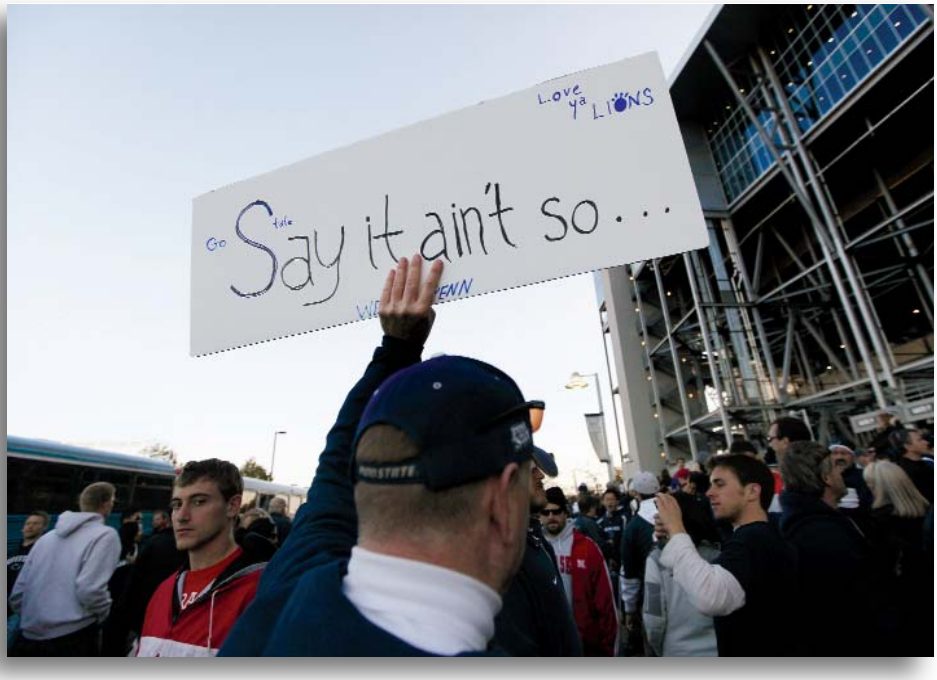
Legal Ethics Lessons from the Penn State Scandal

By Chris McLaughlin

Most headlines about the Pennsylvania State University (PSU) child abuse scandal focused on the connections between convicted child molester Jerry Sandusky and the PSU football program.[1] The scandal cost legendary coach Joe Paterno his job and tarnished his otherwise sterling reputation as a coach who was unwilling to sacrifice his values for victories.[2]



But the repercussions went far beyond the football program. Graham Spanier, PSU's former president, Gary Shultz, a former vice president, and Tim Curley, former athletic director, are currently facing a variety of criminal charges including perjury, obstruction of justice, and failure to report child abuse.[3]

The university's general counsel at the time, Cynthia Baldwin, has also garnered unwanted attention due to her role in the scandal. Former PSU colleagues, outside investigators, and a state court judge have suggested that Baldwin confused her representational roles and her professional loyalties.

Few attorneys will face situations as dreadful as that faced by Cynthia Baldwin. But confusion about the role of an organization's attorney can arise in more common scenarios. Any time an organization's attorney investigates alleged misconduct by that organization's employees, potential conflicts may arise between the organization and its employees. Those conflicts present an even greater risk if the organization's attorney has close professional and personal relationships with those employees, as is often the case with attorneys who have represented organizations for long periods of time.

In recognition of this risk, state bars and courts require proactive measures by organizational attorneys to protect their clients' interests and to insulate themselves from allegations of unethical conduct. The saga at PSU demonstrates how important these legal safeguards can be. While the specifics of Cynthia Baldwin's predicament may be unique, the ethical issues involved offer lessons for any attorney who represents any type of organization.[4]

Baldwin's Role in the Penn State Scandal

Baldwin had worked closely with PSU's

senior executives for years, first while serving as president of the university's alumni association and later as chair of PSU's Board of Trustees. She was appointed PSU's general counsel in January 2010 just as the Sandusky criminal investigation was heating up.

A report on the scandal commissioned by PSU and conducted by Louis Freeh, former director of the Federal Bureau of Investigation, concluded that PSU's board was not kept adequately informed of the growing scandal and its implications for the university.[5] According to the report, Spanier repeatedly downplayed the importance of the Sandusky investigation throughout 2010 and 2011.

