IN THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 166 DB 2017
v.	:	
FRANK G. FINA, Respondent	:	Attorney Registration Number 71711

BRIEF OF *AMICUS CURIAE*, OFFICE OF ATTORNEY GENERAL

This disciplinary proceeding involves significant prosecutions conducted by the Office of Attorney General against a serial child sex abuser and officials who endangered children by failing to act. Because the respondent's alleged misconduct occurred within the scope of his employment in relation to those prosecutions, the Office has an independent interest and perspective relevant to the issues before the Hearing Committee, and respectfully submits this *amicus curiae* brief.

I. BACKGROUND

On January 10, 2018, the Office of Disciplinary Counsel filed a Petition for Discipline asserting that the respondent allegedly violated the Pennsylvania Rules of Professional Conduct at a time when he held the position of Chief Deputy Attorney General in the Criminal Law Division, Criminal Prosecutions Section, of the Pennsylvania Office of Attorney General. Specifically, respondent allegedly violated Rule 3.10 by not properly obtaining prior judicial approval before subpoenaing an attorney to appear before a grand jury. The matter has been assigned to a Hearing Committee, and disciplinary counsel seeks a recommendation by the Committee to impose discipline.

Now before the Hearing Committee are the Petition for Discipline, respondent's Motion to Dismiss, respondent's Supplemental Motion to Dismiss, and disciplinary counsel's Motion in Limine. The conduct alleged to support discipline occurred in the course of Office prosecutions for serious acts of child sex abuse and endangering the welfare of children. The Office of Attorney General therefore has an interest in the proceeding, may be affected by its outcome, and believes that its viewpoint may assist the Committee in addressing the petition. The Office respectfully submits this Brief of *Amicus Curiae*.[1]

II. THE ALLEGATIONS

As the Petition for Discipline states, in 2009 the Office of Attorney General began an investigation into allegations that former assistant football coach Gerald A. Sandusky, of the Penn State University, had sexually assaulted children over an extended period of time. The investigation was conducted through a grand jury, which learned of incidents in 1998 and 2001 on the Penn State campus. Respondent supervised the grand jury investigation from 2009 through 2012, and conducted an examination before the grand jury of Cynthia A. Baldwin, Esquire, a former justice of the Pennsylvania Supreme Court and later an employee of Penn State.

In 2011, Athletic Director Timothy M. Curley, retired Senior Vice President Gary Charles Schultz, and President Graham B. Spanier testified before the grand jury. From approximately February 15, 2010, to June 30, 2012, Justice Baldwin was Vice President and General Counsel for Penn State. The petition alleges that Justice Baldwin conferred with Curley, Schultz, and Spanier

[1] Aside from his participation in this and other high-profile prosecutions conducted by the Office of Attorney General, the respondent has been the subject of considerable negative publicity concerning personal conduct exposed by former Attorney General Kathleen Kane. That personal conduct is not at issue in this proceeding. While the relationship between respondent and Kane is, as discussed below, relevant to one of the legal questions raised by disciplinary counsel here, the petition does not assert the conduct itself as a basis for professional discipline. This brief does not defend or address that conduct.

concerning their knowledge of Sandusky's activities involving sexual misconduct with minors, as well as their individual and Penn State's responses to that activity. She also allegedly conferred with the three administrators with respect to their responses to the investigation and accompanied them to interviews with prosecutors and during their grand jury testimony.

During the grand jury investigation, evidence was presented showing that Sandusky drove a boy to the Penn State campus in 1998, placing his hand on the boy's thigh on multiple occasions. While at Penn State, Sandusky wrestled with the boy, then instructed him to shower. While showering, Sandusky beckoned the boy closer to himself, grabbed the boy around the waist and lifted him into the air. Sandusky also washed the boy's back and bear-hugged the boy from behind. The boy's mother reported the incident to University Police, who investigated. Sandusky admitted the conduct but no charges were filed at the time.

In 2001, an assistant football coach witnessed Sandusky commit a sexual assault on a minor in a shower on the Penn State campus. The assistant reported the incident to the head coach, who in turn reported the incident to Curley. Within two weeks, the assistant coach met with Curley and Schultz. The assistant testified before the grand jury that he told Curley and Schultz that he believed he saw Sandusky having anal sex with the boy.

In November 2011 and based on these incidents and other evidence, Sandusky was charged with numerous offenses relating to the sexual abuse of children.

