

## Legal Ethics Lessons from the Penn State Scandal

Chris McLaughlin  
Associate Professor, UNC SOG  
[mclaughlin@sog.unc.edu](mailto:mclaughlin@sog.unc.edu)  
919.843.9167

Fall 2015



UNC  
SCHOOL OF GOVERNMENT

[www.sog.unc.edu](http://www.sog.unc.edu)



UNC  
SCHOOL OF GOVERNMENT

2




UNC  
SCHOOL OF GOVERNMENT

3



UNC  
SCHOOL OF GOVERNMENT

**Cynthia Baldwin,  
PSU General Counsel**



4

---

---

---

---

---

---

---

---

**Cynthia Baldwin**

- State court judge & PA Supreme Court justice, 1989 – 2008
- President, PSU alumni association, 1989 – 91
- Chair, PSU board of trustees, 2004 – 07
- PSU first general counsel, 2010 – 12

5

---

---

---

---


---

---

---

---

**Graham Spanier,  
PSU President**



6

---

---

---

---

---


---

---

---

Tim Curley

Athletic Director



Gary Schultz

Vice President



7

---

---

---

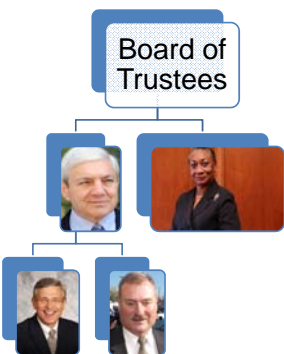
---


---

---

---

---



8

---

---

---


---

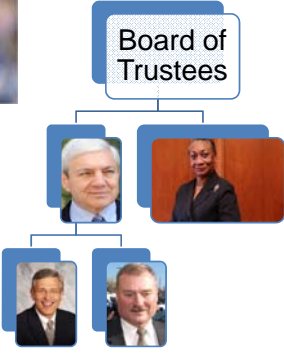
---


---

---

---





9

---

---

---

---

---

---

---

---

## Two Fundamental Questions about Baldwin's Role

- Did Baldwin keep her client (the PSU Board of Trustees) adequately informed about the scandal?
- Did Baldwin's conduct lead Spanier, Curley, and Schultz to reasonably believe that she represented them individually?

---

---

---

---

---

---

---

---

## Who is my client?

---

---

---

---

---

---

---

---

## The Sandusky Saga Timeline

- **1969:** Sandusky hired as assistant coach.
- **1977:** Sandusky creates "Second Mile"
- **1998:** First Sandusky assault reported to PSU and State College police. No charges.
- **1999:** Sandusky retires after being told he will not be the next head coach.

---

---

---

---

---

---

---

---



## The Sandusky Saga Timeline

- **2001:** PSU assistant coach McQueary witnesses assault in locker room and reports it to Paterno, Curley, and Shultz.
- **2008:** New assault reported to State College schools. Criminal investigation begins.
- **January 2010:** Grand jury requests documents from PSU

---

---

---

---

---

---

---

---

## The Sandusky Saga Timeline

- **February 2010:** Baldwin appointed PSU general counsel
- **December 2010:**
  - McQueary testifies before grand jury.
  - Baldwin learns that Paterno, Curly, and Schultz will be called to testify.

---

---

---

---

---

---

---

---

## The Sandusky Saga Timeline

- **January 2011:**
  - Baldwin accompanies Curley & Schultz before grand jury.
  - Paterno hires separate attorney.
- **March 2011:** Sandusky investigation & PSU subpoenas become public
- **April 2011:** Baldwin accompanies Spanier before grand jury

---

---

---

---

---


---

---

---

### The Sandusky Saga Timeline

- **May 2011:**
  - Spanier & Baldwin first brief PSU board of trustees about criminal case
  - Baldwin leaves meeting at Spanier request
- **October 2011:** Baldwin and Spanier learn that Curley and Schultz will be indicted


16

---

---

---

---

---

---

---

---

### The Sandusky Saga Timeline

- **November 5, 2011:**
  - Sandusky arrested
  - charges against Curley and Schultz announced
  - Spanier issues statement of support
  - Spanier briefs board via conference call
- **November 9, 2011:** Paterno and Spanier fired


17

---

---

---

---

---

---

---

---

### The Sandusky Saga Timeline

- **January 2012:** Baldwin resigns
- **June 2012:** Sandusky convicted
- **July 2012:** NCAA sanctions PSU


