Perjury Traps, Prosecutorial Misconduct, and the Penn State Three Case: A Cautionary Tale for Prosecutors and Defense Counsel

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Introduction

President Trump's personal attorney Rudy Giuliani generated considerable publicity when he told the press that he was concerned President Trump might fall victim to a "perjury trap" if Trump provided testimony to Special Counsel Robert Mueller.[1] The press coverage of Giuliani's comments shows that even among legal experts the concept of a perjury trap is controversial and not clearly understood.[2]

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1 *See*, *e.g.*, John Wagner, *'We're not suckers': Giuliani Says He Won't Let Mueller 'trap' Trump into Perjury*, Wash. Post (May 3, 2018), https://www.washingtonpost.com/politics/were-not-suckers-giuliani-says-he-wont-let-mueller-trap-trump-into-perjury/2018/05/03/65e0465c-4ebb-11e8-84a0-458a1aa9ac0a_story.html?noredirect=on&utm_term=.4451d5041884. Perhaps the most highly publicized statement by Giuliani was his August 19, 2018 explanation to Chuck Todd on Meet the Press that ". . . I am not going to be rushed into having [President Trump] testify so that he gets trapped into perjury. And when you tell me that, you know, he should testify because he's going to tell the truth and he shouldn't worry, well that's so silly because it's somebody's version of the truth. Not the truth . . . . Truth isn't truth." *See Meet the Press*, NBC News (Aug. 19, 2018), https://www.nbcnews.com/meet-the-press/meet-press-august-19-2018-n901986.

2 *See* Emily Birnbaum, *Toobin on Giuliani's 'perjury trap' Warning: 'It is not a perjury trap if you tell the truth'*, The Hill (Aug. 9, 2018), https://thehill.com/homenews/administration/401060-jeffrey-toobin-on-giulianis-perjury-trap-warning-it-is-not-a-perjury (quoting CNN Legal Analyst Jeffrey Toobin: "When I was a prosecutor and now that I've been a journalist, I've never even understood the phrase 'perjury trap,'" Toobin said on CNN, "That is an invented phenomenon to explain lying." "It's not a perjury trap if you tell the truth," he continued. "The idea that there is something unfair about asking questions that you may be proved to be lying about—what is that? That is just . . . an invented political, not legal, talking point.") *See also* Chris Cillizza, *Donald Trump Doesn't Appear to Have Any Idea What a 'perjury trap' Is*, CNN Politics (Aug. 21, 2018), www.cnn.com/2018/08/21/politics/donald-trump-perjury-trap/index.html (arguing that "Giuliani (and Trump), whether intentionally or unintentionally, are conflating a 'he said, she said' debate with a perjury trap").

Despite the derision that some commentators heaped upon Giuliani,[3] the risk of being ensnared in a perjury trap is both real and a valid reason for concern for both defense lawyers, who may be charged with failing to adequately represent their clients, and prosecutors, who may be charged with abusing their prosecutorial authority.[4] This Article uses the highly publicized criminal prosecution of three senior Pennsylvania State University ("Penn State" or the "University") officials to explore the perils and pitfalls that a perjury trap can present for prosecutors and defense counsel.

There are two central points of this Article. First, prosecutors should be aware that perjury traps can backfire and therefore should refrain from misusing their investigative powers to set them. Second, defense counsel should be aware that perjury traps can arise and therefore should take every precaution to prevent their clients from becoming caught in one. The following Section of this Article provides a brief explanation of the concept of a perjury trap. Subsequent Sections analyze the perjury trap issues surrounding the "Penn State Three"[5] case and provide recommendations for both prosecutors and defense counsel to avoid charges of ethical misconduct relating to perjury traps.

I. PERJURY TRAPS EXPLAINED

Experienced lawyers are wary of allowing their clients to fall victim to a perjury trap when providing "on the record" testimony in a legal proceeding.[6] A perjury trap "is created when the government

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[3] *See, e.g.*, Daniel S. Goldman, *The Trap of Giuliani's 'Perjury Trap' Argument*, BRENNAN CTR. FOR JUST. (Aug. 21, 2018), https://www.brennancenter.org/blog/trap-giulianis-perjury-trap-argument; Callum Borchers, *Rudy Giuliani Basically Admitted Trump Might Not Tell Mueller the Truth*, WASH. POST (June 4, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/06/04/rudy-giuliani-basically-admitted-that-trump-might-not-tell-mueller-the-truth/?utm_term=.043fd6222b34.

[4] *See* Bennett L. Gershman, *The "Perjury Trap,"* 129 U. PA. L. REV. 624 (1981); Danielle L. Davis, *Perjury*, 44 AM. CRIM. L. REV. 829 (2007); Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715 (1998). *But see* Billy Joe McLain, *Debunking the Perjury-Trap Myth*, 88 TEX. L. REV. 883 (2010) (arguing that "there are no federal cases granting a motion to dismiss because of a perjury trap" and therefore "[d]efense counsel should never raise the perjury-trap defense").

[5] The "Penn State Three" refers to the three senior officials at Penn State University who were the subject of criminal charges, discussed below, arising out of the Jerry Sandusky child sexual abuse scandal.

[6] Lance Cole, *Multiple Representation Meltdown: "Penn State Three" Case Illustrates Entity Representation Pitfalls for Both Criminal Defense Counsel and Prosecutors–and the Need for*

calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to later prosecute him for perjury."[7] Another kind of perjury trap arises when a witness is called to give testimony on multiple occasions in an effort to create inconsistencies in the witness's testimony that can be prosecuted as perjury. One commentator described the risk of this kind of a perjury trap in the context of congressional testimony as follows:

> In the garden variety perjury trap case, the government calls a witness or defendant to testify numerous times, in an effort to produce conflicting statements or contradicting stories. Given the busy schedules of many witnesses before Congress and the detailed nature of many of the questions presented, it is not hard to imagine how a witness might make statements that could be deemed false. The defense is rarely successful, and the use of attorneys in congressional hearings and questioning, as opposed to the unavailability of a lawyer in a grand jury proceeding, usually safeguards the witness.[8]

Although both kinds of perjury trap situations present serious risks for witnesses,[9] the focus of this Article is on the first kind of perjury trap—situations in which criminal prosecutors have reason to believe a target of an investigation may lie to an investigating grand jury and the prosecutors use their subpoena power to compel that person's testimony.[10] A textbook example of this kind of perjury trap

Systemic State Law Reforms, 79 U. PITT. L. REV. 583, 621 n.201 (2018) [hereinafter Cole, *Multiple Representation Meltdown*].

[7] United States v. Chen, 933 F.2d 793, 796 (9th Cir. 1991) (citing United States v. Simone, 627 F. Supp. 1264, 1268 (D.N.J. 1986)); *see also* Gershman, *supra* note 4, at 625-26; Jeffrey Rosen, *The Perjury Trap*, NEW YORKER, Aug. 10, 1998, at 28-29 ("Perjury traps have become a popular tactic among independent counsels: if they can't prove the alleged crime they were appointed to investigate, they indict suspects for lying to investigators."); Cole, *Multiple Representation Meltdown*, *supra* note 6, at 621 n.201.

[8] P.J. Meitl, *The Perjury Paradox: The Amazing Under-Enforcement of the Laws Regarding Lying to Congress*, 25 QUINNIPIAC L. REV. 547, 567 (2007).

[9] Underwood, *supra* note 4, at 750-51 (recognizing that a prosecutor can create a perjury trap by questioning a witness with the intention "of tripping him up or creating the perjury for which the defendant could be prosecuted").

[10] Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C.L. REV. 1, 26 (1999). Professor Henning has analyzed the perjury trap aspect of President Bill Clinton's grand jury testimony in the Whitewater Independent Counsel investigation: "[T]he Independent Counsel's demand that President Clinton testify before the grand jury regarding his conduct in the Paula Jones civil litigation was criticized as an attempt to set a perjury trap. Apparently, the Independent Counsel's trap (if that is what it was) worked rather well because the impeachment articles centered largely on the President's perjured grand jury testimony." *Id.* (footnote refer-

arose during the Commonwealth of Pennsylvania's grand jury investigation of now-convicted child molester Jerry Sandusky, a former Penn State football coach, when state prosecutors subpoenaed three senior Penn State officials to testify before the investigating grand jury.

II. PERJURY TRAPS AND THE PENN STATE THREE CASE

A. *Background on the Penn State Three Case*

Readers will likely be generally familiar with the Jerry Sandusky child abuse scandal at Penn State that resulted in criminal prosecutions of Sandusky and Penn State Athletic Director Timothy M. Curley,[11] Penn State Senior Vice President Gary Schultz,[12] and Penn State President Graham B. Spanier.[13] It is not necessary for this Article to recount in detail all of the criminal proceedings against Sandusky, Curley, Schultz, and Spanier.[14] The focus of this Article is on the grand jury testimony Curley, Schultz, and Spanier provided during the Pennsylvania Office of the Attorney General's (the "OAG")

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ences omitted). Professor Henning notes that in the federal courts "the perjury trap [defense] has occasionally been raised, but it has never been asserted successfully." *See id.* at 27 n.124 (collecting federal cases). Of course, that defendants who have been charged with perjury have not succeeded in asserting a perjury trap defense after the fact at trial does not undermine the point that defense counsel should zealously endeavor to protect their clients from falling prey to a perjury trap.

[11] *See generally* Commonwealth v. Curley, 131 A.3d 994 (Pa. Super. Ct. 2016)*; see also* Cole, *Multiple Representation Meltdown*, *supra* note 6 (providing detailed analysis of the criminal cases against, Curley, Schultz, and Spanier).

[12] *See generally* Commonwealth v. Schultz, 133 A.3d 294 (Pa. Super. Ct. 2016)*; see also* Cole, *Multiple Representation Meltdown*, *supra* note 6, at 591-622 (providing detailed analysis of the criminal cases against, Curley, Schultz, and Spanier).

[13] *See generally* Commonwealth v. Spanier, 131 A.3d 481 (Pa. Super. Ct. 2016)*; see also* Cole, *Multiple Representation Meltdown*, *supra* note 6, at 591-622 (providing detailed analysis of the criminal cases against, Curley, Schultz, and Spanier).

