BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	
	:	No. 151 DB 2017
Petitioner,	:	
	:	Attorney Reg. No. 32119
v.	:	(Allegheny County)
	:	
CYNTHIA A. BALDWIN,	:	
	:	
Respondent.	:	

REPORT AND RECOMMENDATION OF THE HEARING COMMITTEE

PUBLIC VERSION

Respondent Cynthia A. Baldwin was charged with violating four rules of professional conduct all arising from her concurrent representation of the Pennsylvania State University ("PSU") and three of its employees[1] during the grand jury investigation of the Sandusky matter (the "Grand Jury") and her later testimony before that Grand Jury during the period between December 2010 and October 2012.[2]

The Office of Disciplinary Counsel ("ODC") charges that Respondent concurrently represented PSU and Timothy Curley, Gary Schultz and later Graham Spanier in proceedings

[1] Some discussions of these events have referred to these persons as the individual "Defendants". This nomenclature is misleading. As is explained below, the individual employees were not defendants when the events that underlie these charges of misconduct occurred; in fact, they were not even targets of the Grand Jury investigation. To use the term "Defendants" when evaluating the Respondent's interactions with them at the times relevant to these charges unfairly highlights what only hindsight can make apparent.

[2] Throughout these proceedings, Respondent's counsel have decried what they contend has been an inordinate delay in prosecuting these charges, and certainly this is true when measured from the dates of the events in question. We note, however, that the Superior Court decisions that quashed the indictments against these employees due to what it held to be in Respondent's ineffective representation of them were not delivered until January 22, 2016, and the OCD filed its Petition for Discipline on November 21, 2017, 20 months later. While we were advised of no reason for this additional delay and remind the ODC of its duty to proceed with both diligence and dispatch, we cannot hold that a delay of 20 months raises an equitable defense of laches.

before the Grand Jury without adequately informing these individuals that there was a current or potential conflict between their interests and the interests of PSU and that because these individuals were not adequately informed of this conflict, they could not have provided informed consent to her joint representation of them. Petition for Discipline ¶¶ 12, 19. ODC further asserts that Respondent failed to inform Mr. Paterno (whom it was never proven she represented in any capacity[3]), Mr. Curley or Mr. Schultz that it might be advisable for them to assert their right against self-incrimination pursuant to the Fifth Amendment. *Id. ¶ 10.* ODC alleges that she failed to resist the subpoena later issued to her by the Grand Jury and that in her testimony before the Grand Jury she wrongfully disclosed confidential communications Schultz, Curley and Spanier had with her. *Id. ¶¶* 31, 32, 35, 39.

The ODC Petition then recites the undisputed history that the three individuals were charged with perjury and related counts based on their Grand Jury testimony and that ultimately, all perjury-related charges against these three employees were dismissed by the Pennsylvania Superior Court because they "were effectively denied counsel for their testimony before the investigating Grand Jury" by virtue of Respondents' alleged conflict and because it was allegedly "improper that Respondent testified before the Investigating Grand Jury as to her conversations" with the Defendants. *Id.*, ¶¶ 31, 39. This conduct, ODC contends, constituted violations of Rules of Professional Conduct 1.1, 1.6(a), 1.7(a) and 8.4(d) for which it seeks discipline.

[3] Mr. Paterno, through Mr. Spanier, did authorize Respondent to accept service of the Grand Jury subpoena issued to him, but this does not require, nor alone create, an attorney-client relationship. Mr. Paterno's counsel later introduced himself to the Office of the Attorney General as replacing Ms. Baldwin as his counsel. *See* Petitioner's Ex X, 61/14-66/12. However, beyond this limited authority to accept service of a subpoena, and this self-serving contention by his counsel, no evidence was presented that Mr. Paterno engaged Respondent as his counsel, and we accordingly have no basis upon which to find that such a relationship ever existed much less that Respondent breached any duty arising from one.

ODC presented one expert witness and otherwise relied entirely upon the extensive record it submitted from the various proceedings that underlie these proceedings, to the admissibility of which, Respondent stipulated, excepting only the three Superior Court opinions to which she objected.

Respondent maintains and the Dauphin County Court of Common Pleas found – but which the Superior Court reversed – that she properly represented the PSU employees only in their capacities as such, that she properly informed them of the potential conflict in her representation of PSU and them in that capacity, and that the individual employees effectively waived any such conflict. As to her testimony before the Grand Jury, Respondent argues that she did not disclose any confidences and that in any event she was permitted to disclose the information even if confidential because any privilege was waived, the statements were part of an ongoing use of her representation in a crime or fraud and because she was in any event defending herself.

In reversing the Dauphin County Court of Common Pleas and quashing the indictments against the three employees, the Superior Court found that Respondent did not effectively limit her representation of the individual employees to a representation of them only in their representative capacity, that she failed to properly inform them of the conflict in her representation of them jointly with PSU, that the individuals were therefore denied effective assistance of counsel by virtue of this conflict in her joint representation, and that she improperly disclosed confidential client communications with them in her Grand Jury testimony.

While mindful of the prior judicial evaluations of the Respondent's professional conduct relating to these representations and giving them the weight that they are due, we painstakingly

examined the evidence of them presented by the ODC and stipulated to by the Respondent and make this report and recommendation based on that evidence.[4]

I. The Conflict and Competence Issues

Beyond, and logically before, determining whether there was a conflict in Respondent's representation of both PSU and the individual employees, this case requires that we determine the *nature* of her representation of those employees. They have contended that she was their individual counsel, without any limitation. In these proceedings, Respondent's counsel has insisted that she never represented the employees *individually* but only in their *capacity as employees* of PSU. This determination turns on the engagements made by the four possible clients involved and agreed to by the Respondent.

Once it is determined *how* she represented the employees, we must then determine whether that representation posed a conflict in her concurrent representation of PSU. Rule 1.7. Conflict of Interest: Current Clients, provides the ground rules for this determination:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involved a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> . . . .
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

[4] Even after the hearing in this matter, the ODC's contentions seem to the Committee to be largely without context. As we stated during that 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." We found this method of presentation to be far from helpful. To avoid presenting the Board and ultimately the Supreme Court with this same burden, we have endeavored to include in this report and recommendation all relevant testimony in the record regarding the pertinent issues upon which we make recommendation, verbatim and with full citation.

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent.

204 Pa. Code Rule 1.7.

To the extent that Respondent represented the individual employees in any capacity, it is elementary that Respondents' concurrent representation of PSU and the individual PSU employees created a significant risk under 1.7(a)(2) that her representation of them could be materially limited by her representation of PSU. This is nearly always the case when a corporate counsel also represents its employees, particularly in criminal proceedings. Corporations act almost exclusively through their employees, and when employee actions create criminal or civil exposure for the corporation, the corporation's interests frequently diverge from the employee's interests. Nevertheless, the employees' interest may align with their employers or the divergence between the two may be insignificant enough that an informed waiver will enable counsel to represent both the employer and its employees jointly. As counsel for Respondent stressed throughout these proceedings, Rule 1.13(c) of professional conduct expressly authorizes such a joint representation: "A lawyer representing an organization may also represent any of its directors, officers or employees, members, shareholders or other constituents, *subject to the provisions of Rule 1.7* . . . ." The proviso that any such joint representation must still comply with Rule 1.7 is, of course, the essence of this case.

If Respondent represented both the individual employees in some capacity and PSU concurrently, Rule 1.7 allowed Respondent to do so only if she reasonably believed that she was able to provide competent and diligent representation to each affected client and each client gave informed consent. In order for her determination that she could competently represent PSU and its employees to be reasonable, she must have understood whether their interests significantly

diverged, and even if no divergence of interests was immediately apparent, whether it was likely – given all the circumstances known or reasonably foreseeable at the time – the situation might change and a divergence of interests later develop. Similarly, for the individual employees to have provided informed consent to her representation of them and PSU concurrently, they must have understood the risks of such a joint representation and agreed to incur them. The evaluation of all of these issues is done *as of the time the engagement was made and performed* and is based upon the information available to her then, including the known and knowable circumstances involving the matters at issue and in large part the information provided to her by the employees at the time of her engagement; it is *not* determined on the basis of hindsight. *See generally* Rule 1.7, cmts. 2, 3.

