

Barley Snyder

ATTORNEYS AT LAW

**Lessons From the Sandusky Case
About The Attorney-Client
Relationship, Confidentiality And
Other Ethics Issues**

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2018 PBI Employment Law Institute

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General Counsel Cynthia Baldwin

- **February 2010** named **Vice President, General Counsel and Chief Legal Officer** of Penn State
- Served as the **Chair of the University's Board of Trustees 2004-2007**
- **Associate Justice of Pennsylvania Supreme Court;**
16 years as **trial court judge**
- **Pennsylvania AG's office and in private practice**

**Sr. Vice President Finance & Business Gary
Schultz, President Graham Spanier,
Athletic Director Tim Curley**



Legal Ethics Implications of Ms. Baldwin's Role in the Sandusky Case

- Who is the lawyer's client? *Rule 1.13*
- How many clients does the lawyer have? *Rule 1.13*
- What are the lawyer's duties when the lawyer and the organization's agents do not have a common understanding of the relationship? *Rules 1.13, 1.17*
- What are the potential conflicts of interest and confidentiality/privilege issues? *Rules 1.6, 1.7*
- **Cannot Always Be "We're All In This Together"**

The Sandusky Saga Timeline

- **January 2010:** Penn State receives grand jury subpoena for personnel records on Sandusky
- **February 2010:** Baldwin appointed Penn State General Counsel
- **December 2010:**
 - McQueary testifies before grand jury
 - Baldwin learns from prosecutors that grand jury plans to subpoena testimony from Paterno, Curley, and Schultz
 - Baldwin informs Spanier about investigation, meets with Spanier and Schultz

The Sandusky Saga Timeline

- **January 2011:**

- Baldwin meets with Paterno, Curley
- Baldwin updates Spanier about subpoenas
- **Curley & Schultz testify before grand jury, *accompanied by Baldwin***

- **February & March 2011: *Media Blitz***

- Baldwin interviews assistant football coaches
- Baldwin present as state investigators from AG's Office interview coaches, Spanier
- Spanier receives grand jury subpoena
- **Harrisburg *Patriot News* runs article "Jerry Sandusky, Former Penn State Football Staffer, Subject of Grand Jury Investigation"**

The Sandusky Saga Timeline

- **April 2011:**
 - E-mails between Spanier and Trustee
 - Spanier testifies before grand jury, *with Baldwin present*
 - Board Chair Garban call with Spanier and Baldwin – Baldwin assumed Spanier and Garban would relay info to Board of Trustees
- **May 2011:**
 - **Spanier & Baldwin brief Penn State Board of Trustees about criminal case for first time, Spanier asks Baldwin to leave meeting**
- **Late October 2011:**
 - Baldwin and Spanier learn that Curley and Schultz were to be indicted
 - Baldwin meets with Curley, Schultz and Spanier
 - Baldwin and Spanier meet with Board Chair Garban

The Sandusky Saga Timeline

- **November 2011:**
 - **Nov. 4:** Criminal charges filed against Sandusky, Curley and Schultz
 - **Nov. 5:** Sandusky arrested; Spanier briefs Board of Trustees via conference call;* Spanier issues statement of support for Curley
 - **Nov. 6:** Trustees meet; Schultz re-retires, Curley on administrative leave; Curley & Schultz arraigned
 - **Nov. 7:** Press Conference PA AG & State Police announce charges against Sandusky, Schultz and Curley
- **November 9, 2011:** Paterno and Spanier removed

The Sandusky Saga Timeline

- **November 21, 2011:**

Board announces former FBI Director Louis Freeh will lead an independent inquiry into the abuse, alleged failure to report, and University governance, oversight and policies and procedures

The Sandusky Saga Timeline

- **January 2012:** Baldwin resigns
- **June 2012:** Sandusky convicted on 45 counts
- **July 12, 2012:** Freeh Report
- **July 23, 2012:** NCAA sanctions PSU
- **October 2012:** Baldwin testifies against Spanier, regarding Curley & Schultz (Penn State waives attorney/client privilege)*
- **November 2012:** Spanier indicted; new charges filed against Curley and Schultz

The Sandusky Saga Timeline

- **Early 2013:** Defendants move to dismiss charges
- **January 2015:**
 - NCAA reinstates Paterno victories
 - **Trial Court denies motion to dismiss; rules no attorney-client privilege between Baldwin and the defendants**
- **Spring/Summer 2015:** Defendants appeal
- **January 2016: PA Superior Court**
 - Reverses trial court on motion to dismiss
 - **Quashes counts of perjury (except to Curley), obstruction of justice and conspiracy**

Verdicts, Pleas

- **March 13, 2017:** Curley and Schultz plead guilty to misdemeanor charge of endangering the welfare of children in exchange for the dismissal of felony charges
- **March 24, 2017:** Spanier convicted on one misdemeanor count of child endangerment for failure to report

Ethics Issues Raised By Baldwin's Role

- *Did Baldwin keep her client, the Penn State Board of Trustees, adequately informed about the case and implications for the University?*
- *Did Baldwin's conduct (acts or omissions) lead Curley, Schultz and Spanier to reasonably believe that she represented them individually?*

The Freeh Report

- Penn State's Board of Trustees not kept adequately informed of developing scandal & implications for the university – Baldwin abdicated her role to Spanier to inform the Board
- Spanier downplayed the importance of the Sandusky investigation through 2010 and 2011
- Board of Trustees failed to take appropriate steps to investigate & inform itself about Sandusky matter

Who Is Your Client?