[14] For additional detail on the criminal charges against Sandusky, *see* Commonwealth v. Sandusky, 203 A.3d 1033 (Pa. Super. Ct. 2019); Commonwealth v. Sandusky, 77 A.3d 663 (Pa. Super. Ct. 2013); Verdict Slip, Commonwealth v. Sandusky (C.P. June 22, 2012) (No. CD-14-CR-2422-2011), http://co.centre.pa.us/centreco/media/upload/SANDUSKY%20VERDICT%20SLIP%20FOR%202422%20OF%202011.pdf; *see also* Lance Cole, *Paul Manafort, Monica Lewinsky, and the Penn State Three Case: When Should the Crime-Fraud Exception Vitiate the Attorney-Client Privilege?*, 91 TEMP. L. REV. 555 (2019) [hereinafter Cole, *Crime-Fraud Exception*] (discussing the potential application of the crime-fraud exception to the attorney-client privilege to the legal representation of Curley, Schultz, and Spanier by then-Penn State University General Counsel Cynthia Baldwin); Cole, *Multiple Representation Meltdown*, *supra* note 6, at 591-622 (analyzing the factual background and the criminal prosecutions of Curley, Schultz, and Spanier).

investigation of Sandusky's crimes—in particular, the conduct of the prosecutors in the OAG's office who questioned Curley, Schultz, and Spanier.

In early November 2011, a Pennsylvania special investigating grand jury recommended criminal charges against Jerry Sandusky,[15] a respected former Penn State football coach.[16] On November 4, 2011, Sandusky was charged with multiple counts of involuntary deviate sexual intercourse, indecent assault, corruption of minors, unlawful contact with minors, endangering the welfare of minors, aggravated indecent assault, and attempt to commit indecent assault.[17]

In addition to the child sexual abuse charges against Sandusky, the OAG initially charged Penn State Athletic Director Timothy M. Curley and Senior Vice President Gary C. Schultz with failing to report child abuse and committing perjury in their testimony to the Sandusky investigating grand jury.[18] Curley and Schultz were senior University officials who reported to then-University president Graham B. Spanier.[19] When Curley and Schultz were charged, Spanier issued a press release expressing "unconditional support" for them, as well as "complete confidence" that they had acted appropriately.[20]

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15 Technically, the special investigating grand jury returned a "presentment" describing the crimes and prosecutors prepared an indictment formally charging Sandusky with the crimes described in the grand jury presentment report. Police Criminal Complaint, Commonwealth v. Sandusky, 203 A.3d 1033 (Pa. Super. Ct. 2016). For an analysis of grand jury law and practice in Pennsylvania, *see Schultz*, 133 A.3d at 314-15 (describing "[t]he Grand Jury in Pennsylvania and the Advent of the Statutory Right to Grand Jury Counsel").

16 *See* 2011 Presentment, Exhibit A at 1, Commonwealth v. Sandusky, 203 A.3d 1033 (Pa. Super. Ct. 2016).

17 2011 Presentment, Exhibit A at 24.

18 *See, e.g.*, *id.*

19 *See* Commonwealth v. Curley, 131 A.3d 994, 995 (Pa. Super. Ct. Jan. 22, 2016); Commonwealth v. Schultz, 133 A.3d 294, 300 (Pa. Super. Ct. Jan. 22, 2016).

20 Spanier's initial statement of November 5, 2011, read: "The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance. With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee. Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately." *Statement from President Spanier*, PENN STATE NEWS (Nov. 5, 2011), http://news.psu.edu/story/153819/2011/11/05/statement-president-spanier.

The day after the charges against Sandusky, Schultz, and Curley were announced, the Penn State Board of Trustees met with Spanier.[21] After that meeting, Spanier issued a second press release, which stated that Curley and Schultz were being placed on administrative leave while they defended themselves against the criminal allegations.[22] An investigative report later prepared for the Board of Trustees by former Federal Bureau of Investigation Director Louis Freeh[23] ("the Freeh Report") states that "several Trustees described the second press release as a 'turning point' for Spanier" because the Board itself already had decided to suspend Curley and Schultz, and the Board was displeased with the wording of Spanier's original press release.[24] On November 9, 2011, the Penn State Board of Trustees terminated Spanier without cause.[25]

Investigators working to prepare the Freeh Report found e-mails and documentary evidence[26] created by Spanier, Schultz, and Curley that the University had not provided to the investigating grand jury in response to subpoenas.[27] Freeh's investigators found an e-mail exchange between Curley, Schultz, and Spanier in which they agreed not to report Sandusky to child protection authorities. Spanier wrote: "The only downside for us is if the message isn't 'heard' and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is

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21 *See* Sara Ganim & Jan Murphy, *Inside Penn State Board of Trustees, Battle Brews Over Sex Scandal*, THE PATRIOT-NEWS (Nov. 9, 2011), http://www.pennlive.com/midstate/index.ssf/2011/11/jerry_sandusky_penn_state_trus.html.

22 *See Trustees Announce 2 Officials to Step Down While Case is Investigated*, PENN STATE NEWS (Nov. 7, 2011), http://news.psu.edu/story/153816/2011/11/07/trustees-announce-2-officials-step-down-while-case-investigated.

23 FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY, (2012) [hereinafter FREEH REPORT].

24 *See id.* at 93.

25 *See* Paula R. Ammerman, Minutes of Meeting of Board of Trustees 6 (Vol. 259 Nov. 11, 2011)*; see also* Sarah Ganim & Jeff Frantz, *President Graham Spanier Ousted by Penn State Trustees*, THE PATRIOT-NEWS (Nov. 10, 2011), http://www.pennlive.com/midstate/index.ssf/2011/11/president_graham_spanier_also.html. The board also terminated head football coach Joe Paterno. *See Report of the Board of Trustees concerning Nov. 9 decisions*, PENN STATE NEWS (March 12, 2012). *See also* Dave Sheinin, *Joe Paterno Fired as Football Coach at Penn State*, WASH. POST (Nov. 9, 2011), https://www.washingtonpost.com/sports/colleges/joe-paterno-will-retire-at-end-of-penn-state-football-season/2011/11/09/gIQAQbkb6M_story.html?utm_term=.494cc9ffc8b7.

26 *See* FREEH REPORT, *supra* note 23, at 68-78.

27 *See* FREEH REPORT, *supra* note 23, at 16, 62-79.

humane and a reasonable way to proceed."[28] Freeh's investigators also obtained a "confidential" file of Schultz's handwritten notes from meetings about Sandusky, which also had not been produced to the investigating grand jury.[29] Freeh's investigators "immediately provided these documents to law enforcement when they were discovered."[30] Freeh's report concluded that this evidence showed "total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims."[31]

On November 1, 2012, the OAG charged Spanier with eight criminal counts, including: endangering the welfare of children, failure to report child abuse, perjury, obstruction of justice, conspiracy to obstruct justice, conspiracy to commit perjury, and conspiracy to endanger the welfare of children.[32] The OAG also filed additional charges against Curley and Schultz, charging them with endangering the welfare of children, obstruction of justice, conspiracy to obstruct justice, conspiracy to commit perjury, and conspiracy to endanger the welfare of children.[33] Then-Acting Attorney General of Pennsylvania Linda Kelly held a press conference to announce the charges, and stated: "This was not a mistake by these men. It was not an oversight. It was not misjudgment on their part. This was a conspiracy of silence by top officials working to actively conceal the truth, with total disregard for the children who were Sandusky's victims in this case."[34]

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[28] FREEH REPORT, *supra* note 23, at 75 and Exhibit 5G. Spanier told Freeh's investigators that "the comment related 'specifically and only to [Curley's] concern about the possibility that [Sandusky] would not accept our directive and repeat the practice. Were that the outcome of his discussion I would have worried that we did not enlist more help in effacing such a directive.'" *See id.* at 75. Spanier also told those investigators that his use of the word "humane" in his e-mail response to Curley refers "specifically and only to my thought that it was humane of [Curley] to wish to inform Sandusky first and allow him to accompany [Curley] to the meeting with the president of the Second Mile. Moreover, it would be humane to offer counseling to Sandusky if he didn't understand why this was inappropriate and unacceptable to us." *Id.* at 75-76.

[29] *Id.* at 69-70. For a more detailed description and analysis of the e-mail exchange and Schultz notes, *see* Cole, *Multiple Representation Meltdown*, *supra* note 6, at 600-03.

[30] FREEH REPORT, *supra* note 23, at 11.

[31] *See id.* at 14.

[32] Commonwealth v. Spanier, 192 A.3d 141, 143-144 (Pa. Super. Ct. 2018).

[33] *See* Commonwealth v. Curley, 131 A.3d 994, 995,999 (Pa. Super. Ct. 2016); Commonwealth v. Schultz, 133 A.3d 294, 300, 303 (Pa. Super. Ct. 2016).

[34] *See* CNN Wire Staff, *Ex- Penn State Officials Accused of "Conspiracy of Silence,"* CNN (Nov. 1, 2012) (quoting Kelly), http://www.cnn.com/2012/11/01/justice/penn-state-scandal/. No criminal charges were brought against Paterno. He testified to the grand jury that assistant football coach Michael McQueary had reported to him about Sandusky "fondling" a boy in the athletic facility shower room and the conduct was of "a sexual nature," and that he had subse-

Spanier, Schultz, and Curley vigorously contested the criminal charges against them, but in March 2017 Curley and Schultz each pleaded guilty to a single misdemeanor charge of endangering the welfare of children and agreed to cooperate with the OAG in Spanier's criminal trial.[35] Spanier continued to contest the criminal charges against him through trial, but a jury found him guilty of one misdemeanor charge of endangering the welfare of children on March 24, 2017.[36] On April 30, 2019, the day before Spanier was required to report to state prison, a federal magistrate judge granted Spanier's writ of habeas corpus, holding that the state court conviction violated the Ex Post Facto and Due Process clauses of the U.S. Constitution.[37] The OAG's appeal of the federal magistrate's decision was pending at the time of this writing.[38]

B. *The Perjury Trap in the Penn State Three Case*

What appears to have been an effort to set a perjury trap began in December 2010 when Curley and Schultz each received a subpoena to appear before the investigating grand jury on January 12, 2011.[39] After Curley and Schultz were interviewed by prosecutors, but prior to their grand jury testimony, Penn State general counsel Cynthia Baldwin asked one of the senior prosecutors if the two were targets of the criminal investigation.[40] The prosecutor stated that they were not

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quently reported that information to Curley and Schultz. *See* FREEH REPORT, *supra* note 23, at 118.