This obfuscation apparently occurred with Baldwin's assistance or acquiescence even after she learned that criminal charges were likely to be leveled against high ranking PSU officials. Freeh's report suggests that Baldwin consistently allowed Spanier to make the final decisions as to when and how the trustees would be updated about the crisis.

Potentially even more problematic was Baldwin's conduct while accompanying Schultz, Curley, and Spanier when they testified before the Sandusky grand jury in early 2011.

When asked if he was represented by counsel, Schultz, Curley, and Spanier each indicated that Baldwin was his attorney. Baldwin was present for these questions and never took advantage of the opportunity to clarify her legal role. When asked directly by the supervising judge if she was representing the witnesses, Baldwin made no distinction between her role as PSU's general counsel and her possible role as counsel to the individuals.[6]

The following year Baldwin herself testified before the grand jury against Schultz, Curley, and Spanier. Her testimony laid the foundation for the state's decision in November 2012 to indict Spanier and to levy additional charges against Schultz and Curley.[7]

Baldwin says that when the grand jury subpoenas first arrived she told each witness, "You know, I represent the university. You can get your own lawyer." The three witnesses strenuously deny this assertion. But even if Baldwin did offer this half-hearted warning to the witnesses, it apparently was not sufficient to eliminate confusion over her representational role.

The only time Baldwin clarified her role as PSU attorney was when she spoke with the grand jury judge privately in his chambers. None of the PSU witnesses was present for this conversation, meaning they did not hear and could not benefit from Baldwin's explanation to the judge that she was representing PSU and only PSU in the Sandusky matter.

Schultz, Curley, and Spanier say that Baldwin's actions during the Sandusky investigation led them to assume that she was representing them individually in addition to representing PSU. "I think this was a crashing failure of due process," Spanier's current attorney Elizabeth Ainslie told the *Philadelphia Inquirer*. "No one explained to Graham Spanier that the person he thought was his lawyer was not his lawyer."

The three ex-PSU officials argue that they, not PSU, controlled the attorney-client privilege that applied to their confidential conversations with Baldwin. If that is true, then Baldwin breached her duty of confidentiality to Schultz, Curley, and Spanier when she testified before the grand jury about her private conversations with those men.

All three witnesses-turned-defendants have asked the Pennsylvania courts to dismiss the charges based on Baldwin's (alleged) misconduct and the prosecutor's knowledge of that misconduct. Spanier also filed a similar motion in federal court, seeking the rare remedy of federal intervention in a state criminal prosecution.

In April 2014 a Pennsylvania state court judge rejected the motion to dismiss on jurisdictional grounds. But in doing so the judge raised substantial questions about Baldwin's actions and inactions during the grand jury proceedings.[8] According to the judge, Baldwin arguably demonstrated "poor judgment and/or improper ethical conduct in her handling of the investigation."

Quoting a law review article written by Duke Law School's Deborah DeMott on the roles of general counsel, the judge commented, "A contemporary general counsel often occupies other roles as well [besides advising the board and senior management], each complex and additionally interlinked in many ways...[A] general counsel's position has often been characterized as ambiguous.... [N]ot all occupants of the position succeed in balancing its multiple roles in either a professional or socially satisfactory manner."[9]

Baldwin resigned as PSU's counsel in 2012, but the ethical controversy surrounding her conduct in that position has not dissipated.

The Legal Ethics Rules for Organizational Attorneys

Before examining the legal ethics rules most relevant to organizational attorneys like Baldwin, a caveat is needed: neither this author nor any other commentator knows for certain whether Cynthia Baldwin acted inappropriately while serving as PSU's general counsel. No state bar ethics charges have been filed against her. The Freeh report—one source of troubling allegations about Baldwin—has come under heavy criticism for alleged errors and omissions.[10] That said, if the allegations made by Spanier and his co-defendants are true, then Baldwin clearly failed to satisfy her ethical obligations several times over.

Pennsylvania's rules of professional conduct are similar to those that apply to attorneys practicing in North Carolina. Rule 1.13 governs the obligations of organizational attorneys and demands ultimate loyalty to the organization's governing board. If the attorney knows of misconduct by employees that could be imputed to the organization and could cause substantial injury to the organization, the attorney is obligated to report the issue to the governing board unless the issue is resolved satisfactorily by other organizational officials. And when dealing with the organization's employees, the attorney must explain the true identify of her client when the attorney has reason to believe that the interests of the organization may be adverse to the interests of individual employees.