Meanwhile, on January 12, 2011, Curley and Schultz testified before the grand jury; Spanier testified on April 13, 2011. The three men were later charged with perjury for lying before the grand jury, failure to report suspected child abuse, endangering the welfare of children, obstructing the administration of law or other governmental function, and criminal conspiracy.

In 2012, Justice Baldwin left her employment as Penn State's Chief Counsel and Penn State engaged other counsel for purposes of the investigation. The attorney general's office spoke to Penn State's new counsel and eventually to Justice Baldwin in the context of a proffer, with the prospect of Justice Baldwin testifying before the Grand Jury. Before Justice Baldwin testified, defense counsel for Curley and Schultz wrote letters to the attorney general's office and the grand jury supervising judge, claiming attorney-client privilege between their clients and Justice Baldwin.

On October 22, 2012, counsel for Justice Baldwin, counsel for Penn State, and respondent met with the supervising judge regarding Curley and Schultz's claims of privilege and the impact of those claims on Justice Baldwin's anticipated testimony before the grand jury. The Commonwealth expressed the view that the administrators did not have a proper attorney-client privilege with respect to the areas as to which Justice Baldwin would testify. The petition alleges that, during the conference, the Commonwealth expressly declined to have the supervising judge rule on whether Justice Baldwin represented solely Penn State or if she also represented the three administrators individually.

The supervising judge permitted the Commonwealth to call Justice Baldwin before the grand jury to be questioned about her role, and the role of the administrators, with respect to Penn State's responses to various court orders and subpoenas. The supervising judge added that no motions had been filed and that he would address the issue of attorney-client privilege only if proper motions were filed.

The petition alleges that the Commonwealth conceded that the letters written by counsel for Curley and Schultz were sufficient to constitute assertion of the attorney-client privilege. The supervising judge stated that he acknowledged the letters but would not take any action pending

the filing of a proper motion. The petition alleges that the Commonwealth did not push the supervising judge to resolve the issue immediately, and that the Commonwealth allegedly did not gain prior judicial approval for the examination of Justice Baldwin as required by Pennsylvania Rule of Professional Conduct 3.10.

The petition alleges that the Commonwealth asked questions calculated to elicit confidential communications between Justice Baldwin and the administrators as well as confidential information about the administrators. This questioning allegedly turned Justice Baldwin into a witness against Curley, Schultz, and Spanier, and was allegedly contrary to the representations made by the Commonwealth to the Supervising Judge.

Several years later, in opinions issued January 22, 2016, the Superior Court of Pennsylvania held that there was an attorney-client privilege between Justice Baldwin and the three Penn State administrators and that Justice Baldwin was incompetent to testify as to communications between her and those clients. The opinion also concluded that Penn State had not waived any privilege regarding Justice Baldwin's communications with the administrators as agents of the corporation. Finally, the opinion concluded that respondent allegedly acted improperly by failing to seek court approval on the privilege issue prior to Justice Baldwin's testimony. The opinion quashed the charges of perjury, obstructing the administration of law, and conspiracy against Schultz and Spanier, and quashed the charges of obstructing the administration of law and conspiracy against Curley. By the expiration of the 30-day period for seeking review of the Superior Court ruling, no petition for allowance of appeal was filed.

The petition concludes by asserting that respondent violated Rule 3.10 of the Rules of Professional Conduct. No other disciplinary rule or enforcement rule is alleged to have been violated.

III. SOME CLARIFICATIONS OF FACT

As noted above, the Office of Attorney General was directly involved in the events underlying the Petition for Discipline, and therefore has independent knowledge of the existing record. Certain important recitations in the petition require clarification. These clarifications refer only to matters of public record.

First, the petition asserts that Curley, Schultz, and Spanier allegedly did not have any counsel during the course of the grand jury investigation other than Justice Baldwin. The petition thereby suggests that Justice Baldwin knew their interests were adverse to the university, and that a conflict existed. Actually, when charges were filed, each of the administrators retained private counsel. The grand jury investigation continued after the filing of charges, both as to Sandusky and as to the administrators. Justice Baldwin never represented the administrators during the criminal proceedings and did not represent them at the time she testified before the grand jury. Moreover, as Justice Baldwin has testified, during her tenure as general counsel the administrators never admitted to her that they in fact knew about the Sandusky reports and covered them up. Such an admission would have been a confession to the crimes for which all three were later charged, and which all three continued to deny until their eventual convictions. As a result, the administrators were merely witnesses for the university when she represented it, and Justice Baldwin had no reason to believe they required separate counsel.