[35] *See Spanier*, 192 A.3d 141, 144 n.7 (Pa. Super. Ct. 2018).

[36] *See* Will Hobson, *Former Penn State President Graham Spanier Convicted of Child Endangerment*, WASH. POST (March 24, 2017), https://www.washingtonpost.com/sports/colleges/former-penn-state-president-graham-spanier-convicted-of-child-endangerment/2017/03/24/d1936e34-109a-11e7-9b0d-d27c98455440_story.html?utm_term=.c359070b00e5. Spanier was acquitted of a felony charge of endangering the welfare of children and a felony charge of conspiring to endanger the welfare of children. *See id.* On June 26, 2018, the Superior Court of Pennsylvania affirmed Spanier's conviction for one count of endangering the welfare of children. *See Spanier*, 192 A.3d 141, 155 (Pa. Super. Ct. 2018).

[37] *See* Spanier v. Libby, 2019 U.S. Dist. LEXIS 72824 (M.D. Pa. 2019). The court concluded that Spanier should have been prosecuted under the 1995 version of the Pennsylvania child endangerment statute, not the 2007 version that he was charged under in 2012. *See id.* at 43.

[38] *See* Charles Thompson, *Attorney General Files Appeal in Former Penn State President's Child-Endangerment Case*, PENNLIVE (May 29, 2019), https://www.pennlive.com/news/2019/05/pennsylvania-attorney-general-josh-shapiro-files-appeal-in-graham-spanier-case.html.

[39] *See* Commonwealth v. Schultz, 133 A.3d 294, 301-02 (Pa. Super. Ct. Jan. 22, 2016).

[40] *See id.*

targets at that time.[41] In a footnote to its opinion, the Superior Court of Pennsylvania pointed out that at the time that statement was made:

> [T]he OAG was already aware that [Penn State graduate assistant coach Mike] McQueary had told investigators that he reported a sodomy to Schultz and Curley, and it knew that there had been no follow up police investigation. Thus, at that time, the OAG ostensibly had a basis upon which to charge Curley and Schultz with failure to report suspected child abuse. Hence, this claim was misleading.[42]

A classic perjury trap setup occurs when a prosecutor misleads a defense lawyer to obtain on-the-record testimony from that lawyer's client when the prosecution has incriminating evidence about that client that is not known to the defense lawyer. Moreover, a state appellate court finding that a state prosecutor engaged in "misleading" conduct is a very serious matter. Whether or not the court is right in its analysis and conclusion, such a public judicial finding is an outcome any prosecutor undoubtedly wishes to avoid.

The prosecutors also appear to have set a perjury trap for Spanier. Spanier was subpoenaed to testify before the grand jury about three months later, on April 13, 2011.[43] Baldwin also represented Spanier during his March 2011 interview with prosecutors as well as his grand jury testimony on April 13, 2011.[44] Immediately before Spanier's grand jury testimony, and without Baldwin or Spanier present, the prosecution told the supervising judge that "based upon the testimony of Paterno and McQueary, it believed the [prior grand jury] testimony of Curley and Schultz lacked credibility" and that "Spanier, in his interview, had provided a story, similar to Curley's, that he had only been told of nonsexual horseplay."[45] Similar to Curley and Schultz, Spanier appears to have been the subject of a perjury trap based upon the prior testimony of McQueary and Paterno—testimony that the prosecutors did not tell Baldwin or Spanier about prior to Spanier's grand jury testimony.[46] The prosecutors questioned Spanier extensively for information regarding San-

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41 *Schultz*, 133 A.3d at 302; Commonwealth v. Curley, 131 A.3d 994, 996 (Pa. Super. Ct. Jan. 22, 2016).

42 *Schultz*, 133 A.3d at 301-02 n.8*; see also Curley*, 131 A.3d at n.6.

43 *Spanier*, 132 A.3d at 484.

44 *See id*.

45 *Id.*

46 *See id.* at 484-85.

dusky that Spanier received from Curley and Schultz,[47] apparently seeking to make a record for a perjury case against Spanier.

Initially, these perjury traps worked for the prosecution, ensnaring Curley, Schultz, and later Spanier. The initial perjury charges against Curley[48] and Schultz[49] were based upon the grand jury testimony they provided after the prosecutor told Baldwin they were not targets of the grand jury's investigation at that time.[50] They were initially charged in November 2011—at the same time Sandusky was charged[51]—with perjury and failure to report child abuse.[52] Spanier was not charged until almost a year later, in November 2012.[53]

As this timeline suggests, Spanier's perjury trap had a somewhat longer fuse, but it too involved prosecutorial conduct that was subsequently criticized by the Superior Court of Pennsylvania and harshly condemned by the Supreme Court of Pennsylvania.[54] In October 2012, Penn State waived its attorney-client privilege with respect to Baldwin's representation of the University in the Sandusky matter and, in particular, the University's cooperation with investigative efforts in the Sandusky grand jury investigation.[55] The University's waiver of attorney-client privilege allowed Baldwin, who had served as the University's in-house counsel during the grand jury investigation of Sandusky, to provide grand jury testimony about Penn State's efforts to comply with grand jury subpoenas for documents and records relating to Sandusky.[56]

Baldwin's grand jury testimony pursuant to the University's waiver of privilege, however, was subject to a stipulation by the supervising judge that Baldwin not testify about "matters that could involve potential confidential communications between Curley, Schultz,

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47 *See id.* at 486.

48 *See* Commonwealth v. Curley, 131 A.3d 994, 998-99 (Pa. Super. Ct. 2016).

49 *See* Commonwealth v. Schultz, 133 A.3d 294, 303-04 (Pa. Super. Ct. 2016).

50 *See Schultz*, 133 A.3d at n.8; *Curley*, 131 A.3d at n.6.

51 *See* Police Criminal Complaint, Commonwealth v. Sandusky, 203 A.3d 1033 (Pa. Super. Ct. 2016) (No. CR-636-11).

52 *See* Criminal Docket, Commonwealth v. Curley, Docket No. MJ-12303-CR-0000421-2012 (Dauphin Cnty. Magis. Dist. Ct. Nov. 1, 2012); Criminal Docket, Commonwealth v. Schultz, Docket No. MJ-12303-CR-0000422-2012 (Dauphin Cnty. Magis. Dist. Ct. Nov. 1, 2012).

53 *See* Commonwealth v. Spanier, 132 A.3d 481, 490 (Pa. Super. Ct. 2016).

54 *See* Part II.D *infra*.

55 *See* Transcript of Proceedings of the Thirty-Third Statewide Investigation Grand Jury No. 1 (October 22, 2012) at 3-4, Commonwealth v. Sandusky, 203 A.3d 1033 (Pa. Super. Ct. 2019) [hereinafter Oct. 22, 2012 Grand Jury Transcript].

56 *See id.* at 1-4.

Spanier and [herself]."[57] The reason for this limitation on Baldwin's grand jury testimony was that Schultz and Curley, through counsel, asserted attorney-client privilege "for any conversations or information that passed between [Schultz, Curley, and Baldwin] in preparation for their grand jury appearance or anything relating to their grand jury appearance."[58] Counsel for the OAG, for Penn State, and for Baldwin proposed to the supervising judge that Baldwin's grand jury testimony go forward, but with no questions regarding Schultz and Curley's grand jury testimony or preparation for that testimony.[59] The supervising judge agreed that Baldwin could provide grand jury testimony on that basis.[60]

Four days later, on October 26, 2012, Baldwin provided grand jury testimony.[61] She was questioned by Frank Fina, the same OAG prosecutor who had previously assured the supervising judge of the grand jury that Baldwin would not be questioned about Schultz and Curley's grand jury testimony.[62] Baldwin testified that she first became aware of the Sandusky investigation in late December 2010, when she was contacted by the OAG about four grand jury subpoenas.[63] One subpoena was for University documents "requesting basically any information about Jerry Sandusky and allegations of misconduct."[64] The other three subpoenas were "for people to testify. Those three persons were Tim Curley, Gary Schultz, and Joe Paterno."[65] She testified that after she received the telephone call about the subpoenas, she consulted with Spanier, and "[he] said to

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57 *Spanier*, 132 A.3d at 487; *see also* Oct. 22, 2012 Grand Jury Transcript, *supra* note 55, at 4-6.

58 Oct. 22, 2012 Grand Jury Transcript, *supra* note 55, at 4 (statement to the court by counsel for the Pennsylvania Attorney General's Office describing the claims of attorney-client privilege by Schultz and Curley).

59 *See id.* at 10-11.

60 *See id.* at 13-14.

61 Transcript of Proceedings of the Thirty-Third Statewide Investigation Grand Jury No. 1 (October 26, 2012), Commonwealth v. Sandusky, 203 A.3d 1033 (Pa. Super. Ct. 2019) [hereinafter Oct. 26, 2012 Grand Jury Transcript].

62 *See* Oct. 26, 2012 Grand Jury Transcript, *supra* note 61, at 5-6. Baldwin ceased serving as Penn State's general counsel in June 2012, not in January 2012. Paula Reed Ward, *Penn State's General Counsel Cited for Missteps*, PITTSBURG POST-GAZETTE (Jul. 15, 2012), https://www.post-gazette.com/news/state/2012/07/15/Penn-State-s-general-counsel-cited-for-missteps/stories/201207150174.

63 *See* Oct. 26, 2012 Grand Jury Transcript, *supra* note 61, at 11-12.

64 *Id.* at 12.