18

---

---

---

---

---

---

---

---

### The Sandusky Saga Timeline

- **October 2012:** Baldwin testifies against Spanier
- **November 2012:** Spanier indicted. New charges for Curley and Schultz.
- **Early 2013:** Defendants move to dismiss charges


19

---

---

---

---

---

---

---

---

### The Sandusky Saga Timeline

- **September 2014:** NCAA lifts bowl ban
- **January 2015:**
  - NCAA reinstates Paterno victories.
  - Judge denies motion to dismiss. Rules no attorney-client privilege between Baldwin and the defendants.
- **Spring/Summer 2015:** defendants appeal


20

---

---

---

---

---


---

---

---

### Two Fundamental Questions about Baldwin's Role

- Did Baldwin keep her client (the PSU Board of Trustees) adequately informed about the scandal?
- Did Baldwin's conduct lead Spanier, Curley, and Schultz to reasonably believe that she represented them individually?


21

---

---

---

---

---

---

---

---

## Communicating with the Board

- Who controls timing and substance of Board updates?
- Response to document requests
- Prior counsel?

---

---

---

---

---

---

---

---

## NC RRPC 1.13(b): "Organization as Client"

- "violation of law which reasonably might be imputed to the organization"
- "likely to result in substantial injury to the organization"
- "the lawyer shall refer the matter to higher authority in the organization, including . . . to the highest authority that can act on behalf of the organization"

---

---

---

---

---

---

---

---

## Muddling the Client Relationship

- Baldwin to Spanier, Curley, & Schultz: (allegedly)
- "You know, I represent the University. You can get your own lawyer."
- Never again discussed personal representation

---

---

---

---

---

---

---

---





## Muddling the Client Relationship

- Baldwin drove Curley, Schultz, & Spanier to grand jury.
- Baldwin in courtroom for all 3 witnesses, not for Paterno. GJ rules?
- In chambers: "I represent the university solely."

---

---

---

---

---

---

---

---

## Muddling the Client Relationship

- At Curley's testimony:
  - "Do you have counsel with you?"
  - *"Yes, I do. My counsel is Cynthia Baldwin."*
- At Schultz's testimony:
  - "You are accompanied today by counsel, Cynthia Baldwin. Is that correct?"
  - *"That is correct."*

---

---

---

---

---

---

---

---

## Muddling the Client Relationship

- At Spanier's testimony:
  - "Sir, are you represented by counsel today?"
  - *"Yes."*
  - "Could you just identify counsel?"
  - *"Cynthia Baldwin, sitting behind me."*

---

---

---

---

---

---

---

---

## Muddling the Client Relationship

- Spanier's current lawyer:

"This was a crashing failure of due process. Nobody explained to Graham Spanier that the person he thought was his lawyer was not his lawyer."

---

---

---

---

---

---

---

---

## NC RRPC 1.13(f): "Organization as Client"

- "[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."

---

---

---

---

---

---

---

---

## PA Court Denies Spanier's Motion to Dismiss

- Sets very high bar to prove ACP between organization attorney and employee
- "No evidence Baldwin knew a conflict could arise."

---

---

---

---

---

---

---

---

### Other Courts Think Differently

- *Home Care Industries* (D.N.J. 2001)
- Individual “attorney-client relationship need not be articulated but may be inferred from conduct.”
- Was employee’s belief reasonable?

---

---

---

---

---

---

---

---

### Other Courts Think Differently

- *In re: Grand Jury* (4<sup>th</sup> Cir. 2005)
- “We can represent you if no conflict arises.”

---

---

---

---

---

---

---

---

### NC RRPC 1.13(f): “Organization as Client”

- *Upjohn* or “corporate *Miranda*” warnings
- “I represent the organization, not you.”
- “Anything you say can and will be used against you by the organization”

---

---

---

---

---

---

---

---



## Other Relevant Rules

- Rule 3.3: Candor toward tribunal
- Rule 4.3: Dealing with unrepresented persons

---

---

---

---

---

---

---

---

## Beyond Ethics: Why do we care about the failure to identify the client?

- Confidentiality & Privilege
- Disqualification
- Impact on individual criminal charges

---

---

---

---

---

---

---

---

## Discussion Questions

---

---

---

---

---

---

---

---