Next, the petition alleges that the Commonwealth conceded that the administrators properly presented a claim of attorney/client privilege at the grand jury stage. The issue was whether letters sent by the administrators were adequate, or whether instead formal motions were required. Citing the transcript of a proceeding before the supervising judge, the petition asserts

that the Commonwealth "acknowledged that Schultz and Curley's letters were 'sufficient to assert the [attorney-client] privilege.' (Feudale Tr. at 13)." Actually, the transcript indicates the opposite:

> [THE COMMONWEALTH]: Yes, Your Honor; and I think that I probably should put on the record that the issuance of letters by counsel for Mr. Schultz and Mr. Curley from the Commonwealth's perspective and our understanding of the case that in and of itself *is <u>not</u> sufficient – excuse me – sufficient to assert the privilege.*
>
> It certainly could be interpreted as one of the prongs of evidence necessary to prove the privilege *but just the letters themselves do not establish this privilege.*
>
> *I believe that a motion and some hearing and evidence must be provided for the privilege to be found in this case.*

(Notes of Testimony dated October 22, 2012, at 13) (emphasis supplied).

While the first italicized passage, if read completely out of context, might be seen as ambiguous on this point, the actual meaning is made clear from the rest of the transcript. The Commonwealth began by stating explicitly that the "issuance of letters" was not, "in and of itself," sufficient, and he concluded by stating explicitly that "just the letters themselves do not establish the privilege," and that a motion would be necessary. The words "excuse me" in the first sentence clearly were not intended to reverse the meaning of everything else he said, but apparently indicated no more than a cough or clearing of the throat. The supervising judge clearly understood the Commonwealth's position, and in any event made his own determination that the letters were not sufficient, and that he therefore could not finally resolve the privilege claim unless and until formal motions were filed.

Further, the petition states that Penn State's counsel indicated the university was not waiving the attorney-client privilege with respect to communications between Justice Baldwin, Curley, and Schultz. The petition asserts that this statement was made by "Mustokoff, on behalf of Penn State," Petition for Discipline at 12 ¶ 29.c, citing the transcript of the conference at 8-9.

The actual speaker of these words, however, was counsel for Justice Baldwin. The transcript shows that both the Commonwealth and counsel for Penn State acknowledged that any waiver by Penn State would not waive the privilege, if it existed, for Curley and Schultz. Transcript at 4-6

Additionally, the petition asserts that the Commonwealth "failed to gain 'prior judicial approval' for OAG's examination of Baldwin as required by RPC 3.10." Petition at 12 ¶ 30. Actually, as recited in the petition itself, the supervising judge *did* approve the subpoena and calling of Justice Baldwin to testify before the grand jury. *See id.* at 11 ¶ 27. While allegations in the petition appear to suggest a concern with the substance of some of the questions addressed to the justice, the petition does not identify such questioning as the violation of the rules on which discipline is sought, and it is clear that the Commonwealth did obtain "prior judicial approval."

Finally, the petition asserts that respondent supervised the investigation, and that the Office of Attorney General concluded that Sandusky and the administrators committed criminal offenses. Actually, while respondent did supervise, he was only one of many Office attorneys, both above and below him, who worked on this important case, and who continued to prosecute it after he left. Moreover, consistent with 42 Pa.C.S. § 4551(a), it was the grand jury that returned presentments recommending that the administrators be charged after finding a *prima facie* case. Pursuant to the same statutory authority, the supervising judge reviewed and approved the presentments. Based on 42 Pa.C.S. § 4551(d) and 71 P.S. § 732-205(a)(7), the Office then filed the charges and prosecuted the cases. While the Office certainly agreed with the grand jury, it was not simply the Office's conclusion that Curley, Schultz, and Spanier committed crimes that led to the charges. In any event, respondent was not involved with the prosecution of the administrators after the grand jury investigation, as he left the Office in January 2013.

IV. THE ALLEGED VIOLATION OF RULE 3.10

The Office of Attorney General offers these observations on the alleged disciplinary violation.