65 *Id.*

me, well, you can go in with Tim and Gary and that was the conversation we had then."[66]

Baldwin also testified at length about her interactions with Spanier in connection with the Sandusky investigation and Spanier's grand jury testimony.[67] She testified she had no knowledge of the e-mail communications or of Schultz's notes described above while representing Penn State in connection with the Sandusky grand jury investigation, or when she accompanied Spanier, Schultz, and Curley to their grand jury appearances.[68] In response to questions from Fina about her discussions with Spanier prior to his OAG interview and grand jury testimony, Baldwin testified that she was "operating under the presumption that they have told me the truth. They don't know anything else. They have told me the truth."[69] Fina also asked, "Based upon what you know now, what can you tell us about Spanier's representations to you through this lengthy period of the investigation?"[70] Baldwin responded, "That he is—that he is not a person of integrity. He lied to me."[71] Fina then asked, "Why did he tell you the lies? Why did he say the things that he said to you?"[72] Baldwin replied, "I can't get inside his mind, but the fact is that there is no doubt he lied to me. I can't think of any other reason for lying than trying to hide it from me."[73]

On November 1, 2012, four days after Baldwin's grand jury testimony, the OAG filed criminal charges against Spanier and additional charges of conspiracy and obstruction of justice against Curley and Schultz, charging the three men with a "conspiracy of silence" to cover up Sandusky's crimes.[74] As discussed below, Spanier, Schultz, and Curley all later moved to have the charges against them quashed because, they contended, Baldwin's grand jury testimony violated their attorney-client privilege with Baldwin, in their individual capaci-

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66 *Id.* at 14. Baldwin also testified that "later, there was another conversation with Graham; and he said, well, you'll go in [to the grand jury] with me." *Id.* Joe Paterno retained separate counsel to accompany him to his grand jury testimony. *See* Commonwealth v. Schultz, 133 A.3d 294, 301 (Pa. Super. Ct. Jan. 2016).

67 *See* Oct. 26, 2012 Grand Jury Transcript, *supra* note 61, at 49-70.

68 *See id.* at 69; *see also* FREEH REPORT, *supra* note 23.

69 Oct. 26, 2012 Grand Jury Transcript, *supra* note 61, at 69.

70 *Id.* at 69-70.

71 *Id.* at 70.

72 *Id.*

73 *Id.*

74 *See* CNN Wire Staff, *supra* note 34.

ties, as opposed to Baldwin having represented them only in their capacities as University officials, as she contended she had done.[75]

C. *The Perjury Traps Backfire on the Prosecution*

Had the prosecution not provided a "misleading" response to Baldwin's question of whether Curley and Schultz were targets of the grand jury investigation,[76] Baldwin almost certainly would have advised Curley and Schultz to obtain separate counsel and would not have accompanied them to their grand jury testimony because of the potential conflict between their personal interests and Penn State's institutional interests.[77] Similarly, had Baldwin been aware of the information the prosecution provided to the supervising judge prior to Spanier's grand jury testimony,[78] she almost certainly would have advised Spanier to obtain separate counsel and would not have accompanied him to his grand jury testimony.[79] Although the prosecution initially prevailed at the trial court level,[80] the perjury trap tactics of withholding information and misleading Baldwin ultimately led the Superior Court of Pennsylvania to dismiss the most serious charges of perjury, obstruction of justice, and conspiracy against Curley, Schultz, and Spanier.[81] Moreover, as discussed in more detail below, those tactics resulted in serious state bar disciplinary sanctions against both Baldwin and Fina.[82]

The trial court issued a lengthy opinion rejecting the three defendants' personal attorney-client privilege claims.[83] It concluded that Baldwin represented them only as agents of the University,[84] and

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[75] *See* Memorandum Opinion and Order, Commonwealth v. Curley, Schultz, Spanier, No. 3614 CR 2013, No 5165 CR 2011, No. 3616 CR 2013, No. 5164 CR 2011, No. 3615 CR 2013 (Dauphin Cnty. Ct. Jan. 14, 2015) [hereinafter Trial Court Opinion]; *see also* Cole, *Multiple Representation Meltdown*, *supra* note 6, at 615-29 (analyzing the issue of individual representation versus representation solely as Penn State officials).

[76] *See* Commonwealth v. Schultz, 133 A.3d 294, at 302 n.8 (Pa. Super. Ct. Jan. 22, 2016).

[77] *See generally* Cole, *Multiple Representation Meltdown*, *supra* note 6, at 629-33 (arguing that grand jury "target warnings" should be made mandatory under Pennsylvania law).

[78] *See* Schultz, 133 A.3d at 302 n.8.

[79] *See generally* Cole, *Multiple Representation Meltdown*, *supra* note 6, at 629-33 (arguing that grand jury "target warnings" should be made mandatory under Pennsylvania law).

[80] *See* Trial Court Opinion, supra note 75, at 50-52 (denying defendants motions).

[81] *See* Commonwealth v. Curley, 131 A.3d 994 (Pa. Super. Ct. 2016); *Schultz*, 133 A.3d at 299; Commonwealth v. Spanier, 131 A.3d 481, 482 (Pa. Super. Ct. 2016).

[82] *See* Part II.D *infra*.

[83] *See* Trial Court Opinion, supra note 75, at 33.

[84] *Id.*

she had acted appropriately in doing so based on the information known to her at the time.[85] The three defendants then appealed to the Superior Court of Pennsylvania.[86] As noted above, a condition of Penn State's waiver of privilege was that Baldwin would not be questioned before the grand jury about Schultz's and Curley's grand jury testimony or the preparations for their testimony.[87] The superior court discussed the privilege waiver by Penn State and recounted the prosecution's representations to the supervising judge who placed the limitations on questioning Baldwin.[88] The court then noted that "[d]espite the foregoing representations by Mr. Fina, a number of the Commonwealth's questions to Ms. Baldwin before the grand jury precisely implicated potential confidential communications."[89] In a footnote to this statement, the court stated that, in light of Fina's prior representations to the supervising judge, "We find his subsequent questioning of Ms. Baldwin, absent prior judicial approval on the privilege question, to be highly improper."[90]

As is true with respect to the superior court's criticism of another prosecutor's "misleading" response to Baldwin's question of whether Curley and Schultz were targets of the grand jury investigation,[91] the court's finding that Fina engaged in "highly improper" conduct in his questioning of Baldwin at her grand jury appearance[92] raises serious issues of prosecutorial misconduct. If prosecutors were seeking to gain a tactical advantage by withholding information from Baldwin to set perjury traps for Curley, Schultz, and Spanier, their tactics appear to have significantly backfired—resulting in the dismissal of most of the charges against the three defendants. Fina's questioning of Baldwin in the grand jury, discussed above, led to notably harsh language by the Disciplinary Board of the Supreme Court of Pennsylvania, which ultimately prevailed in having the Supreme Court impose serious disciplinary sanctions on Fina.[93]

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85 *Id.* at 34-5.

86 *See Curley,* 131 A.3d at 994; *Schultz,* 133 A.3d at 294; *Spanier,* 132 A.3d at 482.

87 *See supra* notes 49-52 and accompanying text.

88 *See Schultz*, 133 A.3d at 305-06.

89 *Id.* at 306.

90 *Id*. at n.14.

91 *See supra* notes 35-37 and accompanying text.

92 *See* Trial Court Opinion, *supra* note 75, at 34-35.

93 Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania, Office of Disciplinary Counsel v. Fina, 2020 Pa. LEXIS 1056 (Pa. 2020) (No. 166 DB 2017) [hereinafter Fina Disciplinary Board Report]. The Disciplinary Board argued to the

The superior court concluded that Baldwin failed to adequately advise Schultz that she was not representing him in his personal capacity, but rather was representing him only in his capacity as an officer of Penn State.[94] Based on that conclusion, the superior court held that all communications between Schultz and Baldwin were protected by attorney-client privilege and Baldwin had "breached that privilege by testifying before the grand jury with respect to such communications."[95] The court went on to quash the perjury, obstruction of justice, and conspiracy charges against Schultz.[96] Following its analysis in Schultz's case, the superior court also quashed the perjury, obstruction of justice, and conspiracy charges against Curley[97] and Spanier.[98] The dismissal of the most serious charges against Curley, Schultz and Spanier based upon Baldwin's grand jury testimony also led to the Supreme Court imposing disciplinary sanctions against Baldwin for professional misconduct and conduct prejudicial to the administration of justice.[99] Those sanctions, as well as other bar disciplinary charges against Baldwin and Fina that arose out of the events described above, are discussed in the following Section.

D. *The Aftermath: State Bar Disciplinary Proceedings*

1. The Baldwin Disciplinary Proceedings

Although the three defendants prevailed in convincing the Superior Court of Pennsylvania that Baldwin had not provided them ade-

Supreme Court of Pennsylvania that Fina's questioning of Baldwin in the grand jury "extensively about the very subjects he represented to Judge Feudale he would avoid" was "reprehensible" and that his "questioning was calculated to demonstrate that Ms. Baldwin's clients lied. These actions are inexcusable." *Id.* at 27. The Fina Disciplinary Board Report is discussed in more detail in Part II.D *infra*.

94 *See Schultz*, 133 A.3d at 323 ("Ms. Baldwin did not . . . explain to Schultz that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests").

95 *Id.* at 325.

96 *Id.* at 328.

97 *See* Commonwealth v. Curley, 131 A.3d 994 (Pa. Super. Ct. 2016).

98 *See* Commonwealth v. Spanier, 131 A.3d 481 (Pa. Super. Ct. 2016)

99 Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania, Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080 (Pa. 2020) (No. 151 DB 2017) [hereinafter "Baldwin Disciplinary Board Report"]. The Disciplinary Board argued to the Supreme Court of Pennsylvania that Baldwin's "misconduct had real consequences, as it enabled these individuals to escape prosecution on certain charges, all of which stemmed from Sandusky's detestable crimes against minor children." *Id.* at 43. The Baldwin Disciplinary Board Report is discussed in more detail in Part II.D *infra*.

quate representation in connection with their grand jury testimony,[100] a Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania (the "Hearing Committee") subsequently disagreed with the superior court and placed responsibility for any misunderstanding as to the nature of Baldwin's representation on the three individual Penn State officials.[101] The Hearing Committee summarized the evidence relating to Baldwin's decision that she could represent the three officials in her role as general counsel to the University as follows:

> There is no doubt that all three individuals expressly told her they were unaware of any criminal activity, that their recollections were all consistent and that they were consistent with the University's interests. We were unpersuaded that there were sufficient red flags to put a reasonable lawyer on notice that they were lying to her. While every lawyer must consider the possibility that a client may lie to her in an adversary matter—particularly a criminal matter—we certainly do not find that a reasonable lawyer must assume her client is lying. This would effectively prohibit joint representations to the great detriment of litigants and witnesses, not to mention the orderly process of justice. Now there may be occasions when red flags will alert a reasonable lawyer of a likely conflict [in connection with a joint representation, here Baldwin's joint representation of the three officials and the University] on the near horizon. They could include an implausible story, a change in story, prior mendacity or sheer incredibility. But no such red flags existed here.[102]

By finding no "red flags" or evidence of lack of due diligence on Baldwin's part, that vital information was withheld from her, and that she was deceived by Curley, Schultz, and Spanier, the Hearing Committee

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[100] *See* Commonwealth v. Curley, 131 A.3d 994, 1007 (Pa. Super. Ct. 2016); Commonwealth v. Schultz, 133 A.3d 294, 299 (Pa. Super. Ct. 2016); Commonwealth v. Spanier, 131 A.3d 481, 496 (Pa. Super. Ct. 2016)

[101] Report and Recommendations of the Hearing Committee, at 41, Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080 (Pa. 2020), (No. 151 DB 2017) [hereinafter "Baldwin Hearing Committee Report"] (concluding that, based upon the information then reasonably available to Baldwin and her reasonable investigation, she had reasonably concluded that the interests of Penn State University and the senior officials were consistent, she properly informed the individual officials of those circumstances, and they effectively consented to being jointly represented with the University). The Hearing Committee Report further concluded that Baldwin had not violated any ethical rules in her grand jury testimony. *Id.* at 42.