The known circumstance as of December 28, 2010, the time the circumstances creating her engagement began, were that a Grand Jury had been empaneled to investigate the activities of Jerry Sandusky a former assistant football coach at PSU; that the Office of Attorney General ("OAG") had issued a document subpoena to PSU and subpoenas to testify at the Grand Jury proceedings to PSU Head Football Coach Joe Paterno, former PSU Senior Vice President for Finance and Business Gary Schultz and PSU Athletic Director Timothy Curley, individually, and that the three individuals were not then targets of the investigation. On that day, a representative of the OAG called Respondent as General Counsel of PSU and advised her of the four subpoenas. She then immediately advised Graham Spanier, President of PSU and her immediate supervisor, and they proceeded to advise the three subpoenaed employees of the subpoenas and to determine whether they would authorize her to accept service of the subpoenas for them. Later, Mr. Spanier was also summoned to an interview by the OAG and subpoenaed to testify before the Grand Jury, and Respondent represented him in both these matters in some now disputed capacity as well.

In determining the nature of Respondent's representation of these three individuals and whether those representations were in any way in breach of her professional duties, we reviewed a great deal of testimony from the Grand Jury proceedings and the three criminal prosecutions of the individual employees. After the three individual employees were indicted for committing perjury in their Grand Jury testimony, they each moved to dismiss their indictments alleging that they had been denied effect assistance of counsel during their Grand Jury testimony, due to Respondent's alleged conflict of interest in representing both PSU and them. The trial judge for these charges was the Honorable Todd A. Hoover, then-President Judge of Dauphin County Court of Common Pleas. Judge Hoover conducted in camera hearings on these motions, at which considerable testimony regarding the nature of these engagements was given. We turn now to reviewing and discussing the relevant portions of all this testimony.[5]

A. Schultz's Testimony

At the hearing before Judge Hoover on his motion to quash the criminal indictments against him, Mr. Schultz testified that Respondent called him at his home on December 28, 2010 and advised him that he would be subpoenaed to testify before the Grand Jury and asked him whether he would agree to allow her to accept the subpoena on his behalf, which he approved. They then met in person on January 5, 2011, in her office at PSU. He testified as follows regarding this meeting:

[CONFIDENTIAL TESTIMONY]

Com. v. Schultz, Nos. 5164 CR 2011 and 3616 CR 2013 (Pa. Com. Pl. Dauphin Co., Pa) (Transcript of in camera proceeding, Nov. 20, 2014)[hereinafter, "Schultz, Hoover Hearing"],

[5] Much of the testimony that we reviewed was given in sealed proceedings either before the Grand Jury or during in camera proceedings before Judge Hoover. Accordingly, we issue two versions of this report and recommendation: One that is complete, but confidential and exclusively provided to the parties and the Disciplinary Board; the other has confidential materials redacted and is provided to the public.

Petitioner's Ex X, 10/15-13/20.[6] Later in his testimony, Mr. Schultz explained that before Respondent said that the recollections of the three employees were consistent and not in conflict with the interests of PSU, he had had a discussion with her about those recollections and that she had also discussed Messrs. Paterno and Curley's recollections with them. *Id.* at 23/22-24/18.

In the Hoover Hearing, Mr. Schultz explained his understanding of the import of this conversation during cross examination:

[CONFIDENTIAL TESTIMONY]

Id. at 24/19-25/13.

In his testimony before Judge Hoover, Mr. Schultz went on to describe what occurred before his testimony to the Grand Jury:

[CONFIDENTIAL TESTIMONY]

Id. at 13/22-16/18.

He then described a pre-testimony interview he had with two Deputy Attorneys General:

[CONFIDENTIAL TESTIMONY]

Id. at 16/19-17/16.[7]

Mr. Schultz ultimately testified before the Grand Jury on January 12, 2011. Respondent accompanied him during his testimony. After being sworn, the examining lawyer, Deputy Attorney General Eshbach, asked him, "You are accompanied today by counsel, Cynthia Baldwin; is that correct?" To which he replied, "That is correct." No further discussion of his representation occurred, and Respondent said nothing regarding the issue. *Pa Thirtieth Statewide Investigating Grand Jury, In Re: Notice 29* (Transcript of Grand Jury Proceedings Jan. 12, 2011, 12:02 p.m.)[hereinafter, "Schultz Grand Jury Testimony"], Petitioner's Ex G, 3/14-16.

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[6] Citations to transcripts are to page and line references, separated by a slash "/".

[7] Mr. Schultz filed an affidavit in support of the motion to dismiss the criminal complaint against him which generated this testimony. That affidavit was consistent with this testimony. Respondent's Ex CCC.

At the Hoover Hearing, Mr. Schultz was asked, "At any point during or after your testimony that day, January 12th, did Ms. Baldwin ever qualify or limit to you her representation of you?" to which he replied, "No." Schultz, Hoover Hearing, 19/4-8.

B. Curley's Testimony

After his indictment for perjury, Mr. Curley likewise testified at an in camera proceeding before Judge Hoover to dismiss that indictment due to ineffective assistance of counsel at his Grand Jury testimony. Taken on November 20, 2014, he testified as follows regarding his engagement of Respondent:

[CONFIDENTIAL TESTIMONY]

Com. v. Curley, Nos. 5165 CR 2011 and 3614 2013 (Pa. Com. Pl. Dauphin Co.)(Transcript of in camera proceeding, Nov. 20, 2014)[hereinafter, "Curley, Hoover Hearing"], Petitioner's. Ex W, 44/7-47/16.

Later in that proceeding, Mr. Curley testified about being challenged regarding Respondent's ability to represent him, which he explained as follows:

[CONFIDENTIAL TESTIMONY]

Id. at 49/17-52/18.

On cross-examination, Mr. Curley went on to testify as follows:

[CONFIDENTIAL TESTIMONY]

Id. at 65/2-68/12

Later Mr. Curley appeared before that Grand Jury with Respondent to testify on January 12, 2011, and this exchange occurred:

[CONFIDENTIAL TESTIMONY]

Pa Thirtieth Statewide Investigating Grand Jury In Re: Notice 19 (Transcript of Grand Jury Proceedings Jan. 12, 2011, 11:20 a.m.)[hereinafter, "Curley Grand Jury Testimony"], Petitioner's Ex F, 3/10-13.

C. Spanier's Testimony

Mr. Spanier also testified before Judge Hoover regarding his motion to quash the criminal complaint indictment against him. His testimony included the following:

[CONFIDENTIAL TESTIMONY]

Com. v. Spanier, 3615 CR 2013 (Pa. Com. Pl. Dauphin Co.)(Transcript of in camera proceeding Nov. 21, 2014)[hereinafter, "Spanier, Hoover Hearing"], Petitioner's Ex Y, 14/15-15/17, 19/4-24/20, 29/14-30/12.

Mr. Spanier also testified regarding these matters on cross-examination:

[CONFIDENTIAL TESTIMONY]

Id. at 42/2-43/13; 62/21-64/17.[8]

Ultimately Mr. Spanier testified before the Grand Jury on April 13, 2011, at which he was accompanied by Respondent. His testimony began as follows:

[CONFIDENTIAL TESTIMONY]

Pa Thirty-Third Statewide Grand Jury, In re: Notice 1 (Transcript of Grand Jury Proceedings April 13, 2011)[hereinafter, "Spanier Grand Jury Testimony"] Petitioner's Ex J, 3/7-14.