- When top Penn State officials Tim Curley and Gary Schultz testified before a grand jury in the Sandusky investigation, both men apparently thought they had an attorney – *and that attorney was Cynthia Baldwin*

Grand Jury Colloquy

Tim Curley

- “Good morning, my name is Tim Curley”
- Do you have counsel with you?
- Yes I do . . . My counsel is Cynthia Baldwin.”

Gary Schultz

- “You are accompanied today by counsel, Cynthia Baldwin. Is that correct?”
- That is correct.”

Colloquy with Supervising Judge of Grand Jury

- **Mr. Barker:** Judge, we're here on Notice 29. We have some witnesses to be sworn, Mr. Curley and Mr. Schultz.
- **JUDGE:** Represented by?
- **Ms. Baldwin:** My name is Cynthia Baldwin, general counsel for Pennsylvania State University.
- **JUDGE:** Will you be providing representation for both of those identified witnesses?
- **Ms. Baldwin:** Gary is retired but was employed by the University and Tim is still an employee.

Spanier's Grand Jury Colloquy

- **JUDGE to Ms. Baldwin (outside presence of Spanier):** “Cindy, just for the record, who do you represent?”
- **Ms. Baldwin:** “The University.”
- **JUDGE:** “The University solely?”
- **Ms. Baldwin:** “Yes, I represent the University solely.”
- **JUDGE to Graham Spanier (later in grand jury room):** “Are you represented by counsel?”
- **Graham Spanier:** “Cynthia Baldwin sitting behind me.”

Allegations Derived from Ms. Baldwin's Grand Jury Testimony

- Spanier directed Ms. Baldwin to accompany Curley & Schultz to their grand jury appearances
- Spanier, Curley & Schultz misrepresented to Ms. Baldwin that they did not possess any information or documents relating to Sandusky's alleged misconduct
- Spanier required Ms. Baldwin to inform him on ongoing basis of all information regarding grand jury proceedings

November 2012 Grand Jury Presentment

- Spanier, Curley, Schultz all “indicted” for endangering the welfare of children, obstruction of justice, and criminal conspiracy
- Spanier additionally indicted for perjury and failure to make mandatory child abuse report
- Curly & Schultz previously indicted for failure to make mandatory report of child abuse

Curley and Schultz: Pre-Trial Motions

- Ms. Baldwin:
 - had represented them
 - had not appropriately explained any potential conflicts of interest or limitations on her representation
 - had not advised them to consider their 5th Amendment rights
 - had not competently represented them before the grand jury

Trial Court -- Motions Denied

- **In January 2015**, trial court denied motions, finding that Ms. Baldwin had represented all defendants solely as agents of Penn State and not individually, and defendants knew or should have known that at the time of their grand jury appearances

Pennsylvania Superior Court

January 22, 2016

- Reversed and quashed counts of perjury (except to Curley), obstruction of justice and conspiracy
- Communications between Ms. Baldwin and Curley, Schultz & Spanier protected by attorney client privilege
- Ms. Baldwin could not testify regarding privileged communications

Who's the Client?

- **Rule 1.13(a)** -- A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- **Rule 1.13(e)** – A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7

Conflict of Interest

- **Rule 1.7(a)**-- . . .a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) The representation of one client will be directly adverse to another client; or
 - (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 a third person or by a personal interest of the lawyer.

Conflict of Interest

- **Rule 1.13(d)** – In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”
- **“I represent the University. You can get your own lawyer”**

Conflict of Interest

- **PA Superior Court:** Schultz constructively denied right to counsel before the grand jury
- “He was not aware that Ms. Baldwin was not appearing with him in order to protect his interests and therefore unable to provide advice concerning whether he should answer potentially incriminating questions or invoke his right against self-incrimination.”

Formation of Attorney Client Relationship (clients by estoppel)

A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
 - (a) the lawyer manifests to the person consent to do so; **OR**
 - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.

Restatement (Third) of the Law Governing Lawyers Section 14 (2000)

In the Face of Illegal Conduct ...

- **Rule 1.13 (b) -- If a lawyer for an organization knows** that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, **the lawyer shall proceed as is necessary in the best interests of the organization.**

Rule 1.13 (b) contd.

Any measures taken **shall** be designed to minimize disruption of the organization and the risk of revealing information related to the representation to persons outside the organization. Such measures **may** include . . .

- (1) Asking for reconsideration of the matter
- (2) Advising that a separate legal opinion in the matter be sought . . .
- (3) Referring the matter to higher authority in the organization . . .

If All Else Fails . . .

- If despite the lawyer's efforts . . .the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, **the lawyer may resign in accordance with Rule 1.16.**

Confidentiality and Privilege

- **Rule 1.13 Comment 2** – When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6.
- If an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6.

Confidentiality and Privilege

- **PA Superior Court** “communications between a putative client and corporate counsel are generally privileged prior to counsel’s informing the individual of the distinction” between agency representation and personal representation.

Takeaways

- **Be clear** – as either in-house or outside counsel -- **that you are the attorney for the institution**
- Whenever there is an implication of wrongdoing, **consider hiring independent counsel**, whether it is a civil complaint or a criminal investigation
- When interviewing witnesses, **provide *Upjohn* Warnings to employees** to make sure employees know the attorney represents the company

Takeaways

- **Provide Clear Retention Letter Language in Joint Representation Cases**
 - Explanation of a concurrent conflict of interest
 - What will happen if a concurrent conflict of interest develops
 - Explanation of sharing of information
 - Confirmation and signature of all defendants

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