[102] *Id.* at 21.

essentially concluded that blame rested with the clients, not the lawyer.[103] Unfortunately for Baldwin, however, her initial victory in the state bar disciplinary proceedings would not be the last word on the matter.

After the Baldwin Hearing Committee report was issued, the Office of Disciplinary Counsel ("ODC") challenged the conclusions of the Hearing Committee and requested that the Disciplinary Board of the Supreme Court of Pennsylvania ("the Board") find that Baldwin had violated the Pennsylvania Rules of Professional Conduct and recommend to the Supreme Court that Baldwin receive a public censure.[104] The Board agreed with the ODC and concluded that Baldwin had violated the Pennsylvania Rules of Professional Conduct[105] and unanimously recommended she be subjected to a public censure by the Supreme Court of Pennsylvania.[106]

The Board charged that Baldwin had failed to perform "any independent, aggressive investigation" of what she had been told by Curley and Schultz, by contacting their staff "or going to their respective offices to ascertain the existence of documents responsive to the subpoena."[107] The Board also faulted Baldwin for not "seeking advice from an experienced practitioner on the question of potential conflicts of interest."[108] In addition, the Board noted that Baldwin did not

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103 *See id.*

104 Baldwin Disciplinary Board Report, *supra* note 99, at 5.

105 *Id.* at 22-23.

106 *Id.* at 49.

107 *Id.* at 12. The Board did not address the "no red flags" finding of the Hearing Committee or identify any specific facts that should have made Baldwin suspect that Curley and Schultz were withholding information from her. *Id.*

108 *Id.* at 13. Again, the Board did not identify any specific facts or circumstances that should have made Baldwin recognize that there was a conflict of interest or potential conflict of interest between the interests of Schultz and Curley, on the one hand, and Penn State, on the other hand, stating only that "[t]his conflict is obvious." *Id.* at 34; *see also id.* at 33 ("We note that as attorneys, a form of knowledge is understanding our limitations and seeking guidance. [Baldwin] by all accounts did not appear aware of what faced her clients and their potential for jeopardy."). The Supreme Court of Pennsylvania sought to correct this oversight in its opinion, discussed below, observing that "[t]he substantial risk of disqualifying conflicts that should have been apparent from the outset of the service of grand jury subpoenas . . . became actual conflicts at least as early as the OAG interviews [of Curley and Schultz] preceding the grand jury testimony" because of differences in Curley and Schultz's recollections and because their recollections "implicated Spanier with knowledge of Sandusky's activities." Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080, *57-58 (Pa. 2020).

advise Curley and Schultz "to seek advice from an experienced criminal lawyer, although she was aware that Mr. Paterno had done so."[109]

Based upon its review of the record, the Board concluded that Baldwin (1) failed to render competent representation to Curley, Schultz, and Spanier,[110] (2) failed to recognize a concurrent conflict of interest in representing Penn State and the three individual University officials,[111] (3) breached her duty of confidentiality to the three officials during her grand jury testimony,[112] and (4) engaged in conduct prejudicial to the administration of justice because her grand jury testimony resulted in the dismissal of the most serious charges against Curley, Schultz, and Spanier.[113] Based upon those findings and its analysis of relevant precedent regarding attorney discipline, the Board recommended that Baldwin be subjected to a public censure by the Supreme Court of Pennsylvania.[114]

The supreme court viewed Baldwin's actions even more harshly than the ODC and the Board. After concluding that Baldwin represented Curley, Schultz, and Spanier personally at their grand jury

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109 Baldwin Disciplinary Board Report, *supra* note 99, at 14. Again, it is not clear what facts or circumstances, other than the benefit of hindsight enjoyed by ODC and the Board, should have made Baldwin believe at that point in time that Curley and Schultz needed advice from an experienced criminal attorney. The Board recognized that Baldwin testified she had given Curley and Schultz "the appropriate verbal 'Upjohn warnings,'" but also noted that there was no evidence that Baldwin had "memorialized in a signed writing an informed consent disclosure from Mr. Curley or Mr. Schultz before representing them before the investigating grand jury." *Id.* at 13-14. This criticism by the Board reinforces the recommendation this author offered after the Superior Court decision in *Schultz*:

> No prudent lawyer who is aware of the Superior Court's holding in the *Schultz* case will fail to provide an *Upjohn*-type warning that explicitly informs individuals that the lawyer represents the entity and does not represent the entity officials in their individual capacities. Moreover, no prudent lawyer should fail to document that warning, either in a contemporaneous memorandum to the file or, if the lawyer wants to ensure that their professional conduct cannot later be second-guessed, by having the individual official sign a document verifying that she received and understands a warning that the lawyer represents only the entity and not her personally.

Cole, *Multiple Representation Meltdown*, *supra* note 6. The Board confirmed the wisdom of this course of action. *See* Baldwin Disciplinary Board Report, *supra* note 99, at 14 ("RPC 1.7 does not require that informed consent be given in writing, although certainly that is a prudent course of action and simply good legal practice, *one which if undertaken in this case would have obviated all that followed*.") (emphasis added).

110 *See* Baldwin Disciplinary Board Report, *supra* note 99, at 30-33.

111 *See id.* at 33-37.

112 *See id.* at 37-42.

113 *See id.* at 42-43.

114 *Id.* at 49.

appearances,[115] the supreme court condemned Baldwin for failing from the outset to "exhibit any understanding of the magnitude of the challenge she was facing."[116] In the supreme court's view, Baldwin "should have understood that by subpoenaing Curley and Schultz, the grand jury investigation was expanding beyond the conduct of Sandusky into the possible roles that individuals associated with Penn State may have had in facilitating or covering up his criminal acts, including in particular those that occurred on the Penn State campus."[117]

This is a remarkable analytical leap for the supreme court to make, without offering any rationale or supporting factual basis,[118] particularly when Curley was the Penn State Athletic Director and Schultz had supervised the University police during the period in which Sandusky brought children into Penn State athletic facilities.[119] A thorough grand jury investigation of a former Penn State football coach, which is what Baldwin understood was the focus of the investigation, would reasonably be expected to include questioning University officials with senior managerial responsibility for the football program—Curley—and campus law enforcement—Schultz. Moreover, both the Board and the supreme court fail to include in their analysis the important fact that Baldwin asked a senior prosecutor if Curley and Schultz were "targets" of the investigation and received a "misleading" response to her inquiry.[120] Neither the Board nor the supreme court explain how or why Baldwin would have known that "the grand jury investigation was expanding" or that Curley and Schultz were targets, especially after she directly asked a senior member of the prosecution team and was told they were not.[121] Perjury traps

115 *See* Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080, *39-41 (Pa. 2020).

116 *Id.* at *43.

117 *Id.*

118 The Hearing Committee apparently noted the same deficiency in ODC's presentation of its case against Baldwin, stating that "the ODC's contentions seem to the Committee to be largely without context. As we stated during the hearing, ODC submitted an extensive paper record as its case in chief with virtually no guidance to the hearing committee regarding where in that extensive record the evidence supporting its charges was located; it effectively said, 'It's in there somewhere.'" Baldwin Hearing Committee Report, *supra* note 101, at 4 n.4.

119 *See* FREEH REPORT, *supra* note 23, at 33, 35.

120 *See* Commonwealth v. Schultz, 133 A.3d 294, 301-02 (Pa. Super. Ct. 2016).

121 Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080, *43 (Pa. 2020); *see also Schultz*, 133 A.3d at 302, n. 8 ("The OAG, *outside the presence of Ms. Baldwin* later explicitly told the grand jury supervising judge that Schultz's and Curley's testimony was not consistent.") (emphasis added).

catch both defense lawyers and the witnesses they represent. The one Baldwin faced was particularly nefarious, both because of the misleading conduct of the prosecutors and the fact that her clients had concealed vital information from her.[122]

The Hearing Committee's finding that there were not "sufficient red flags"[123] to cause Baldwin to believe Curley, Schultz, and Spanier were lying and therefore facing criminal exposure better comports with what Baldwin could reasonably have been expected to know at the time than the conclusions reached by the Board[124] and the supreme court.[125] Both the Board and the supreme court faulted Baldwin for believing her clients—highly respected senior University officials who consistently assured her they were unaware of any crimi-

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[122] As Baldwin's expert witness observed in the disciplinary proceedings against her, "no lawyer could have been prepared to deal with the level of conspiracy among Spanier, Schultz, and Curley to conceal the truth . . . ." *Baldwin*, 2020 Pa. LEXIS 1080, at *53 n.14. The supreme court, however, not only disagreed with this assertion, but instead effectively held that *any* lawyer should have recognized the risk Baldwin was facing. *Id.* at *54 ("Respondent reasonably should have recognized the substantial risk that the representation of the Individual Clients could be materially limited by the responsibilities to each of the Individual Clients.").

[123] Baldwin Hearing Committee Report, *supra* note 101, at 21.