D. Respondent's Testimony re the Engagements

[8] Mr. Spanier also submitted an affidavit in support of that motion which was consistent with this testimony. Petitioner's Ex DD.

The Respondent testified to the circumstances regarding her engagement by the individual employees as well, at each of their pre-trial motions to dismiss, during her Grand Jury testimony and, again, in these disciplinary proceedings.

At the hearing on Mr. Schultz's motion to dismiss the perjury charges against him on November 20, 2014, the OAG called Respondent as a witness. She testified as follows regarding her discussion with Mr. Schultz:

[CONFIDENTIAL TESTIMONY]

Schultz, Hoover Hearing, Ex X, 53/21-60/6. .

Respondent similarly testified at the in camera proceeding before Judge Hoover on Mr. Curley's motion to dismiss. She first described her meeting with Messrs. Curley and Spanier on January 3:

[CONFIDENTIAL TESTIMONY]

Curley, Hoover Hearing, Petitioner's Ex W, 92/12-99/9.

Respondent also testified at the Curley, Hoover Hearing on cross-examination:

[CONFIDENTIAL TESTIMONY]

Id. at 106/18-118/15.

Respondent also testified at the hearing on Mr. Spanier's motion to dismiss:

[CONFIDENTIAL TESTIMONY]

Spanier, Hoover Hearing, Petitioner's Ex Y, 73/5-24, 77/9-80/7, 82/17-22, 86/11-16, 95/9-25, 108/4-6.

On April 13, 2011, Ms. Baldwin accompanied Mr. Spanier to the Grand Jury for his testimony. Before his testimony, Ms. Baldwin appeared in Judge Feudale's chambers with several Deputy Attorneys General and made objection to the breadth of the document subpoena

served on PSU. After considerable discussion, the Court and counsel agreed to put aside the disagreement over the scope of that subpoena and proceed with Mr. Spanier's testimony to the Grand Jury. *Pa Thirty-Third Statewide Investigating Grand Jury, In Re: Notices 1, 7, 10, 18* (April 13, 2011 8:57 a.m.) Petitioner's Ex I, 2/1-28/7. At the conclusion of that discussion and immediately prior to Mr. Spanier being admitted to chambers for his pre-testimony colloquy, the following exchange occurred.

[CONFIDENTIAL TESTIMONY]

Id. at 28/8-17. Immediately after this exchange, the Court, still in chambers, proceeded to the colloquy with Mr. Spanier at which Ms. Baldwin and Mr. Fina remained. During his colloquy with Mr. Spanier and before his Grand Jury testimony, Judge Feudale described Mr. Spanier's right to have counsel present and said:

[CONFIDENTIAL TESTIMONY]

Id. at 30/25-31/8. It is clear from the testimony and transcript that Judge Feudale was referring to Respondent.

At the beginning of Mr. Spanier's testimony, the following exchange occurred:

[CONFIDENTIAL TESTIMONY]

Spanier Grand Jury Testimony, Petitioner's Ex J, 3/7-14.

Respondent was also interviewed by the Special Investigative Counsel retained by PSU regarding the actions of PSU related to the Child Sexual Abuse Committed by Gerald A. Sandusky. In its July 12, 2012 Report (the "Freed Report"), the Investigative Counsel reports that in its February 29, 2012 interview of Respondent she stated that "she went to the Grand Jury appearances [of Curley and Schultz] as the attorney for Penn State, and that she told both Curley

and Schultz that she represented the University and that they could have their own counsel if they wished." Freed Report, Petitioner's Ex KK, p. 84.

Respondent was subpoenaed to testify before the Grand Jury herself in October of 2012. At that time each of the three individual employees of PSU had not yet been indicted for perjury in their testimony before the Grand Jury and had secured their own representation.[9]

During that testimony, she again described the circumstances surrounding her engagement by the individual employees:

[CONFIDENTIAL TESTIMONY]

Pa Thirty-Third Statewide grand Jury, In Re: Notice 1, (Transcript of Grand Jury Proceedings Oct. 26, 2012, 10:38 a.m.)[hereinafter, "Respondent's Grand Jury Testimony"], Petitioner's Ex N, 13/23-14/20.

Messrs. Schultz, Curley and Spanier did not appear or testify at the hearing in this matter. Respondent did. Much of her testimony was the same as what she had testified to at the Grand Jury proceeding, including that she ensured that all the individual employees had consistent recollections so that there was no conflict in her attending their Grand Jury testimony. She did testify that,

> A . . . I - - I did explain that Tim could have a personal attorney go - - to go with him to the grand jury, . . . and Graham said, "Well, Cynthia, you go with him, you can go with him, you go with him."
>
> And I said, "well, yes, but I can't be his personal attorney because I'm general counsel," and I said - - and I said to him, I said, "You know, Tim, that if I go with you, nothing that you say would be confidential," that - - and - - and I know that the testimony has been I said I have to tell the board of trustees, but I said, "Just like we're talking here to Graham, Graham could know, the board of trustees could know," and I said to him, you, "If you

[9] See our discussion, of, and disagreement with, ODC's implication that there was some culpable failure on Respondent's part to resist this subpoena, *infra*.

want a personal attorney, you know, just call someone." He said, "I don't know any lawyers." After that discussion, then he went downstairs to my office.

Q Did Mr. Curley understand the instructions you gave him, based on your understanding?

A Oh, yes.

* * *

Q Okay. Did Mr. Curley ask you to be his personal counsel?

A No.

* * *

Q Did at some point in time you speak to Mr. Schultz-

A I did.

Q - - about your representation of him?

A When he came back from vacation.

Q And what did you discuss with Mr. Schultz?

A I discussed the same thing with him. I went through what we in the office called the corporate Miranda, and that is, I told him that I could go in with him, he could get personal counsel, I could go in with him, but he knew that I was general counsel of Penn State, that nothing he told me would be confidential as to my client, Penn State, and that I needed to know what he was going to tell me to determine whether there was any conflict with the client. Gary told me the same thing that Tim told me, . . .

Q Did Mr., Schultz ask you to represent him in any type of personal capacity?

A No.

Q Did Mr. Curley or Mr. Schultz raise any concern about complying or cooperating with the investigation?

A None.

Q Now, a lot has been made about these Upjohn warnings. Do you know what the Upjohn warnings are?

A Yes.

Q Do you believe you gave them?

A Yes.

Q Was your inquiry about whether a conflict existed between these individuals and the university satisfied?

A Yes.

Q Can you explain to the Panel?

A Well, the fact is, is that there was no way that I was going in if there was a conflict between Penn State and what they were telling me. They both said that [what they had been told back in 2001 about Sandusky's contact with a youth] was horseplay, that it was wrestling around, and that's what they knew. Okay? And there was - - that, therefore, no conflict with the university, and so, that was the reason that I - - I went in with them, and - - and they were - - because it was explained to me that this was about the Sandusky investigation, and Penn State had an obligation to cooperate, I mean, there was no way that the university wasn't going to cooperate with this, and that - - and they were executives of the university, so - -

Q What would you have done if they had told you that it was reported to them that a sexual act had occurred in the Lasch Building?

A Well, I would have done several things. I would have had to report it to the university, to Graham and the board, and I would have advised them to get counsel to go in. I would have called Jonelle Eshbach or Frank Fina, because both of them were - - were on that case, they had both contacted, and I would have asked them if we could have a continuance while we looked for counsel, and - - and I wouldn't be here.

Transcript of Hearing, Vol 2, 371/15-379/14.

She went on to testify that she attended the Grand Jury proceedings with Mr. Curley and Schultz; that she signed in as representing Pennsylvania State University and that she explained Mr. Curley and Schultz's connection with PSU. *Id.* at 383/19-384/17. She likewise testified that Mr. Spanier could have separate counsel and that he said there was no reason for him to have separate counsel.