Disciplinary counsel asserts one legal ground as the basis for discipline against respondent: that he allegedly did not obtain prior judicial approval prior to issuing a subpoena to Justice Baldwin as required by Rule 3.10. *See* Petition for Discipline at 39-41 ¶¶ 40-42. Rule 3.10 and its accompanying comment provide in full:

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

Because the supervising judge clearly did give prior judicial approval, and because all the factors noted in the comment were met, it is unclear how a basis exists for the finding of a disciplinary violation against the Commonwealth attorney who relied on the judge's ruling.

First, the record shows that the judge, with full knowledge of the relevant considerations, gave prior approval for Justice Baldwin's testimony. As noted above and discussed at length in the Petition for Discipline, counsel for the Commonwealth met with the supervising judge, new

counsel for Penn State, and counsel for Justice Baldwin. Petition for Discipline at 8-12 ¶¶ 21-30.[2] At that time, the Commonwealth made clear to the court that it intended to call Justice Baldwin to testify before the grand jury regarding Penn State's compliance with subpoenas, court orders, and other investigative efforts relating to Sandusky (N.T. 10/22/12 at 4). The Commonwealth recognized that Penn State's waiver of the attorney-client privilege was limited to its own representation by Justice Baldwin and that it did not cover any privilege on the part of Curley and Schultz. The Commonwealth made clear, however, that it did not believe there was an attorney-client relationship on the part of the administrators. *Id.* at 4-5. Penn State's waiver included "the issues of Gerald Sandusky, his relationship with the University, any conduct of his that was known by the University, and it extended to the contacts between the university and this grand jury and investigators." *Id.* at 4.

Thus, the judge held the appropriate hearing, although, because the matter was a grand jury investigation, he did so with "due regard for the need for appropriate secrecy," as the comment to Rule 3.10 specifically contemplates. At the hearing the judge was notified that Justice Baldwin was going to be subpoenaed to testify before the grand jury; he was apprised of the circumstances and subject of the testimony; and he was made aware that other persons were asserting a privilege as to communications with Justice Baldwin. The supervising judge then made a determination that the testimony could proceed, *i.e.*, provided prior judicial approval for the subpoena.

That determination, moreover, was consistent with all the factors laid out in the comment to Rule 3.10. Primary among those factors is whether the information sought is protected by the

[2] The charged violation appears to be premised on the idea that respondent should have taken some action to require the supervising judge to do more to prevent the alleged violation of the attorney-client privilege. Several other lawyers, however, had as much or more knowledge of the alleged intrusion on the privilege, including the supervising judge, counsel for Penn State, and counsel for Justice Baldwin. There is no indication that any of these lawyers, other than respondent and Justice Baldwin, have been the subject of disciplinary proceedings arising from these events. Moreover, counsel for the administrators have not been disciplined for failing to file proper motions as opposed to attempting to litigate by correspondence or, in the case of counsel for Spanier, taking no action at all.

attorney/client privilege; and in this case that question turns primarily on the crime/fraud exception. Although the Superior Court later opined that there was an attorney/client relationship between the administrators and Justice Baldwin, the court specifically declined to address crime/fraud. *See Commonwealth v. Curley*, 131 A.3d 994, 1001 n.12 (Pa. Super. 2016); *Commonwealth v. Schultz*, 133 A.3d 294, 306 n.13 (Pa. Super. 2016); *Commonwealth v. Spanier*, 132 A.3d 481, 487 n.10 (Pa. Super. 2016).[3] Regardless of the Superior Court's silence, however, the record controls. The transcript of Justice Baldwin's testimony showed that the three men lied to her and to the grand jury repeatedly, and did so to further their cover-up of the failure to report known sexual abuse of children. Even assuming that the Superior Court was correct in finding an attorney/client relationship, therefore, the crime/fraud exception plainly applied and the testimony was not barred by privilege.

The judge's approval of the testimony was also consistent with the remaining factors in the Rule 3.10 comment. The evidence plainly was relevant to the investigation of Penn State's handling of reports of Sandusky's criminal conduct. Justice Baldwin did not object that responding to the subpoena was unreasonable or oppressive, and the primary purpose of the subpoena was not to harass Baldwin or the administrators. And, in view of the repeated lies told by the administrators to Justice Baldwin, to investigators, and to the grand jury, there was no other feasible alternative to obtain the information sought via the subpoena. Thus, the prior judicial approval to issue the subpoena was valid and there was no Rule 3.10 violation.[4]

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[3] Notably, the court did not determine that the Commonwealth had waived the crime/fraud issue, and plainly there was no waiver. The administrators sent letters, but chose not to file any motion before the supervising judge, and the judge made clear that motions would be required. When those motions were later filed before trial, the Commonwealth fully responded to them, and the trial judge made his own determination about the privilege claim.