Baldwin's alleged failure to keep the PSU trustees appropriately informed about the Sandusky investigation would have violated Rule 1.13 as well as Rule 1.4, which sets the standards for adequate attorney-client communication. Baldwin would have violated another section of Rule 1.13 if she did not take appropriate steps to make clear to Schultz, Curley, and Spanier that she did not represent them as individuals. That failure might also have violated Rule 4.3, which prohibits giving legal advice to unrepresented parties that are likely to be in conflict

with the attorney's client—in this case, PSU. Finally, Baldwin's failure to clarify her representational role to the grand jury judge may have violated Rule 3.3, which requires candor to the court.

Again, it is not clear that Baldwin violated any ethical rules. But even if her version of events is taken as fact, it is apparent that Baldwin did not do as much as she could have to protect her client, position individual employees to protect their interests, and defuse allegations of misconduct.

Upjohn Warnings

One crucial ethical safeguard available to organizational attorneys is known as the *Upjohn* warning. *Upjohn* is the 1981 US Supreme Court case that is most famous for its (somewhat convoluted) test for determining the scope of the attorney-client privilege for organizational clients in federal court.[11] More relevant to Baldwin's predicament is *Upjohn's* discussion of situations that might require an organization's attorney to warn employees about the attorney's role, and the fact that the organization rather than the employee controls any privilege that may attach to their conversations.

These warnings are sometimes known as "corporate *Miranda*" warnings after the lines uttered by every television and movie cop making an arrest since 1966.[12] While organizational attorneys are not expected to tell employees that "anything you say can and will be used against you by your employer," the required warning is intended to send a very similar message.[13]

Failure to provide an *Upjohn* warning can have a very detrimental result for the organization: the employee and not the organization may control disclosure of statements made by the employee to the organizational attorney.[14] As mentioned above, the failure to offer an adequate warning to employees also can violate the organizational attorney's ethical obligations under Rule 1.13.

Baldwin claims that she employed an *Upjohn* warning when she told Schultz, Curley, and Spanier, "I represent the university. You can get your own lawyer." But that brief statement may not have been sufficient to put the three PSU officials on notice that conversations between them and Baldwin could be disclosed by Baldwin at the direction of PSU. And the potential effectiveness of her lukewarm warning was undercut by Baldwin's subsequent failure to clarify her role when those witnesses indicated that she was representing them individually.

In the words of the Fourth Circuit Court of Appeals, watered-down *Upjohn* warnings such as the ones Baldwin claims to have offered are "potential legal and ethical minefield[s]."[15] In addition to risking control of the attorney-client privilege, an organizational attorney such as Baldwin who failed to clarify her role would almost certainly be disqualified from representing the organization in any subsequent dispute between it and the employee who was misled.[16]

Lessons for All Organizational Attorneys

The PSU legal saga is an extreme example of what can go wrong in organizational representations. Cynthia Baldwin's predicament nevertheless offers helpful lessons to organizational attorneys who face more mundane concerns.

First, an organizational attorney cannot abdicate the roles as legal advisor to the organization's governing board no matter how much the attorney trusts the organization's senior management. The attorney must control the flow of information to the board about legal risks. This responsibility cannot be delegated to the president, the CEO, the executive director, or (for local governments) the manager or mayor.

Second, attorneys representing organizations must constantly be wary of situations in which the interests of individual employees—even very senior employees—might conflict with the interests of their organizations. When such a situation arises, the attorney must provide adequate warnings to the employees about the attorney's role and the attorney's loyalty to the organization over the individual. To offer maximum protection for both the organization and the attorney, the *Upjohn* warnings should be documented in writing.

These ethical lessons are challenging to implement, especially when the organization's attorney has close relationships with senior management. But as an attorney in Cynthia Baldwin's shoes would likely admit, that challenge is minor compared to those that can arise when the lessons are ignored and the attorney's roles are muddled. ■

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Endnotes

1. Sandusky was convicted in 2012 of 45 counts of sexual crimes against children and sentenced to a minimum of 30 years in prison.
2. Paterno coached at PSU for 45 years. The university fired him in the middle of the 2011 football season as the scandal broke. Paterno died from lung cancer only a few months later.
3. The *New York Times Magazine* recently published a lengthy cover story on Spanier's career, involvement with the Sandusky case, and the criminal charges lodged against him. nytimes.com/2014/07/20/magazine/the-trials-of-graham-spanier-penn-states-ousted-president.html.
4. For a more detailed look at some of the legal ethics issues raised in the Penn State scandal, see this 2013

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