The former associate general counsel of PSU under Respondent, Amy McCall testified at the hearing in this matter as well. Her testimony included the following:

> Q Was it consistent with university practice for the office of general counsel to provide counsel for individuals when legal issues arose within the scope of their employment?
>
> A If, by your question, you mean - - you mean, did the office of general counsel serve as - - as that counsel for employees when issues rose within the scope of their employment, yes, after Upjohn warnings and - - you know, it was our practice - - you know, I think I've told the story many times that my first day in the office, Cynthia brought me into her office and said, "You know, I know you haven't been in-house general counsel before. Here - - here's what I think of as an Upjohn warning, and you need to make sure that anybody who comes to you for advice you say, you know, that, 'I represent the university. I don't represent you individually. To the extent that your interest aligns with that of the university, I can provide you with counsel. To the extent that it doesn't, you might need to find your own counsel,'" so to the extent that interests aligned, the individual was asking as an agent of the university, we provided counsel.
>
> Q And was that practice of providing Upjohn warnings consistently followed?
>
> A Absolutely.

Id. Vol. 1, 333/9-333/10. She explained that she did this weekly throughout her tenure at PSU and that Respondent may have done it even more often. She also said that these Upjohn warnings did not usually "go to the extent to discussing who controlled any privilege over these employees' conversations with [her]." *Id.* at 337/9-338/18.

E. Analysis

Based on all of this evidence, we conclude that Respondent was engaged as counsel to Messrs. Schultz, Curley and Spanier regarding their testimony before the Grand Jury and not merely in their capacity as agents of the University.

Respondent very clearly sought to ensure that there was no conflict between their interests and the interests of PSU. She said that she could not go in with them to the Grand Jury proceedings unless she was sure that there was no conflict between them and the University. Her Upjohn or Miranda warnings, as they were referred to, expressly provide that she can concurrently represent employees of PSU while representing PSU if their interests align. Indeed, Ms. McCall, PSU's former associate general counsel, confirmed that the Upjohn warnings were given and the conflict examination made in order to determine if they *could also* represent the individual employees is matters in which they were representing PSU, and if this could not be done, then the employees were advised to get their own counsel. She acknowledged that it was common practice for the PSU office of general counsel to provide joint representation to university employees when their interests were aligned.

Respondent clearly determined on the basis of what these individuals told her that their interests were aligned with the University such that she could represent them. Based upon this conclusion, she told them that she could accompany them to their Grand Jury testimony. While she clearly advised then that they could engage separate counsel, she never told them they needed separate counsel because she could not represent them or that if they did not get separate counsel they would be unrepresented.

We do not find that her admonitions to at least Messrs. Curley and Spanier that their conversations with her were not privileged from disclosure to the University in any way

undermines the conclusion that she represented the individual employees. It is merely the appropriate advice to give one of multiple clients: Where an attorney represents multiple clients in the same matter, it is in fact imperative that they be advised whether their communications with her are privileged from each other or shared jointly. She never told them that their conversations with her were not privileged from disclosure to third parties because she did not represent them; nor did she tell them that the University was free to authorize the disclosure of her conversations with them to third parties because she did not represent them individually. Instead, all of her statements in this regard that were put into evidence were wholly consistent with her representing them jointly with PSU.

During the colloquy for Messers. Schultz and Curley before their Grand Jury testimony, Judge Feudale directly asked who represented them. Respondent immediately replied by stating her name, her title and their relationship to PSU. She did not in any way state she was not their counsel or explain that her representation of them was in any way limited. She freely allowed each of them and later Mr. Spanier to identify her as their counsel in sworn testimony without any objection or clarification. Even Judge Hoover referred to her as their counsel. The one and only time anywhere in the record that she expressly disavowed being their counsel was out of their presence, alone, and in camera with Judge Feudale, and, yet, moments later, she sat silent when Mr. Spanier identified her under oath as his counsel.

We also find that this is how the individual employees reasonably understood her engagement to be structured. They all knew she was General Counsel to PSU, and they were anxious to show PSU they had done nothing wrong and had nothing to hide by securing her representation of them jointly with PSU. They each heard her tell them that she could not do so until she determined if their stories were consistent and not adverse to the interests of PSU.

Implicit in seeking to confirm these facts is that every one – including PSU – will be advised of the consistent stories so the joint representation can proceed. They then dutifully told consistent stories, and she then proceeded to say that she could go into the Grand Jury room with them. They heard her say that they could have separate counsel if they wanted separate counsel but they did not hear her say that they needed separate counsel or that she could not represent them. As a direct result of this process, each one of them identified her as his counsel before the Grand Jury, and each time one of them did so, she failed to in any way contradict or limit this declaration. [10] No matter what conclusion one draws regarding their honesty or criminal activity, it is clear to us by a preponderance of the evidence that she agreed to represent these three individuals jointly with the University and that they understood this to be her agreement.

Respondent contends that her representation of the individuals was solely in their capacity as agents of the University. To the extent such an engagement exists at all, we understand it to necessarily mean that an attorney so engaged has no duty to the individuals but only the superior. Initially, this is simply not a representation of the individuals at all. Most importantly, we find no evidence to support such a limited or indeed, non-engagement by the individual employees in this case. In the face of all the indicia of her joint representation of them and the University, described above, we saw no evidence that she ever once, at any time stated to any of them, in any fashion, that she solely represented them in their capacity as agents of the

[10] [CONFIDENTIAL TESTIMONY] Petitioner's Ex V, pp. 10-12. While he did not explicitly state this, it appears from the context that the statement by Respondent that she represented the University solely puzzled him because before the statement, he thought she represented the witnesses as well. Because the statement was made outside their presence, these circumstances give further credence to the finding that the individual defendants were reasonable in believing that Respondent had agreed to represent them as well, because, before Respondent made this statement, Judge Feudale appears to have thought so too.

University. We find that under all these circumstances, a reasonable person would expect that the attorney had agreed to represent them and the University for which they worked, jointly, so long as their interests remained consistent. Any intention on her part to limit her representation of them to one solely in their capacity as agents of PSU was simply ineffective because she never told them she was so limiting her representation of them and they had no reasonable basis upon which to conclude that she was doing so.

While Respondent's failure to clearly advise the individual employees of the limitation she intended to place on her representation of them is inconsistent with her duty to do so under Rule 1.2(c)[11], we do not find that her failure to explain this limitation created a conflict in her de factor representation of them and the University jointly because we find that they were reasonably informed of the nature of a joint representation and they effectively consented to it. We reach this conclusion because we do not find that the interests of the individual employees and PSU, as disclosed to her by them in her reasonable investigation, were in such patent conflict that Respondent's representation of them jointly was improper. We reject the argument advanced by the ODC that the recollections of Messrs. Schultz and Curley were so inconsistent that they could not have been jointly represented. They both emphatically denied being told by Mr. McQueary that any sexual intercourse occurred during the 2001 incident. They both contended it was reported to them to have been horseplay. The "sexual contact" recalled by Mr. Schultz was described as being incident to the horseplay and did not involve a sexual act. Former Deputy Attorney General Fina himself testified that the testimony of Messrs. Schultz, Curley and Spanier was consistent on this point. Hearing Transcript Vol. 1 250/4-11. Likewise, the fact that Mr. Schultz recalled being advised of a 1998 incident is not a fatal inconsistency with Mr.

[11] "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." 204 Pa. Code Rule 1.2(c).

Curley's recollection but an additional fact that the other may never had learned or may have forgotten after 13 years. We were unpersuaded that the joint representation as the circumstances were disclosed to her could not be reasonably undertaken. We likewise find that Respondent reasonably investigated the circumstances and explained the implications of a joint representation to the individual employees and that they effectively consented to it. Respondent's exploration of her ability to represent the employees jointly with PSU was properly focused: What did each of them know and when did they know it. Respondent carefully rebuffed Mr. Spanier's efforts to short-circuit this inquiry by explaining that she could not agree to represent them before the Grand Jury until she confirmed that there was no conflict. There is no doubt that all three individuals expressly told her that 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 on the near horizon. They could include an implausible story, a change in story, prior mendacity or sheer incredibility. But no such flags existed here.