[4] Perhaps recognizing that no Rule 3.10 violation occurred, the Petition for Discipline suggests by allegation that respondent committed other misconduct by asking questions outside the proper scope of inquiry. Disciplinary counsel, however, has chosen not to charge respondent with violating a court order or engaging in any form of misconduct other than failing to obtain prior leave of court before issuing a subpoena. The record shows that there *was* prior

But even if the judge's approval had in any way been in error, that would be no basis for professional discipline against the Commonwealth attorney who appeared before him. Rule 3.10 calls upon the Commonwealth to invoke a judicial procedure before compelling an attorney's testimony; it does not purport to hold the Commonwealth's representative individually liable if the procedure is invoked but the judge is later deemed to have erred. In this case not just one but two different common pleas judges considered the privilege issue; neither ever suggested that there was any impropriety in this matter by the prosecutor. The Commonwealth simply raised and discussed the issue with the supervising judge, who exercised his duty to supervise. The defendants then raised the issue with the trial judge, who also exercised his duty to decide. It is true that, years later, a higher court disagreed with those rulings. Such disagreement is always a possibility in our system of appellate review. When it happens, there may be a remand for further proceedings, or a reversal for a new trial, or even, as here, a dismissal of charges. It is unclear, however, why the lower court's error in approving the testimony would constitute a violation of Rule 3.10 by an attorney who relied on that judicial determination at the time it was made.

V. THE ASSERTION OF COLLATERAL ESTOPPEL

Disciplinary counsel asserts that the Hearing Committee cannot consider any of the above issues, because the respondent is constrained by the collateral estoppel doctrine. Counsel has filed a motion in limine contending that the Superior Court's January 2016 decision has already resolved the only relevant issues, that the decision became final when then-Attorney General Kathleen Kane chose not to seek further review, and that the decision therefore bars respondent, who left the Office in January 2013, from "relitigating" his alleged disciplinary violation. The central premise

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judicial approval. In any case, there would have been no merit to a charge that the Commonwealth's questioning improperly intruded into the administrators' attorney/client privilege, given the applicability of the crime/fraud exception.

of the motion is that respondent is in "privity" with Kane, who is awaiting imprisonment on her conviction for crimes she committed trying to harm respondent's reputation. The Office of Attorney General offers some observations on that point, as well as other factors relevant to the collateral estoppel claim, which seeks to stretch the significance of the Superior Court opinion beyond proper limits.

The doctrine of collateral estoppel may be applied either defensively or "offensively" in attorney disciplinary proceedings. *See Office of Disciplinary Counsel v. Duffield*, 644 A.2d 1186, 1189 (Pa. 1994) (defensive); *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 51 (Pa. 2005) (offensive).

> The doctrine of collateral estoppel precludes relitigation of an issue determined in a previous action if: (1) the issue decided in the prior case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment. *Duffield,* 644 A.2d at 1189.

Kiesewetter at 50-51. Here disciplinary counsel seeks to use the doctrine in an offensive manner, on the ground that respondent worked for the Office at the time of the alleged Rule 3.10 violation, and is therefore bound by the subsequent litigation of the Justice Baldwin issue conducted under the Kane administration.

From the vantage point of the Office of Attorney General, however, there is plainly no privity in this case. There is some surface appeal to the notion that employees of the Office share the same litigation interests, and at times that will be the case. It is not the case in the very atypical circumstances presented here.

Even a casual observer of Pennsylvania politics in recent years would be aware of the considerable animus between respondent and the Kane administration.[5] Even before her election, during the 2012 campaign for Attorney General, Kane publicly and regularly criticized the Sandusky investigation, which respondent had led and which led in turn to the testimony by Justice Baldwin that is the subject of the present disciplinary proceeding. Respondent resigned from the Office shortly after Kane took over. Kane later accused respondent of revealing that she had dropped an investigation of numerous Pennsylvania legislators. Kane was eventually convicted of offenses related to her disclosure of confidential grand jury materials for the purpose of embarrassing respondent. *See Commonwealth v. Kane*, 2018 WL 2376305 (Pa. Super. 2018).