[124] *See* Baldwin Disciplinary Board Report, *supra* note 99, at 32 (faulting Baldwin for failing to "perform[ ] any independent investigation to verify her clients' recollections, such as contacting their staff or going to their offices to gather documents and review records" and for failing to "advise[ ] Dr. Spanier to talk to a criminal lawyer with grand jury experience, or perform[ ] any independent investigation of Dr. Spanier's recollections"). *Id.* The admonitions with respect to Spanier are particularly naïve, because at the time he was the President of the University and Baldwin's direct superior, so the Board is essentially faulting Baldwin for not assuming her boss was a criminal who was engaged in a conspiracy to obstruct justice and treating him as such despite his explicit statements to the contrary. Baldwin testified that Spanier directed her to represent Curley and Schultz at their grand jury appearances. *See* Oct. 26, 2012 Grand Jury Transcript, *supra* note 61, at 11-12. He told Baldwin to represent Curley before the grand jury despite Baldwin protesting that "I can't be his personal attorney because I'm general counsel." Baldwin Hearing Committee Report, *supra* note 101, at 13 (quoting Baldwin grand jury testimony). To expect that Spanier would have simply acquiesced to advice from Baldwin that all three officials obtain expert criminal defense counsel is contrary to the record's clear evidence that Spanier, as Baldwin's superior and the chief executive officer of the University, dominated and controlled the decision regarding the representation of Schultz and Curley. *See id.* at 13-15. Baldwin paid a high price for her acquiescence to Spanier. All in-house attorneys who report to a chief executive or other senior nonlawyer executive should make note of the fate that befell Baldwin after she allowed Spanier to override her protests to be personal counsel.

[125] Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080, at *45-46 (Pa. 2020) (faulting Baldwin for not interviewing Curley and Schultz's staff or having anyone search their offices before their grand jury appearances). As with the criticisms leveled at Baldwin by the Board, the Supreme Court's conception of Baldwin's authority and responsibility when dealing with senior officials who are consistently denying knowledge or involvement in the matters under investigation is both unrealistic and, as a practical matter, unreasonable.

nal activity by Sandusky—and consequently failing to search their offices for incriminating evidence or suggest that they should retain expert criminal defense counsel, on the assumption that they had engaged in criminal activity and were hiding it from her. Nonetheless, the decision of the Supreme Court of Pennsylvania is the final word on this matter, and it confirms the conclusion this author reached after the Superior Court of Pennsylvania's decision in *Schultz*: the Pennsylvania Rules of Professional Conduct should be revised to make clear to all lawyers what they must do to meet the professional responsibility requirements imposed by the *Schultz* superior court decision and now the *Baldwin* supreme court decision.[126]

Having found that Baldwin failed to provide competent representation to Curley, Schultz, and Spanier or recognize the likelihood of conflicts of interest not only among them as individuals but also between them and the University,[127] the supreme court concluded, like the superior court in *Schultz*,[128] that Baldwin's grand jury testimony breached her duty of confidentiality to the three individuals by disclosing client confidences.[129] Once again, the supreme court agreed with the Board and rejected the Hearing Committee's finding that Baldwin's grand jury testimony was permissible because the three individuals had lied to her and used her services to cover up their past misconduct and obstruct the grand jury investigation.[130] Again, the

126 *See* Cole, *Multiple Representation Meltdown*, *supra* note 6, at 622-629 (discussing deficiencies in the Pennsylvania professional rules of responsibility).

127 *See Baldwin*, 2020 Pa. LEXIS 1080, at *42-51.

128 *See* Commonwealth v. Schultz, 133 A.3d 294, 325-28 (Pa. Super. Ct. 2016) (quashing criminal charges because they were based on testimony from Baldwin that breached attorney-client privilege with Schultz).

129 *See Baldwin*, 2020 Pa. LEXIS 1080, at *42-65.

130 *Id.* at *59-60. Baldwin argued that her grand jury testimony was permitted under Pennsylvania Rule of Professional Conduct 1.6(c)(3) "to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were being used or had been used." *See id.* at 41. The Hearing Committee had accepted this argument. *Id.* at *60 (quoting the Baldwin Hearing Committee Report). However, the Board summarily dismissed this argument because in its view "[Baldwin's] presence in the grand jury room when false testimony was given by her clients did not mean that her services were "used" to make their false statements." *See* Baldwin Disciplinary Board Report, *supra* note 99, at 41. The Pennsylvania Supreme Court agreed with the Board, dismissing as "dubious" the Hearing Committee's conclusion that when Baldwin "discovered how her services had been used in this course of the commission of the crime of obstruction of justice, she revealed how they had done this with her testimony before the grand jury." *Baldwin*, 2020 Pa. LEXIS 1080, at *59-60. This is a remarkably short-sighted and credulous analysis by the Board and the Pennsylvania Supreme Court. The OAG charged Curley, Schultz, and Spanier with a conspiracy to commit perjury and obstruct justice. *See supra* notes 31-32 and accompanying text. It does not require sophisticated

supreme court makes a remarkable analytical leap in support of its conclusion, stating:

> As of early 2011, Curley, Schultz and Spanier could not have been engaged in a conspiracy "to hide responsive documents from the OAG [quoting Baldwin's Brief to the Supreme Court at 42]." At most, they delayed a response because [Baldwin] did not avail herself of other resources to produce the documents in the possession of Penn State.[131]

These assertions are completely inconsistent with the core "conspiracy of silence" theory underlying the OAG's charges against Curley, Schultz, and Spanier.[132] Instead, the supreme court appears to blame only Baldwin, and not the three University officials, for the failure to produce to the grand jury the "secret file" in Schultz's office[133] and the years-earlier email exchanges among the three individuals.[134]

The supreme court's conclusions regarding Baldwin's duty to recognize potential conflicts of interest impose an onerous burden on practicing attorneys.[135] But blaming Baldwin for failing to produce information that her clients concealed from her puts an even greater burden on counsel: You cannot rely on what your clients tell you, even when you have no reason to doubt their veracity, and you always must conduct an independent investigation before proceeding based on your client's representations to you.[136]

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legal analysis to recognize that any admission that they needed criminal counsel, or even that they needed separate counsel, would undermine an effort to obstruct the grand jury investigation by hiding their past actions and knowledge of Sandusky's misconduct with children. Contrary to the simplistic assertion of the Board that Baldwin's services were not being "used" by the three individuals, *see* Baldwin Disciplinary Board Report, *supra* note 99, at 41, her very presence in the grand jury room with them was an implicit representation to the prosecutors and to the supervising judge that they had not engaged in any wrongdoing and did not need separate representation. For a more detailed analysis of this important aspect of the case, *see* Cole, *Crime-Fraud Exception*, *supra* note 14 (discussing the potential application of the crime-fraud exception to the attorney-client privilege to the legal representation of Curley, Schultz, and Spanier by Baldwin during their grand jury appearances).

131 *Baldwin*, 2020 Pa. LEXIS 1080, at *82-83.

132 *See supra* notes 33-34 and accompanying text. The Supreme Court's conclusions are also contrary to the findings and conclusions of the Freeh Report. *See supra* notes 26-31 and accompanying text.

133 Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080, at *83 (Pa. 2020).

134 *See id.* (referring to "smoking gun documents" that presumably include the emails).

135 *See supra* notes 115-126 and accompanying text.

136 *Baldwin*, 2020 Pa. LEXIS 1080, at *45 ("While it is questionable whether an attorney can ever blindly rely on statements by a client regarding events that occurred years prior to anticipated testimony, it was below any reasonable standard of care to do so here where another

This is a bombshell holding from the *Baldwin* supreme court opinion for attorneys practicing in Pennsylvania courts, and for attorneys in other jurisdictions that might adopt the position of the Supreme Court of Pennsylvania. The court's requirement of independent investigation clearly makes sense and comports with standard practice when a criminal lawyer is representing an individual the lawyer knows or has reason to believe is a target or subject of a criminal investigation. But to impose the same duty of inquiry and investigation on a business lawyer who is representing an entity when entity officials are subpoenaed as witnesses in a grand jury investigation of a third party—in this case Sandusky—is an altogether different matter. This significantly raises the bar of competent representation for any lawyer who represents someone they believe is a witness—and only a witness, not a target or subject—in a grand jury investigation.[137] Moreover, it is not clear that even a written "*Upjohn* warning" would protect a lawyer who fails to conduct an independent investigation before permitting a client to testify or be interviewed by prosecutors.[138] The duty to investigate that the supreme court imposes in *Baldwin* is separate from, and greater than, the requirement to disclose a potential conflict of interest and obtain informed consent from the client that is discussed above.[139]

The supreme court's condemnations of Baldwin's failure to recognize potential conflicts of interest and failure to conduct an adequate independent investigation provided the foundation for concluding she had engaged in conduct prejudicial to the administration of justice. The court concluded, without additional analysis or commentary, that Baldwin's "multiple violations of the Pennsylvania Rules of Professional Conduct thus resulted in an inability to prose-

client [the University] may have been in possession of relevant documents. The duty to investigate becomes all the more important when, as here, counsel undertakes the representation of multiple clients, one of which is a sophisticated institutional client with massive document retention capabilities.")

137 *Cf*. Baldwin Disciplinary Board Report, *supra* note 99, at 21 ("While every lawyer must consider the possibility that a client may lie to her in an adversary matter—particularly a criminal matter—we certainly do not find that a reasonable lawyer must assume her client is lying. This would effectively prohibit joint representations to the great detriment of litigants and witnesses, not to mention the orderly process of justice.").

138 *Cf.* Cole, *Multiple Representation Meltdown*, *supra* note 6, at 622-629 (arguing for mandatory written *Upjohn* warnings in cases where a lawyer represents an agent of an organization in connection with a criminal investigation).

139 *See supra* notes 115-126 and accompanying text.

cute Curley, Schultz, and Spanier on a wide number of criminal charges" and supported the Board's finding that her conduct was prejudicial to the administration of justice.[140]

The final issue before the supreme court was the appropriate sanction to impose on Baldwin. Despite the supreme court's scathing across-the-board condemnation of Baldwin's conduct, the court recognized that the violations it had found did not reflect any intentional dishonesty by Baldwin.[141] The court also recognized that Baldwin had been licensed to practice law in Pennsylvania for approximately twenty years, during which "she has had an unblemished record, marred by the two episodes of misconduct detailed in this Opinion: undertaking the conflicted and incompetent representations of Clients and the subsequent breach of her duties to maintain client confidences."[142] The court recognized that "the publication of this Opinion recounting [Baldwin's] violations of our rules . . . is, in itself, a public censure."[143] Nonetheless, the court concluded that further disciplinary action was necessary because Baldwin "never contemplated, much less expressed, remorse."[144] Rather than imposing a public censure itself, as requested by the Board, the supreme court directed the Board to issue a public reprimand of Baldwin and ordered Baldwin to pay the costs of the disciplinary proceedings against her.[145] This result, while technically more lenient than the sanction requested by the Board, was nonetheless a terrible outcome for Baldwin.