Three very well respected senior executives with unblemished records, tell consistent stories that they had no knowledge about any criminal activity over a decade ago. Indeed, the alleged conduct was sufficiently egregious, that one would rightly expect such people never to have ignored it if they had learned of it. In short, we saw no persuasive evidence of

incredulousness in their consistent story. Likewise, they clearly knew that she was PSU's counsel first and foremost; that they could engage her only if their interests were not inconsistent with the University's, and that her engagement by them was subject to and conditional on their interests not diverging from the interests of the University, and it was based on this full understanding that they consented to the joint representation. Thus while Respondent may have unwittingly violated Rule 1.2, a charge not made by the ODC and therefore not responded to by Respondent, we find that the ODC failed to prove any violation of Rule 1.7 regarding an impermissible or ineffectively waived conflict.

We also find that the ODC failed to prove Respondent's representation of the individual employees failed to meet the level of competence required under Rule 1.1. The individual employees testified that Respondent advised them of the Grand Jury process and their rights in that process; that she carefully examined what their testimony would be before permitting them to give it; that she sought to ensure that they had committed no impropriety or crimes that they would be admitting to in their testimony; that she explained the need that their interests coincided with the university before she would appear with them; that she explained that they had the right to separate counsel if they so chose; and that if they did she would help them secure it. Set forth below is the extensive testimony of the Respondent regarding the care and great extent to which she went in preparing Mr. Spanier for his testimony, which we have no reason to believe was not also given to the other individual employees. The ODC does also charge that Respondent failed to advise them of their Fifth Amendment right against self-incrimination, but the ODC failed to produce any evidence that she did not advise them of this right. The ODC did not introduce any testimony by them nor did we in our searching examination of the extensive record find any testimony by them that they were unaware of these rights or even that she did not

advise them of it. In addition, Judge Feudale clearly, expressly and repeatedly advised each of them of it prior to their testimony. In short, we were unpersuaded that Respondent's representation of the individual employees in their individual capacity was incompetent notwithstanding the fact that Respondent contends she represented them solely in their capacity as agents of the University.

II. Respondent's Grand Jury Disclosures and the Administration of Justice Issue

A. The Disclosures

We next turn to the charges that Respondent's testimony to the Grand Jury was a breach of her duty of confidentiality to her clients, the individual employees, whom, we have concluded in the previous section, she represented jointly with PSU. First, we address the ODC's allegation in its Petition that, "There is nothing of record showing that Respondent resisted the subpoena issued for her testimony." Petition for Discipline, ¶ 32. We are unaware of any authority that requires an attorney to move to quash a subpoena issued to her regarding confidential communications with a client. Indeed, appearing and invoking privilege as to only those questions that inquire into confidential communications is a perfectly acceptable approach particularly when questions regarding non-confidential matters are expected. In addition, and more to the point, there was a proceeding before Judge Feudale four days before Respondent testified that was devoted entirely to dealing with the privilege implications of Respondent's testimony before she entered the Grand Jury room as a witness. *Pa Thirty-Third Statewide Investigating Grand Jury, In Re Notice 1* (Transcript of Proceedings, October 22, 2012, 8:43 a.m.), Petitioner's Ex M. Counsel for the OAG, PSU, and Respondent appeared before Judge Feudale and directly addressed the possibility that the OAG might inquire about confidential communications between her and Messrs. Schultz, Curley and Spanier. The resolution reached

was based on the OAG's commitment to avoid questions that implicated any of those communications. While the OAG did eventually inquire into communications between the three individual employees and Respondent, the fact remains that an effort was undertaken to protect potential confidential communications in a manner other than by motion to quash. Thus it is simply incorrect to imply that Respondent's failure to formally "resist" the subpoena was something less than professional conduct.

We also must address the fact that prior to her testimony, PSU expressly waived any privilege it had regarding Respondent's testimony with the express exception of any communications with Messrs. Schultz or Curley (but not Spanier). Letter from Michael M. Mustokoff, Esq., to Feudale, J., Oct. 2, 2012, Petitioners Ex K-e; and Letter from Michael M. Mustokoff, Esq. to Frank G. Fina, Esq., Oct. 19, 2012, Petitioner's Ex K-h. Of equal importance to our analysis is the fact that Messrs. Curley and Schultz, by counsel, expressly refused to waive any privilege[12] they had regarding Respondent's testimony. Letter from Thomas J. Farrell, Esq. to Feudale, J., Oct. 11, 2011, Petitioner's Ex K-f; Letter from Caroline M. Roberto, Esq. to Feudale, J., Oct 11, 2012, Petitioner's Ex K-g. This situation provides Respondent little protection regarding her testimony to the Grand Jury. While she could testify freely regarding what the University did and what others not her individual clients might have said, it clearly does not release her from any obligation to protect communications from Messrs. Schultz or Curley or even Mr. Spanier, for that matter. While the University excluded the Schultz and Curley communications from its waiver, it could not waive the protection 1.6 provides for the communications of any of the individual employees to Respondent any way, in light of our finding that she had agreed to represent them individually along with PSU. In absence of a

[12] We understand that the use of the term "privilege" here is meant in the broad sense and includes all information protected under rule 1.6 and not just information protected by the attorney-client privilege.

specific, informed agreement regarding who controls the privilege in a joint representation, all clients are entitled to have their communications protected from disclosure to anyone other than those jointly being represented. Thus even without the exception to the University's waiver, it in no way could authorize Respondent to disclose communications from the three individual employees because we have found that they were her clients entitled to all the protections of rule 1.6 individually. With this background we turn then to the communications between Respondent and the individual employees that Respondent disclosed during her Grand Jury testimony.

The beginning of her Grand Jury testimony related to the Respondent's efforts to comply with the Grand Jury subpoena duces tecum served on PSU, referred to as Subpoena 1179 ("Subpoena 1179"). This testimony described what she told the individual employees they needed to do in order for PSU to comply with the Subpoena 1179 and what they told her about their efforts to comply. This included statements by Schultz and Curley regarding the absence of any responsive documents The OAG asked specific questions regarding Respondent's conversations with the individual employees, and how those statements compare to what she had come to learn was the truth about what they had said: :

[CONFIDENTIAL TESTIMONY]

Respondent's Grand Jury Testimony, Petitioner's Ex N, 16/9-20-24.

This area of inquiry consumed a small portion of Respondent's testimony, the balance of it, well over the remaining three quarters involved her discussions and interactions with Mr. Spanier and the Board of Trustees of PSU before her resignation as General Counsel in June or 2012. These included her conversations with Mr. Spanier preparing for his interview by the OAG before he was subpoenaed to testify before the Grand Jury, what he said during the interview, how she evaluated his conduct during the interview, how that compared to the manner

in which he testified to the Grand Jury later; her conversations with him about being subpoenaed and how that would likely proceed; his preparation for that testimony and her refutation of statements Mr. Spanier reportedly made in a letter to the Board of Trustees, in an interview with a reporter from the New Yorker Magazine and in an interview with a reporter from ABC News Nightline .

By virtue of the university's explicit waiver, there can be no misconduct in Respondent's discussions of her activities on behalf of the University and her interactions with the Board of Trustees unless they involve communications or aspects of her representation of the individual employees. This creates some difficulty regarding her disclosures of her conversations and activities with or on behalf of Mr. Spanier, which we will address individually. This testimony includes the following:

[CONFIDENTIAL TESTIMONY]

Id. at 22/21-25/6. She also described reports and requests from the Board of Trustees of PSU, all of which would be unprotected in light of the PSU waiver. *Id.* at 27/20-28/6, 29/6-39/21; 43/2-46/2.