The Superior Court litigation on which disciplinary counsel relies occurred long after respondent's departure from the Office, but before Kane's. Rather obviously, respondent's interest in the litigation would be in defending his actions before the grand jury. While the Office's interest might normally have been the same, that was not the case under the Kane administration; instead, Kane regularly criticized respondent in public and private. Indeed, by that point, Kane had been charged by the Montgomery County District Attorney's Office for her actions against respondent, and the Supreme Court of Pennsylvania had issued an emergency temporary suspension of Kane's license to practice law pursuant to Pa.R.D.E. 208(f). Thus, to the extent the Superior Court's opinion could be read as criticism of respondent's actions, Kane would have been motivated to abandon any challenge to the decision.

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[5] *See, e.g.*, Amber Philips, "How racy emails and a grand jury leak brought down rising political star Kathleen Kane," *The Washington Post*, August 16, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/08/16/how-racy-emails-and-a-grand-jury-leak-brought-down-a-political-rising-star/?noredirect=on&utm_term=.7801dde77428 (last visited May 7, 2018); Charles Thompson, "In Kathleen Kane v. Frank Fina, bad blood, porn and leaks make for mutual assured destruction," *PennLive.com*, August 26, 2015, http://www.pennlive.com/midstate/index.ssf/2015/08/post_787.html (last visited May 7, 2018).

In the end, that is what happened – in opposition to the recommendation of the Office's top criminal lawyers, and in contravention of a claim of privity between the Kane administration and respondent. The case had been vetted by the First Deputy Attorney General, the Chief Deputy Attorney General in charge of the Criminal Prosecutions Section, and the Chief Deputy Attorney General in charge of the Special Litigation and the Appeals and Legal Services Sections. These prosecutors with lengthy experience in both trial and appellate litigation all recommended without hesitation that the Office should file a petition for allowance of appeal on behalf of the Commonwealth, seeking to challenge the Superior Court opinion before the Supreme Court of Pennsylvania. A petition was drafted and readied for filing.

At the deadline, however, and without notice to the assigned attorneys, the Kane administration announced publicly that it would not challenge the Superior Court ruling. That announcement was made by a senior official hired by Kane, after her suspension from the bar, to act as her proxy. The validity of that act, while perhaps questionable, is ultimately not relevant to the privity question. Privity required alignment of interests between the subject of the litigation – for present purposes, respondent – and the person controlling the litigation – the official who was under criminal indictment for her actions against respondent. To be sure, these are unusual and uncomfortable circumstances, which hopefully will never arise again. In the view of the Office of Attorney General, however, they cannot support a finding of privity in this case.

Other factors also appear to defeat collateral estoppel. Application of the doctrine requires that the issue in the prior proceeding – whether common pleas court erred in allowing Justice Baldwin's testimony – be identical to the issue in the current proceeding – whether the Commonwealth attorney violated Rule 3.10 by relying on the common pleas court ruling. As disciplinary counsel necessarily acknowledges, the only issue adjudicated by the Superior Court

was whether an attorney-client relationship existed between Justice Baldwin and the administrators. A violation of Rule 3.10, however, could be established only if a lawyer failed to seek prior judicial approval, and only if the attorney-client privilege applied to the particular circumstances – that is, if there was no exception such as crime/fraud.[6]

The crime/fraud issue is clearly presented here, but has not yet been adjudicated. The evidence showed that Curley, Schultz, and Spanier repeatedly lied to Justice Baldwin and to the grand jury in an effort to cover for their failure to report Sandusky's conduct to law enforcement or to take meaningful action to stop that conduct with respect to children on Penn State's campus. Those efforts to continue their criminal activity fell squarely within the crime/fraud exception. The Superior Court failed to address the exception, simply noting that the Commonwealth had not raised the issue during the conference with the supervising judge.[7] Because it is necessary to resolve the complete issue, *i.e.* whether the communications in question were protected by the attorney-client privilege, and the existence of an attorney-client relationship is only a part of that question, it cannot be said that the issues are identical.