2. The Fina Disciplinary Proceedings

Baldwin was not the only subject of state bar disciplinary proceedings. In January 2018, the ODC initiated disciplinary proceedings before the Board against Frank Fina, the Chief Deputy Attorney General overseeing the Sandusky investigation, charging that he had violated Pennsylvania Rule of Professional Conduct 3.10 by failing to gain prior judicial approval before he questioned Baldwin in her grand jury testimony about her representation of Curley, Schultz, and Spanier, when he knew that all three men were claiming attorney-cli-

140 *See* Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080, at *90 (Pa. 2020).
141 *Id.* at *91.
142 *Id.* at *95-96.
143 *Id.* at *96.
144 *Id.* at *97.
145 *Id*.

ent privilege for their confidential communications with Baldwin.[146] The ODC charged that in his questioning of Baldwin before the grand jury, Fina had "turned Baldwin into a witness for the prosecution against Spanier, Schultz, and Curley, in violation of the attorney-client privilege and confidentiality that had been asserted by Curley and Schultz, and that Fina expressly anticipated would be asserted by Spanier, and had not yet been ruled upon."[147] The ODC requested that the Board "recommend disciplinary action as it may deem appropriate" against Fina for the alleged violation of Rule 3.10.[148]

After extensive presentation of evidence and arguments, a Hearing Committee of the Disciplinary Board concluded that Fina had "questioned Ms. Baldwin about prior grand jury testimony of Schultz, Curley and Spanier, as well as Ms. Baldwin's representation of the three men and the information they had told her," contrary to the representations he had made to the judge who was supervising the grand jury.[149] Despite this finding, the Hearing Committee concluded that the ODC had "failed to establish by clear and convincing evidence any violation of Rule 3.10 of the Pennsylvania Rules of Professional Conduct."[150]

The Hearing Committee concluded that the ODC had not established a violation notwithstanding the Committee's factual finding that the prosecutor had acted in manner contrary to his prior representations to the supervising judge.[151] The Hearing Committee reasoned that a violation of Rule 3.10 required that the ODC:

> must prove that the 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 [in the Office of the Attorney General], Bruce Beemer. The ODC did not offer any evidence that Respondent issued the subpoena to Ms. Baldwin or even

146 *See* Petition for Discipline at 41, Office of Disciplinary Counsel v. Fina, 2020 Pa. LEXIS 1056 (Jan. 19, 2020) (No. 166 DB 2017) [hereinafter "Fina Disciplinary Board Petition"].

147 *Id.* at 13.

148 *See id.* at 41.

149 Report and Recommendation of the Hearing Committee at 12, Office of Disciplinary Counsel v. Fina, 2020 Pa. LEXIS 1056 (Pa. 2020) (No. 166 DB 2017) [hereinafter "Fina Hearing Committee Report"].

150 *Id.* at 15.

151 *Id.* at 12.

> caused it to be issued . . . . Without such proof, the ODC cannot make out a violation of Rule 3.10.[152]

In short, the Hearing Committee decided the matter based upon a technicality—some might say an extreme technicality—that the prosecutor's superior, not the prosecutor himself, issued the subpoena that compelled Baldwin to appear before the grand jury, and proof that the prosecutor had personally issued the subpoena was required as a condition precedent to finding a violation.[153] Although this technicality initially spared Fina from a finding of professional misconduct, as in the Baldwin disciplinary proceedings discussed above, the Hearing Committee's conclusion did not stand.

After the Hearing Committee issued its report was issued, the ODC challenged the conclusions in the report and argued that the Board should find that Fina had violated Rule 3.10.[154] The Board agreed with the ODC and concluded that Fina had violated Rule 3.10.[155]

The Board rejected the Fina Hearing Committee's analysis of the requirement that the prosecutor must have personally issued the subpoena, and that his or her name be on the face of the subpoena, as "an absurd result and not intended by the rule."[156] The Board concluded that Fina represented OAG at all relevant times and it did not matter that he did not personally issue the subpoena to Baldwin.[157]

The Board also strongly condemned Fina's conduct before the judge who was supervising the grand jury, arguing that the only reason the judge allowed Baldwin to be questioned in the grand jury without a prior hearing on the attorney-client privilege issues was Fina's "oft-repeated representations and assurances" that he would respect the privilege between Baldwin and the three university officials, and would not ask questions that could invade that privilege.[158] In the Board's view, Fina "concealed his true intentions and misled the court,"[159] and "deliberately avoided the hearing required by Rule

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152 *Id.* at 16.

153 *See id*. at 15-17.

154 Fina Disciplinary Board Report, *supra* note 93, at 2.

155 *Id.* at 35.

156 *Id.* at 25.

157 *Id.*

158 *Id.* at 25-26.

159 Fina Disciplinary Board Report, *supra* note 93, at 27.

3.10."[160] As harsh as this language is, the Board went even further in condemning Fina's conduct, stating that "[t]hese actions are reprehensible."[161] The Board argued that Fina's "questioning was calculated to demonstrate that Ms. Baldwin's clients lied. These actions are inexcusable."[162] The Board argued that Fina "turned Ms. Baldwin into a witness for the prosecution against her clients."[163] The Board also expressed concern that Fina had "failed to demonstrate regret or remorse for his actions"[164] and had "deflected responsibility by describing himself as a 'worker bee' in the OAG system."[165]

Consistent with these extraordinarily harsh condemnations, the Board concluded that Fina's actions "undermine the public trust and bring shame to the profession."[166] After analyzing prior disciplinary cases involving prosecutorial misconduct,[167] the Board unanimously recommended that the Supreme Court of Pennsylvania suspend Fina from the practice of law in Pennsylvania for one year and one day and be required to pay the costs of the Board's investigation and prosecution of the disciplinary proceedings against him.[168]

The Supreme Court of Pennsylvania's disposition in the Fina disciplinary proceedings differed markedly from its action in the Baldwin proceedings. In *Baldwin*, the Court issued a seventy-page opinion with detailed factual and legal analysis, discussed above. In *Fina*, the Court issued a one-paragraph per curiam order adopting the Board's recommendation and ordering that Fina be suspended for one year and one day, and that he pay costs to the Board.[169]

It appears that the only point of contention among the members of the supreme court concerning the Fina case was the gravity of his offense and the appropriate sanction. Two justices joined in a concurring statement that the Hearing Committee's narrow interpretation of Rule 3.10 was "untenable"[170] and emphasized the "special and distinctive" role of the prosecutor in our system of justice that requires pros-

160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.* at 30.
165 Fina Disciplinary Board Report, *supra* note 93, at 30.
166 *Id.* at 35.
167 *Id.* at 28-34.
168 *Id.* at 35-36.
169 *See* Office of Disciplinary Counsel v. Fina, 2020 Pa. LEXIS 1056, at *1 (Pa. 2020).
170 *Id.* at *4 (Wecht, J., concurring).

ecutors to bear "the high and non-delegable duty of ensuring a fair process for the defendant and of comporting himself or herself in a manner consistent with the public trust."[171] In the view of those two justices, Fina's actions failed to meet that standard when he made what both the Hearing Committee and the Board found were misrepresentations to the supervising judge and thereby avoided a hearing under Rule 3.10 to adjudicate the privilege claims.[172] If a hearing had been held, the justices observed, "any permitted testimony and resulting indictments would have been insulated from reversal on this basis,"[173] which demonstrates that "Rule 3.10 protects not just the attorney-client relationship, but the prosecution as well."[174] The justices concluded that Fina's conduct "fell far below the ethical standard we rightly demand of a prosecutor in this type of situation"[175] and "[s]uspension for a year and a day is manifestly appropriate."[176]

One justice disagreed that the sanction of suspension for a year and a day was appropriate for Fina. In a concurring and dissenting statement, Justice Dougherty stated that he agreed with the majority that Fina had violated Rule 3.10, but that he disagreed "that the present circumstances warrant as severe a sanction as the recommended suspension of one year and one day."[177] Justice Dougherty cited only the court's opinion in the *Baldwin* case as support for the assertion that the Fina sanction was too severe, so presumably he believed that Fina's misconduct was not significantly more egregious than Baldwin's misconduct.[178] Although the opinions do not so state, it may be that the concurring statement, with its emphasis of the special role of the prosecutor in our justice system, was intended to be a response to the Dougherty statement. In any event, the Supreme Court of Pennsylvania's disposition in the *Fina* case reflects a conclusion that Fina's professional misconduct was more serious than that of Baldwin and warranted more severe sanctions.

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171 *Id.*

172 *Id.* at *9-10.

173 *Id.* at *10.

174 *Id.*

175 Office of Disciplinary Counsel v. Fina, 2020 Pa. LEXIS 1056, at *12 (Pa. 2020) (Wecht, J., concurring).

176 *Id.*

177 *Id.* at *12 (Dougherty, J., concurring and dissenting).

178 *See id.*

III. LESSONS FOR PROSECUTORS AND DEFENSE COUNSEL

Grand jury practice poses unique risks for both prosecutors and defense counsel. The United States Department of Justice (the "DOJ") has extensive internal guidelines for federal prosecutors conducting and supervising grand jury investigations.[179] Defense counsel representing witnesses who are appearing before grand juries can refer to numerous scholarly articles and practitioner materials on grand jury practice.[180] The Penn State Three case reinforces a number of valuable lessons for both prosecutors and defense counsel on how to avoid charges of ethical misconduct while meeting their respective responsibilities in the adversarial system of criminal justice.

For defense counsel, without question, the most important lesson from the Penn State Three case is the absolute necessity of determining the status of your client before permitting the client to provide grand jury testimony. In the federal system, this is not difficult because DOJ policy requires that "targets" and "subjects" of an investigation be advised of their status as such when they are subpoenaed to appear before a federal grand jury.[181] A person becomes a "target" of an investigation when the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and is a putative defendant in the judgment of the prosecutor.[182] A person is the "subject" of an investigation when his conduct is within the scope of the grand jury's investigation.[183] The DOJ follows this longstanding policy even though the U.S. Supreme Court has held that targets of a grand jury investigation are entitled to no special warnings relative to their status as "potential defendants."[184]

Not surprisingly, in light of the Supreme Court's ruling that witnesses are not entitled to a warning that they are targets or subjects of a grand jury investigation, states do not necessarily follow the DOJ

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179 *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL: CRIMINAL RESOURCE MANUAL, § 9-11.000 (2020).