She testified specifically what Mr. Spanier told her about his personal knowledge where the information disclosed not only implicated his role as President of the University but which clearly involved potentially personal responsibility:.

[CONFIDENTIAL TESTIMONY]

Id. at 39/22-40/25. She also testified that many of Spanier's statements in his July 23, 2012 letter to the Board of Trustees are false, including that she failed to inform him that the University or he had been subpoenaed; that he was not prepared for his testimony; that at his Grand Jury

testimony she handed the Judge a thumb drive containing all his e-mails; and that she had failed to keep him apprised of the progress of the investigation. 49/18-55/4.

She then discusses several her disagreement with various statements Mr. Spanier made in an interview with the New Yorker magazine including that she told him the authorities did not want to talk to him; that he had no idea the Sandusky investigation involved child abuse; that he was uninformed about the progress of the investigation before his testimony; that he did not know his emails were subpoenaed; that he did not recall the 1998 incident; that she was confident that the investigation would not go higher than Sandusky himself; that he had never been altered to the fact that the Grand Jury questioning would delve into anything more serious than the one "horseplay" incident; and that she told him he could not disclose his Grand Jury testimony to the University Board of Trustees. *Id.* at 55/5-66-18.

Lastly, she testified regarding her disagreement with statements he reportedly made during his interview with ABC Nightline, including, again, that he was unaware that the investigation involved more than the one horseplay incident. Id. at 66/22-69/5. Respondent ultimately testified about her perspective on her involvement with Mr. Spanier, as follows:

[CONFIDENTIAL TESTIMONY]

Id. at 66/22-70/11.

B. Analysis

In evaluation the propriety of these disclosures we begin with the axiom that the Rules of Professional Conduct prohibit a lawyer from revealing any information relating to the representation of a client, unless its disclosure is otherwise permitted or required. Pa. R. Prof. Cond. 1.6(a). This is far broader protection than the scope of information protected by the attorney-client privilege, and presumptively encompasses everything a client says to the lawyer and everything the lawyer does for the client. Indeed, the confidentiality rule, as it is called,

"applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Id.* com. 3. However, under the rule, a lawyer may reveal information that the client consents to disclosing. Likewise, a lawyer may make disclosures that are impliedly authorized in order to carry out the representation. *Id.* Rule 1.6(a).

Rule 1.6 goes on to provide that a lawyer may also reveal information relating to a representation of a client, to the extent that a lawyer reasonably believes necessary:

> (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 are being or had been used; or
>
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish the defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id. Rule 1.6(c).

Thus Rule 1.6 clearly permits a lawyer to reveal such information relating to a representation as she reasonable believes necessary to establish a defense to a criminal charge or to respond to allegations against her in any proceeding. The comments to the rule make it clear that this right does not await the institution of formal proceedings against the lawyer: The lawyers' right to respond arises when an assertion of misconduct involving representation of the client has been made. *Id.* com. 14.

There was ample evidence that Respondent had been accused of misconduct, indeed criminal conduct, regarding her response to Subpoena 1179 which permitted her to describe in detail how she sought the production of documents by her individual clients and what they had told her. Deputy Attorney General Fina testified at the hearing that

A . . . . A lot of [the follow-up investigation to Subpoena 1179] was the result of we weren't getting responses, we weren't getting information we believed existed and, you know, the face of that for some time had been Justice Baldwin. Justice Baldwin had been the person, you know, frequently appearing in – with whatever grand jury subpoena we had issued, and saying, "We don't have anything in response to this," or, "We have just this very limited amount of information." For a variety of reasons, we didn't always believe that, and so, you know, we were aggressively conducting an investigation into whether those representations were true, and as to whether Justice Baldwin and others may have had criminal liability for again, obstruction, hindering, you know.

Q Okay.

A Failure to comply with grand jury subpoena is a crime.

Q And that was part of your investigation?

A Very much so.

Hearing Transcript Vol. 1 260/23-261-20. Mr. Fina later testified that his conclusion that PSU's prior general counsel had withheld information,

> was important to us because, candidly, she was under criminal investigation. Number two, it indicated that she had been actively searching for information to comply with the subpoenas, which, frankly, was something, you know, we were trying to determine. It would be an indicia of guilt if we were to find that, you know, we were giving Justice Baldwin subpoenas and she wasn't trying to comply with them, she wasn't trying to find the evidence. This indicated otherwise.

Id. at 281/14-25. He later again confirmed that they were investigating her for possible obstruction of justice and that this was one of the reasons they subpoenaed her to testify before the Grand Jury. *Id.* at 284/14-285/9.

Ms. McCall, PSU associate general counsel, also testified that in the fall of 2011 a representative of the OAG interviewed her regarding their investigation into whether Respondent had engaged in the willful obstruction of justice by failing to produce documents responsive to Subpoena 1179. *Id* at 335/2-336/6

In addition, Respondent testified in these proceedings to all the reasons she believed she was entitled to reveal during her Grand Jury testimony information about her representations of PSU and the individual employees:

> Q Ms. Baldwin, as a result of the open letter to the trustees, the New Yorker interview, the ABC Nightline interview, perhaps in other circumstances, did you believe that Dr. Spanier had disclosed your communications between he and you?
>
> A He did disclose our communications.
>
> Q Did he also discuss the content, the subject matter, of what was discussed between you and Dr. Spanier?
>
> A Yes. Some of the things we discussed, and some things we -- never happened, but yes.
>
> Q Right. But it was within the subject matter of what –
>
> A Yes.
>
> Q -- was discussed?
>
> A That's true.
>
> Q And when you were asked in front of the grand jury about those areas, did you believe you were disclosing anything confidential?
>
> A No.
>
> Q Why not?
>
> A Because it was -- I didn't talk about anything that he hadn't already talked about in the press or in that open letter.
>
> Q And you believe that you were testifying consistent with the instructions of the supervising judge; didn't you?
>
> A That is correct.
>
> Q And let's talk about all of it, the proffer, the interview, the grand jury testimony. You did that with the advice of counsel; didn't you?
>
> A Yes.

Q And did you believe your counsel to have been experienced about these types of grand jury, criminal law, ethical issues?

A I wouldn't have hired you all if I didn't.

Q Now, did you also believe that you were testifying to avoid any potential criminal culpability?

A I believed that was part of it.

Q Did you also believe that you had the right to defend yourself?

A Well, yes.

Q And did you come to understand that your legal services were being used to further the conspiracy of Mr. Curley, Mr. Schultz, and Dr. Spanier?

A I came to understand that after I found out that they had lied to me, yes.

Hearing Transcript Vol. 2 421/6-423/8.

All of this testimony shows that Respondent was being actively investigated for possible obstruction of justice regarding her response to Subpoena 1179 in the fall of 2011, that she was fully aware of these accusations, and that her subpoena to appear before the Grand Jury was in part precisely occasioned by this investigation. Accordingly, we cannot find that her testimony regarding what she and the individual employees said regarding the search and production of documents was professional misconduct on her part.

Respondent also contends that she was free to disclose these statements by the individual employees because she reasonable believed it was necessary to mitigate or rectify the consequences of her client's criminal acts in which her services had been used. Prof. Cond. Rule 1.6(c)(3). The comment to this rule states that, "[I]f the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate and overriding interest in being able to rectify the consequences of such conduct." *Id.* com. 13. Here the individual employees had obstructed justice by failing to produce responsive documents they knew existed

with intent to prevent themselves from being incriminated. They did so by lying to Respondent with the understanding that she would knowingly use their denials of additional information in responding to the subpoena for the University and them, which is precisely what she did: She responded to a lawful subpoena in her capacity as their lawyer and an officer of the court by unwittingly transmitting their lies as the truth. When she 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. We find this to be a clear example of her right to do so under Rule 1.6(c)(3), and accordingly find that her testimony in this regard is not misconduct on this basis either.

