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## Coates' Canons Blog: Legal Ethics Lessons from the Penn State Scandal

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*[Please see this more recent post for updates on Cynthia Baldwin's role in the PSU scandal.]*

Most of the headlines relating to the Pennsylvania State University ("PSU") child abuse scandal focused on the connections between convicted child molester Jerry Sandusky and the PSU football program. 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.

The scandal had negative repercussions for senior PSU employees beyond the football program as well. Graham Spanier, the university'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.

The university's general counsel at the time, Cynthia Baldwin, has also garnered unwanted attention thanks 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 local government 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 far more common scenarios. Any time an organization is accused of misconduct, potential conflicts may arise between the organization and the organization's 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 experienced local government attorneys. Baldwin's predicament provides a valuable learning opportunity for any attorney who represents any type of organization.

Baldwin had worked closely with PSU's senior executives first while serving as president of the university's alumni association and later as chair of PSU's Board of Trustees. She was appointed as 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 developing scandal and its implications for the university. According to the report, Spanier repeatedly downplayed the importance of the Sandusky investigation throughout 2010 and 2011.

This obfuscation allegedly 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 repeatedly allowed Spanier to make the final decisions as to when and how the trustees would be updated about the growing scandal.

Potentially even more problematic was Baldwin's conduct while accompanying Schultz, Curley and Spanier when they testified before the Sandusky grand jury early 2011. When asked if he was represented by counsel, each witness 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.

The following year Baldwin testified herself 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.

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All three men now claim that Baldwin led them to assume that she was representing them individually in addition to representing PSU. Schultz, Curley and Spanier argue that they, not PSU, controlled the attorney-client privilege that applied to their confidential conversations. If true, then Baldwin breached her duty of confidentiality to the three PSU officials when she testified before the grand jury about her conversations with them.

The three defendants have asked the Pennsylvania state court to dismiss the charges based on Baldwin's (alleged) misconduct and the prosecutor's (alleged) knowledge of that misconduct. Spanier recently filed a similar motion in federal court. "I think this was a crashing failure of due process," says Spanier's current attorney Elizabeth Ainslie, "No one explained to Graham Spanier that the person he thought was his lawyer was not his lawyer."

The first state court judge to review the issue declined to reach the merits of the motion due to jurisdictional issues but indicated even if the allegations were true the prosecutions could proceed.

In his opinion the judge observed that Baldwin arguably demonstrated "poor judgment and/or improper ethical conduct in her handling of the investigation." Quoting a law review article 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 interlinked . . . [A] general counsel's position has often been characterized as ambiguous. . . . [N]ot all occupants of the position succeed in balancing multiple roles in either a professional or socially satisfactory manner."

I want to be clear that we don't know for sure whether Cynthia Baldwin acted inappropriately. As far as I can tell, no state bar ethics charges have been filed against Baldwin. The Freeh report, one source of troubling allegations about Baldwin, has come under heavy criticism for alleged errors and omissions. But if the allegations raised by that report or by Spanier and his co-defendants are true then Baldwin clearly failed to satisfy her professional responsibility obligations several times over.

Pennsylvania's rules of professional conduct are similar to ours here in North Carolina. Rule 1.13 governs the obligations of organizational attorneys. The rule 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 cause substantial injury to the organization, that attorney is obligated to report the issue to the governing board if the issue is not resolved satisfactorily by other organizational officials. When dealing with the organization's employees, the attorney must explain the true identity 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 informed about the Sandusky investigation would clearly violate Rule 1.13. Her apparent legal relationships with Schultz, Curley, and Spanier would violate not only Rule 1.13 but also Rule 4.3, which prohibits giving legal advice to unrepresented parties that are likely to be in conflict with the attorney's client. And her failure to clarify her representational role to the grand jury judge may have violated Rule 3.3, which requires candor to the court.

What should Baldwin have done better? Lots.

She should not have abdicated to Spanier her role as legal advisor to the board. She should have realized immediately that PSU's interests were likely to conflict with the interests of those PSU officials who, like Schultz, Curley, and Spanier, may have known about the Sandusky allegations long before they became public. And she should have remembered perhaps the most important ethical rule when representing organizations: the attorney represents the organization, not its employees, and must never give its employees reason to think otherwise.

Local government attorneys should keep Cynthia Baldwin in mind when they confront situations in which the interests of their government colleagues could diverge from the interests of their local governments. Regardless of how close the attorney's relationship might be with the manager or the police chief or the mayor, the attorney needs to put the interests of the organization above the interests of the individual. And the attorney needs to make sure that individuals involved know where the attorney's loyalty lies.



## Links

- [en.wikipedia.org/wiki/Penn\\_State\\_sex\\_abuse\\_scandal](http://en.wikipedia.org/wiki/Penn_State_sex_abuse_scandal)
- [www.cbsnews.com/news/paterno-retiring-amid-child-abuse-tragedy/](http://www.cbsnews.com/news/paterno-retiring-amid-child-abuse-tragedy/)
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