence about a past or present client,”<sup>72</sup> they do not require prosecutors to obtain judicial approval for such subpoenas.<sup>73</sup> It is that requirement of judicial approval that the Pennsylvania disciplinary authorities noted is the core tenet of RPC 3.10 and the basis for Respondent's discipline. The Court also noted that “Delaware does not have a rule akin to RPC 3.10. Delaware's applicable Rule of Professional Conduct mirrors the Model Rules....”<sup>74</sup>

The Delaware court continued: “[a]dditionally there were clear differences of opinion on important issues in this case. As noted, the various bodies that reviewed this matter reached opposing conclusions regarding whether Respondent's actions constituted a violation of RPC 3.10. There was also disagreement regarding the privileged nature of the communications Respondent asked Ms. Baldwin about before the grand jury. Moreover, Judge Feudale submitted an affidavit on Respondent's behalf to the ODC during the investigation, in which he averred, *inter alia*: (i) “Ms Baldwin testified consistent with [his] authorization of October 22, 2012”; (ii) “Ms Baldwin testified consistent with the colloquy of Respondent of October 22, 2012”; (iii) he “found no fault with the conduct of Respondent in the proceedings involving Ms. Baldwin before [him], and ... sees no basis

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<sup>71</sup> D. Del. LR 83.6(d).

<sup>72</sup> See D. Del. LR 3.8(e).

<sup>73</sup> *In the Matter of Frank G. Fina*, Memorandum Opinion No. 20-mc-103 (D. Del. July 20, 2020), at 13.

<sup>74</sup> *Id.*

for the allegation of misconduct”; and (iv) he “has specifically considered the claim that [Respondent] violated Rule 3.10 and ... find[s] this claim baseless.”<sup>75</sup>

The Court further found that “others involved in the grand jury testimony received different or no discipline.... [T]he attorney whose name appears on the subpoena at issue as the requesting Deputy Attorney – General Bruce Beemer, Mr. Fina’s supervisor – appears to have received no discipline... Yet, along with having his name on the subpoena, Mr. Beemer participated in meetings with Ms. Baldwin and her lawyers regarding her potential grand jury testimony in advance of that appearance... , and was present in the grand jury for Ms. Baldwin's testimony....”<sup>76</sup>

Another factor referenced by the Delaware Court was that “Respondent has also held a license to practice law in Pennsylvania since 1994 and had an unblemished disciplinary record both prior to and since this incident.”<sup>77</sup>

The final factor, and arguably the most important, is that the Pennsylvania Disciplinary Board and Pennsylvania Supreme Court in administering discipline focused not on the requirement of R.P.C. 3.10 for judiciary approval but rather on their belief that Fina misled Judge Feudale, an allegation roundly rejected by Judge Feudale.

“Finally, although Respondent was found to have violated RPC 3.10, the decisions recommending and imposing discipline in Pennsylvania focus on his representations to Judge Feudale and the extent to which those representations caused the circumvention of the judicial approval requirement of RPC 3.10. Attorney misrepresentations are serious matters, and the Court does not take them lightly. See, e.g. Model Rule 3.3(a). The Court finds compelling, however, that Judge Feudale did not believe that a misrepresentation occurred and supported Mr. Fina in his disciplinary proceedings.”<sup>78</sup>

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<sup>75</sup> *Id.* at 14.

<sup>76</sup> *Id.* at 15.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 16.

The Delaware Court then held, “[t]aking into consideration all of these factors, as well as the severity of the public trust and power afforded to a prosecutor, the Court feels that imposition of identical discipline in this Court is unwarranted. Accordingly, the Delaware court held that [p]ursuant to Local Rule 83.6(b)(5)(D), Respondent's conduct warrants substantially different discipline in this Court. As such, Respondent's automatic suspension is lifted.”<sup>79</sup>

### **VSB DISCIPLINARY BOARD DISPOSITION**

The extensive record before this Board demonstrates that there is no evidentiary basis for finding a violation of Pa. RPC 3.10. The Pennsylvania Supreme Court found Respondent to be in violation of a rule which requires a prosecutor to obtain judicial approval before issuing a subpoena for an attorney to appear as a witness at a hearing. None of the elements of this purported ethical violation exist in the record of this matter. First, Respondent did not issue the subpoena in question and his name nowhere appears on it. The subpoena bore the name of Deputy Attorney General Bruce Beemer, Respondent's immediate superior and the director of the investigation ongoing at the time. More importantly, the subpoena issued to Ms. Baldwin was specifically authorized by the Supervising Judge of the Statewide Investigating Grand Jury, and in addition to bearing the name of Bruce Beemer, noted above, included the signature of Judge Feudale authorizing the subpoena. Such judicial authorization was obtained after a hearing was held on the issue of privilege, well before Ms. Baldwin's testimony. Judge Feudale has twice confirmed his approval of the subpoena and Respondent's compliance with the conditions

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<sup>79</sup> *Id.*



of his approval.<sup>80</sup> In short, the uncontroverted facts in the record establish that there is no reasonable basis for finding of a violation of Pa. RPC 3.10.

The Board, having considered all of the evidence and the argument of counsel, recessed to deliberate and determine whether the same or equivalent discipline as that imposed by the Pennsylvania Supreme Court should be imposed by the Board. After due deliberation, the Board reconvened and stated its finding that the Respondent had proven by clear and convincing evidence, that his conduct was not conduct that would have resulted in disciplinary action in the Commonwealth of Virginia and the imposition by the Board of the same or equivalent discipline upon the same proof would result in an injustice. Accordingly, pursuant to ¶ 13-24(C)(2), (3) and (4) of the *Rules*, it is ORDERED that the Rule to Show Cause be and the same hereby is DISMISSED; and it is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to the Respondent at his address of record with the Virginia State Bar by certified mail, return receipt requested, and also by regular and electronic mail, and by electronic mail to Elizabeth Shoenfeld, Senior Assistant Bar Counsel, Virginia State Bar, 111 East Main Street, Suite 700, Richmond Virginia, 23219-0026.

ENTERED: October 30, 2020.

VIRGINIA STATE BAR DISCIPLINARY BOARD

**Sandra L.  
Havrilak**

Sandra Havrilak, Acting Chair

Digitally signed by Sandra L. Havrilak  
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<sup>80</sup> Resp. Ex 26 at FINA 0001946-0001947.



**A COPY TESTE**

**DaVida M. Davis**

*DaVida M. Davis*

**Clerk of the Disciplinary System  
Virginia State Bar**