Lastly, Respondent's testimony that Messrs. Schultz and Curley told her they had no documents responsive to Subpoena 1179 is also not misconduct because the disclosure of this information was impliedly authorized by her very representation of PSU and them in responding to Subpoena 1179. The statements in question relate to the existence or not of documents demanded by Subpoena 1179. The circumstance surrounding these statements were that Respondent told the individual employees, along with other members of the University community, that the University had been subpoenaed for documents and they were each part of the process for responding to the Subpoena and that she was getting increasing pressure to respond to the Subpoena with more documents. The statements that she testified to the individual employees having made to her, were made by the employees for one purpose: To respond to the subpoena. We find that it would be unreasonable for a person to tell an attorney responding to a subpoena that the person has no documents responsive to the subpoena and believe that the response would never be disclosed to the party that issued the subpoena. It is completely reasonable to conclude that the statements made by the clients—and which she later

testified to during her Grand Jury testimony-- were for the expressed purpose of communicating them back to the OAG. The likely dialogue is elementary: "The OAG wants to know where the documents are." "Tell them I don't have any." This is precisely what Respondent did, she told this to the Grand Jury, the very entity which had served the subpoena and was then examining her for the sufficiency of her and her clients' response.[13]

This leaves us with the charges that the Respondent's step by step disputation of various charges leveled against her by Mr. Spanier was misconduct. Other than the information regarding the individual employees efforts to respond, or not, to Subpoena 1179, substantially all of the information Respondent revealed about her representation of the individual employees were responses to what Mr. Spanier had publicly said about her. Thus, we evaluate whether these revelations were misconduct by analyzing whether Respondent reasonably believed they were necessary to establish a defense to criminal conduct or to accusations of misconduct by Mr. Spanier in a controversy between her and Mr. Spanier.

Respondent testified to her efforts to get Mr. Spanier to advise the Board of Trustees about the investigation during the first half of 2012. This testimony included communications in which Members of the Board of Trustees demanded information regarding the investigation, Mr. Spanier told Board members that he was not at liberty to discuss his Grand Jury testimony, she repeatedly advised him that as a testifying witness he was not prevented by the secrecy rules from disclosing his testimony, she encouraged Mr. Spanier to increase the amount of information he communicated to the Board about the investigation, she sought to report to the Board about the investigation, and he, in one instance, terminated her report to the Board regarding the investigation and asked her to exit the Board meeting. *Id.* at 29/16- 39/21; 43/2-45/16. We find

[13] We note that under cross-examination Mr. Rudovsky, ODC's expert witness, conceded that this testimony was not confidential for this reason. Hearing Transcript Vol 1, 150/23-152/25.

that these disclosures were reasonably necessary to rebut the claim that she was obstructing justice and to accusations of misconduct by Mr. Spanier. Indeed, Mr. Spanier had expressly stated in a letter to the Board of Trustees that he released to the public that any failure to keep the Board of Trustees advised about the investigation was Respondent's fault. Id at 50/6-8 ("[I]n reporting to the Trustees, I was guided by and followed all instructions from the University's General Counsel.") In addition, the facts that members of the Board of Trustee were claiming that they were being kept in the dark and that Mr. Spanier was himself seeking to prevent them from learning more about the investigation, support a charge of obstruction of justice in that he had a duty to advise them of what he and Respondent had learned during the investigation. Ms. Baldwin, then under suspicion of being part of the group seeking to obstruct justice, had every right to explain that she had done just the opposite and advised Mr. Spanier of the incorrectness of his excuse for not reporting more fully to the Board.

She next described her preparation of Mr. Spanier for his testimony, which we have quoted, above, and her advice to him regarding the progress of the investigation. This was clearly permissible in light of his repeated public assertions that she had failed to prepare him for his testimony or keep him apprised of the progress of the investigation, which statements were made with the clear implication that any mistakes he made or charges against him were her fault. *Id.* at 49/21-22 ("I had no preparation"); 61/19-64/8 ("I was stunned" by the questions asked of him during his testimony). These were direct accusations of criminal conduct and misconduct against her in a controversy between them that he initiated, and her testimony was a reasonable defense to the allegations permissible under Rule 1.6(c)(4).

This leaves Respondent's discussion, is some detail, of what Mr. Spanier had told her about his knowledge regarding the incidents in 1998 and 2001 involving, what he said during the

OAG interview, how she evaluated his conduct during the interview, how that interview compared to the manner in which he testified to the Grand Jury later and her overall evaluation of how Spanier had been dishonest with her. These are disclosures of a very serious kind and not to be made lightly. While Respondent had clearly been accused of obstructing justice by failing to produce documents and failing to report the progress of the investigation to the Board of Trustees and misconduct in failing to prepare Mr. Spanier for his interviews and testimony, there was no direct evidence that she had been accused of knowingly permitting her clients to commit perjury, which would clearly permit a response regarding her testimony that he had lied to her, too. The question becomes, then, are accusations that a lawyer has obstructed justice by conspiring with clients to criminally fail to produce incriminating documents responsive to a Grand Jury Subpoena sufficient to justify a reasonable fear that the lawyer should also defend herself against a claim that she conspired with the same client to commit perjury before the same Grand Jury about the same crimes? In isolation, this appears to be a difficult question, but in the case before us there are two additional relevant facts that tip the scale against any misconduct. First, we find that Respondent was not unreasonable in believing she could make these disclosures because she had been assured by her counsel and the OAG itself that Judge Feudale has authorized the questioning eliciting this information after a specific argument regarding the need to protect her client communications, and second we find that Respondent was not unreasonable in believing she could make these disclosures because she was then acting under the advice of ethics counsel with respect to the propriety of the very questions in issue. We simply cannot say that Respondent was unreasonable in believing these revelations were necessary to defend against accusations of criminal and professional misconduct when she had been directly accused of criminally withholding information from the Grand Jury, the

supervising Judge had cleared the questioning eliciting the information in a proceeding designed to protect her clients' right to keep confidence secret and she retained experienced ethics counsel to ensure she did not inadvertently commit misconduct during her testimony. We come to this conclusion because the determination of whether a lawyer's revelation of her client's confidences is permissible is to be based upon whether or not she reasonably believes it is necessary to do so. In making this determination, we must consider all the circumstances surrounding Respondent's determination and those circumstances include the proceedings before Judge Feudale regarding the topics permissible for inquiry during her Grand Jury testimony and the advice of her counsel retained to advise her on this very issue.[14] Accordingly, we find that the ODC failed to prove that Respondent had revealed protected client information in violation of Rule 1.6.

Lastly, we find that the ODC failed to prove by clear evidence that Respondent engaged in conduct that was prejudicial to the administration of justice because she had no intent to do so, she did not act in reckless disregard of the administration of justice and because the perjury and lies to her by her clients were the supervening causes of the quashing of their indictments such that her possible misconduct in not properly limiting her representation of them was not the proximate cause of the indictments being quashed.

Conclusion

We note that our finding that the Respondent did not commit sanctionable misconduct appears to be inconsistent with the Superior Court's decision that the individual defendants were deprived of their constitutional rights by Respondent's joint representation and testimony to the

[14] We do not find that this testimony was reasonably necessary to mitigate or rectify the consequences of criminal conduct in which Respondent's services had been used. This testimony did not relate to the use of her services in the commission of the crime. It instead, supported the fact that they had committed the crime and that she was not a knowing party to it.