180 *See, e.g.*, Henning, supra note 10; Stephen D. Brown & Christine C. Levin, *Preparing a Witness to Testify in the Grand Jury*, 37 LITIGATION 1 (2011).

181 *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL: CRIMINAL RESOURCE MANUAL, § 9-11-151 (2020).

182 *Id.*

183 *Id.*

184 *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL: CRIMINAL RESOURCE MANUAL, § 9-11-151 (2020) (citing United States v. Washington, 431 U.S. 181, 186, 190-91 (1977)).

approach of providing target warnings.[185] The decision of the Supreme Court of Pennsylvania in *Baldwin* has placed an especially heavy burden on attorneys in Pennsylvania who represent a witness—or, more precisely, a person they believe to be a witness—in a grand jury investigation.[186] Under the supreme court's *Baldwin* analysis, a Pennsylvania lawyer must conduct a thorough independent investigation of his client's version of events and cannot rely on the client's representations, even if the lawyer has no reason to believe the client is a target or subject of the grand jury investigation.[187] In addition to the necessity of a thorough, independent investigation, the *Baldwin* case makes very clear that in all cases in which a defense attorney is representing a witness appearing before a grand jury, and especially in state grand jury investigations, defense counsel should demand a clear and unambiguous answer from the prosecutors whether the witness is a target or subject of the investigation.[188]

As the *Baldwin* case demonstrates, however, asking the question may not always be sufficient. As discussed above, Baldwin did ask whether Schultz and Curley were targets of the investigation, and she was told that they were not targets at that time.[189] One can criticize the prosecutor for giving Baldwin a misleading response, as the Superior Court of Pennsylvania did,[190] and one can criticize Baldwin for not inquiring further and seeking more definitive assurance that Schultz and Curley were not potential targets.[191] The Supreme Court of Pennsylvania, however, focused *only* on Baldwin and not on the misleading conduct of the prosecutors. In doing so, the court seems to

185 *See* 42 PA. CONS. STAT. § 4549 (2020) (describing grand jury procedures in Pennsylvania); Commonwealth v. Columbia Inv. Corp., 325 A.2d 289, 295-96 (Pa. 1974) (declining to extend *Miranda* warnings to a grand jury witnesses).

186 *See* Office of Disciplinary Counsel v. Baldwin, 2020 Pa. LEXIS 1080, at * 50-51 (Pa. 2020). *See also* Baldwin Hearing Committee Report, *supra* note 101, at 41 (concluding that, based upon the information then reasonably available to Baldwin and her reasonable investigation, she had reasonably concluded that the interests of Penn State University and the senior officials were consistent, she properly informed the individual officials of those circumstances, and they effectively consented to being jointly represented with the University).

187 *See Baldwin*, 2020 Pa. LEXIS 1080, at *45.

188 In the regard, the Baldwin Supreme Court Opinion provides strong additional support for the recommendation made by this author, after the *Schultz* Superior Court decision, that grand jury "target warnings" should be made mandatory in Pennsylvania. Cole, *Multiple Representation Meltdown*, *supra* note 6, at 629-633.

189 *See* Commonwealth v. Schultz, 133 A.3d 294, 301-02 (Pa. Super. Ct. 2016).

190 *See id.* at 328.

191 *See Schultz*, 133 A.3d at 302 ("Ms. Baldwin set forth, [the prosecutor] said, no, that they weren't targets but I don't know.").

have placed the blame for the perjury trap solely on Baldwin, and admonished her for not thoroughly informing her clients of the scope of her representation. This leaves Pennsylvania defense lawyers in a perilous position if both their client and the prosecutors investigating their client mislead them about key underlying facts relevant to the grand jury investigation.

What can the careful defense lawyer do to avoid the fate that befell Baldwin in the Penn State Three case? One relatively easy answer is to demand that prosecutors provide a written assurance that a witness is not a target or subject of the grand jury's investigation. Although prosecutors obviously should never knowingly mislead defense counsel, the criminal investigative process is intensely adversarial, and a prosecutor may be tempted to cross the line and make an oral statement they would not make in writing. In addition to the psychic discipline that results from putting a statement in writing, in most prosecutor's offices written communications by prosecutors will be reviewed by superiors as a standard matter of office procedure. This review process should prevent knowing misrepresentations in written communications by line prosecutors.

In light of the Supreme Court of Pennsylvania's imposition of a duty of independent investigation on lawyers representing persons they believe are witnesses in a grand jury investigation,[192] the most prudent course of action may be, especially if a defense lawyer cannot obtain a definitive and unambiguous written assurance that their client is not a target or subject of the grand jury investigation, to advise their client to assert the Fifth Amendment privilege against self-incrimination and refuse to provide testimony without a grant of immunity from prosecution.[193] Experienced white collar criminal defense lawyers almost always advise their clients to assert the Fifth Amendment privilege and refuse to testify without a grant of immunity.[194] If a witness is not a potential target or subject of an investigation, then a prosecutor has no reason to deny the request for

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192 *See Baldwin*, 2020 Pa. LEXIS 1080, at *45.

193 *See generally* Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After* United States v. Hubbell*—New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 176-80 (2002) (discussing the use of immunity grants to compel testimony from witnesses and distinguishing "transactional" immunity from "use and derivative use" immunity).

194 *See, e.g.*, Brown & Levin, *supra* note 180, at 3 ("Without any grand jury testimony, there obviously cannot be any perjury.").

immunity.[195] If a prosecutor refuses to give a witness immunity despite the discretion to do so,[196] then defense counsel should advise the witness to invoke the Fifth Amendment privilege against self-incrimination and refuse to testify. In short, the *Baldwin* case reinforces, in a notably compelling fashion, the conventional wisdom of experienced criminal defense lawyers that they should, absent exceptional circumstances, advise clients to assert the Fifth Amendment privilege if the prosecutors will not grant the client immunity from prosecution in exchange for their grand jury testimony.

What lessons does the Penn State Three case hold for prosecutors? First and foremost, the case teaches prosecutors that attempting to set a perjury trap for a grand jury witness can backfire, with disastrous adverse consequences for the prosecutors. Two senior prosecutors in the Pennsylvania OAG were publicly rebuked by the Superior Court of Pennsylvania for their conduct in that case,[197] and an experienced senior prosecutor was excoriated by the Supreme Court of Pennsylvania and suspended from the practice of law.[198] Obviously, this outcome demonstrates that prosecutors must exercise utmost care and good judgment when employing grand jury investigative power.

It is not unusual for aggressive prosecutors to use so-called "process offenses," like perjury or false statements charges against witnesses in criminal and regulatory investigations,[199] even if the witness is not charged with substantive offenses arising out of the investigation.[200] Although the use of process offenses has been criticized, it is a legitimate tool in combating criminal conduct, such as perjury and obstruction of justice. Still, the Penn State Three case shows that

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195 In the federal system, prosecutors, not judges, decide whether a witness will be granted immunity. The federal immunity statute for court and grand jury proceedings provides that a federal judge "shall issue" an immunity order upon a properly submitted application by federal prosecutors. *See* 18 U.S.C. § 6003(a) (2020).

196 *See id.*

197 *See* Commonwealth v. Schultz, 133 A.3d 294, 302 n.8, 306 n.14 (Pa. Super. Ct. 2016).

198 *See* Office of Disciplinary Counsel v. Fina, 2020 Pa. LEXIS 1056, at *12 (Pa. 2020).

199 See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1442-46 (2009) (discussing how "process crimes" are utilized by prosecutors are pretextual charges for underlying criminal conduct).

200 For example, Special Counsel Robert Mueller charged Donald Trump advisor Roger Stone with false statements, obstruction of official proceedings, and witness tampering in connection with congressional investigations of the Trump campaign and Russian interference in the 2016 presidential election. *See* Indictment, United States v. Stone, 394 F. Supp. 3d 1 (D.D.C. Jan. 24, 2019). The charges against Stone were "process offenses" relating to his responses to congressional investigations.

prosecutors should exercise great caution and use those tools only when the conduct of a witness merits prosecution—they should not manipulate the process in hopes of entrapping a witness. Most important, if prosecutors have a case in which they suspect a witness may provide false testimony, they should be scrupulously candid and honest with both the court and defense counsel to avoid later charges that they abused their power and engaged in misleading and unethical conduct. This is the point that is most starkly illustrated by the Penn State Three case. The prosecutorial misconduct that was criticized by the Superior Court of Pennsylvania and was the subject of bar disciplinary proceedings against Fina was not the decision to subpoena Curley, Schultz, and Spanier to appear before the grand jury—it was the misleading response of the prosecutor to Baldwin and the misrepresentations Fina made to the supervising judge that led to public rebuke and disciplinary proceedings.

The principal lesson for prosecutors from the Penn State Three case is to avoid the temptation to push too hard and in so doing shade the truth or make misleading statements to courts or defense lawyers. If prosecutors fall prey to that temptation, the Penn State Three case shows that it is the prosecutors, not the witness, who will be caught in the perjury trap.

CONCLUSION

The Penn State Three case is in every way a tragic tale. The horrible crimes of Jerry Sandusky are of course by far the greatest tragedy. The legal problems that later befell the three senior Penn State administrators, the University's general counsel, and the Pennsylvania OAG prosecutors pale in significance when compared to the terrible harm suffered by Sandusky's victims. For defense lawyers and prosecutors, however, important lessons can be learned from the mistakes made during the investigation of Sandusky's crimes. A respected former justice of the Supreme Court of Pennsylvania who was serving as Penn State's general counsel suffered significant reputational injury and was the subject of state bar disciplinary proceedings resulting in a public reprimand. Experienced and respected prosecutors were publicly criticized by the Superior Court of Pennsylvania, and one of the prosecutors was also the subject of public bar disciplinary proceedings and was suspended from the practice of law. This Article seeks to caution defense lawyers and prosecutors about the risks that are

inherent in the criminal investigative process and to provide lessons on how to avoid the serious adverse consequences suffered by lawyers on both sides of the Penn State Three case.