Similarly, collateral estoppel also requires a final adjudication on the merits. Because the crime/fraud exception has not yet been resolved, there was no final adjudication on the merits. Nor could there have been, as the Superior Court, without explanation, limited its review to certain

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[6] *See* Pa. R. Prof. Conduct 3.3(b) (relating to exception to confidentiality based on requirement of candor toward the tribunal); *In re Investigating Grand Jury of Philadelphia County*, 593 A.2d 402, 406-407 (Pa. 1991) (crime-fraud exception excludes from privilege any communications between attorney and client made for purpose of committing crime or fraud); *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215-218 (Pa. 2014) (discussing competing interests involved).

[7] In fact the Commonwealth did address the exception at the relevant time before the trial court, after the administrators filed pretrial motions concerning their privilege claim, as the supervising judge had advised. *See* Commonwealth v. Curley, No. CP-22-CR-3615-2013, 2015 WL 13216773 at *21 (C.P. Dauphin January 14, 2015) (noting that parties disputed applicability of crime-fraud exception but not reaching the issue); Commonwealth's Memorandum of Law Relating to Pending Pretrial Motions filed December 5, 2013, at 8-10 (filed in each administrator's case in the Dauphin County Court of Common Pleas and arguing applicability of crime-fraud exception).

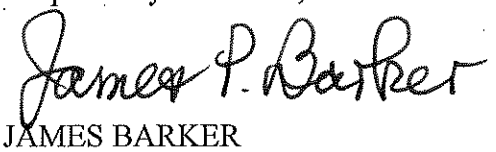
proceedings before the supervising judge and the grand jury. In fact there were numerous other hearings during the course of the prosecution that were directly relevant to the question of whether an attorney/client relationship existed, and if so whether the crime/fraud exception applied. Some of these proceedings resulted in fact findings that the Superior Court would have had no power to disregard, because appellate courts do not act as factfinders. Unless and until these other proceedings are accounted for, there could have been no final adjudication of the dispositive issues.

Finally, application of the collateral estoppel doctrine also requires a full and fair opportunity to litigate the issues in question. Because the Superior Court failed to consider either the complete factual record or the crucial legal issue, there has not been a full and fair opportunity. Even more importantly, as noted above, the Commonwealth properly relied on the actions of the judge whose job was to supervise the proceedings in which Justice Baldwin appeared. That judge was fully informed of all the circumstances relevant to an analysis under Rule 3.10, and approved Justice Baldwin's testimony. By the time the issue came up on appeal, respondent had been gone for years, and the official in charge of the attorney general's office was under criminal indictment for her actions against him. In such a situation interests are obviously not aligned, and the individual attorney has no full and fair opportunity to defend himself from the decision that is subsequently asserted against him for collateral estoppel purposes. The Superior Court decision cannot be given collateral estoppel effect under such circumstances.

Finally, the Office of Attorney General reiterates that its submission here is not about defending the general character of a former employee of the Office, nor is it about attacking a former attorney general. Rather, the Office offers its views because this proceeding overlaps with significant criminal prosecutions, implicates the role of government attorneys, and involves the proper reach of appellate decisions in which the Office participates.

WHEREFORE, the Office of Attorney General respectfully submits this *amicus curiae* brief for the assistance of the Hearing Committee.

Respectfully submitted,



JAMES BARKER
Chief Deputy Attorney General
Appeals and Legal Services Section
Criminal Division
RONALD EISENBERG
Senior Appellate Counsel
Office of Attorney General

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

By: 

JAMES P. BARKER
Chief Deputy Attorney General
Attorney No. 67315
jbarker@attorneygeneral.gov

OFFICE OF ATTORNEY GENERAL
Criminal Law Division
Appeals and Legal Services Section
16th Floor—Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
(Fax) (717) 783-5431

Date: June 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing Brief of *Amicus Curiae*, Office of Attorney General, upon the person and in the manner indicated below:

Via U.S. First-Class Mail, Postage pre-paid:

Amelia C. Kittredge, Esquire
Office of Disciplinary Counsel
820 Adams Avenue, Suite 170
Trooper, PA 19403-2328
(610) 650-8210
(Counsel for Petitioner)

By: 

JAMES P. BARKER
Chief Deputy Attorney General
Attorney No. 67315
jbarker@attorneygeneral.gov

OFFICE OF ATTORNEY GENERAL
Criminal Law Division
Appeals and Legal Services Section
16th Floor—Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
(Fax) (717) 783-5431

Date: June 13, 2018