Grand Jury. This difference results from two principal differences between the proceedings before it and the proceeding before us: First, Respondent was not a party to the Superior Court proceedings, and while the decisions in those cases are facts of record before us, any determinations regarding Respondent's conduct are not binding against her in these proceedings under long-established collateral estoppel rules and constitutional principles. Second, the Superior Court was making different determinations than we address here. The Superior Court was determining whether the criminal defendants in the case before them were entitled to have the information Respondent disclosed in her Grand Jury testimony maintained in confidence. They were conducting a searching examination of whether all of the individual defendants' due process and related constitutional rights had been scrupulously observed. We do not address that question. Instead, we determine only whether her disclosure of the information contained in her Grand Jury testimony was professional misconduct under circumstances that were not before the Superior Court. Most importantly, what was not before the Superior Court and not relevant to its inquiry but what was fully relevant to ours, was the fact that Respondent engaged and, we find, reasonably relied upon counsel in giving her testimony. The issues were different, and the evidence relevant to those different issues is also different.

In conclusion, we find that the ODC failed to prove by clear evidence that Respondent committed professional misconduct in her representation of the individual employees. We find that she investigated and properly disclosed the potential conflict in the interests of the individual employees and PSU and that they effectively consented to a joint representation. We find that she competently performed this joint representation. We find that none of Respondent's Grand Jury testimony was misconduct because Respondent reasonably believed that her testimony was necessary to defend against accusations of criminal conduct and accusations of professional

misconduct made by Mr. Spanier in a controversy between them that he initiated . We find that Respondent did not engage in conduct prejudicial to the administration of justice.

III. Findings of Fact and Conclusions of Law

While we believe that the absence of a clear record regarding the facts of this case required us to deviate from the standard form of report and recommendation set forth above, we are mindful of our obligation to provide findings of fact and conclusions of law in the customary format. Accordingly, without limiting the factual and legal determinations that we have found and made as set forth above, we repeat the essence of them in the following:

A. Findings of Facts

1. In December of 2011, Respondent was General Counsel of PSU.

2. On December 28, 2011, she was advised that the University would be served with a subpoena duces tecum for documents ("Subpoena 1179") and that Messrs. Paterno, Schultz and Curley would be served with subpoenas to testify before the Investigating Grand Jury looking into the Sandusky crimes.

3. Later in 2012, Mr. Spanier was asked to voluntarily be interviewed by the Office of the Attorney General regarding the Sandusky crimes and ultimately was subpoenaed to testify before the Grand Jury.

4. Before representing Messrs. Schultz, Curley and Spanier regarding the Grand Jury investigation and subpoenas, Respondent investigated to determine whether each of these three individual's and PSU's interests were all sufficiently consistent that she could represent all of them regarding the Grand Jury investigation and subpoenas. This investigation included Respondent's standard "Miranda" warnings that were geared to determine, and were described to

the individual employees as being given to them to determine, if PSU's office of general counsel could permissibly represent the University and them jointly.

5. Respondent's investigation of these circumstances was not unreasonable. Based on the information that they disclosed to her, she reasonably determined that their interests were sufficiently consistent that she could lawfully represent them jointly in these matters.

6. By refusing to agree to represent the individual employees before determining if their interests and the interests of the PSU were consistent; by meeting and speaking with each of them to determine this fact; by delivering her "Miranda" warning; by stating that she had found that their interests were reasonably consistent; by telling them that she could share what they told her with PSU but never saying she could disclose them to anyone else; by working with them in the collection of documents; by discussing with them how the Grand Jury process worked, what they might be asked, what they might say and everything they knew about the Sandusky situation; by appearing with them before the Grand Jury; by allowing them to state without qualification under oath that she was their counsel; and by never once telling them that she did not represent them individually, Respondent in fact agreed to represent the individual employees jointly with PSU in the Grand Jury investigation and subpoenas.

7. For these same reasons, the individual employees reasonably believed that Respondent had agreed to represent them jointly with PSU regarding the Grand Jury investigation and subpoenas.

8. While Respondent contends that she did not represent the individual employees in their individual capacities but only in their capacities as employees of the University, she failed to adequately disclose this to them. She only told this to Judge Feudale before his colloquy of Mr. Spanier outside the presence of the individual employees, and she never told them this

contention. She then let each of them testify under oath that she was their counsel without qualification or limitation, and she did not herself limit, qualify or in any way correct these statements.

9. Respondent represented each of the individual employees in their preparation for and testimony to the Grand Jury.

10. Notwithstanding the disconnect regarding the nature of her representation of the individual employees, her representation of them, even with respect to their individual interests, was not incompetent, and the OAG failed to prove any incompetence in her representation of them.

11. By October of 2012, Respondent's individual representation of the employees had ended, and the OAG had come to suspect that the individual employees had committed perjury in their testimony before the Grand Jury, had intentionally withheld incriminating documents that were responsive to Subpoena 1179; and that the individual employees were, by this conduct, obstructing justice.

12. The individual employees lied to Respondent regarding their prior knowledge of reports regarding certain conduct by Sandusky and the existence of documents responsive to the University's subpoena.

13. By October of 2012, the OAG was actively investigating to determine if Respondent was herself involved in the suspected obstruction of justice being perpetrated by the individual employees. Respondent became aware of this investigation and knew that her subpoena to testify before the Grand Jury was part of this investigation.

14. Before testifying before the Grand Jury on October 26, 2012, Respondent engaged her own counsel specifically with regard to both the OAG's suspicion of her possible involvement in

the obstruction of justice offenses and her need to avoid improperly disclosing protected client communications during her testimony.

15. On October 22, 2012, Respondent's counsel, representatives of the OAG and outside counsel for PSU met in chamber with Judge Feudale to address how to prevent the disclosure of protected client communications during the course of Respondent's testimony to the Grand Jury. A process was developed that the parties to the conference, including Judge Feudale, believed would protect against any inappropriate disclosures by Respondent of protected client communications during her testimony to the Grand Jury. Respondent was made aware of this process.

16. Respondent testified before the Grand Jury on October 26, 2012, about what the individual employees told her regarding what they knew about Sandusky's conduct, what she told them about the grand Jury process, the progress of the Grand Jury investigation, and whether they had documents responsive to Subpoena 1179. This testimony included that the individual employees had lied to her about the existence of documents and about what they had heard about Sandusky's conduct.

B. Conclusions of Law

1. Based upon the information then reasonably available to Respondent at the time and her reasonable investigation of the interests of PSU and the individual employees with respect to the Grand Jury investigation, Respondent reasonably concluded that the interests of PSU and the individual employees were consistent. She properly informed the individual employees of these circumstances, and they effectively consented to being jointly represented with PSU. Accordingly, Respondent did not violate Rule 1.7.

2. The ODC failed to prove that Respondent's representation of the individual employees and PSU jointly was incompetent, and we do not find that she violated Rule 1.1.

3. Respondent's testimony to the Grand Jury related to the existence of documents responsive to Subpoena 1179 did not improperly reveal protected information about her representation of the individual employees because 1) the revelation of this information was implicitly authorized by the representation itself; 2) Respondent reasonably believed that the revelation of this was necessary to rectify or mitigate the use of her services in the crime of obstruction of justice; and 3) Respondent reasonably believed that the revelation of this information was necessary to defend herself against accusations of crimes and misconduct by both the OAG and Mr. Spanier.

4. Respondent's testimony to the Grand Jury responding to the statements made by Mr. Spanier publicly to the PSU Board of Trustees and the media did not improperly reveal protected information about her representation of the individual employees because 1) Respondent reasonably believed that the revelation of some of this information was necessary to rectify or mitigate the use of her services in the crime of obstruction of justice; and 2) Respondent reasonably believed that the revelation of all of this information was necessary to defend herself against accusations crimes and misconduct by both the OAG and Mr. Spanier.

5. The ODC failed to prove Respondent violate Rule 1.6.

6. Respondent did not engage in conduct that was prejudicial to the administration of justice in violation of Rule 8.4.

Dated: October 26, 2018

BY THE HEARING COMMITTEE:

/s/ Leonard J. Marsico

Leonard J. Marsico

/s/_____
David Ridge

/s/_____
M. Scott Zegeer