
Coates' Canons Blog: More Legal Ethics Lessons from Penn State

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[UPDATE 2/2020: Adopting reasoning similar to mine below, in March 2019 the Pennsylvania Disciplinary Board rejected the 2018 ethics report and recommendation and concluded that Baldwin violated the attorney-client privilege held by the three Penn State executives. The Disciplinary Board recommended that Baldwin receive a public censure for her professional misconduct. In February 2020, the Pennsylvania Supreme Court agreed with that Baldwin violated her duties of professional responsibility and ordered that she receive a public reprimand from the Disciplinary Board.]

The Penn State child abuse scandal first hit the national consciousness eight years ago but continues to make headlines today. In late February 2019, the university's former president lost an appeal of his conviction on child endangerment charges relating to his failure to properly report allegations of child abuse in 2001. Two other senior Penn State executives served jail terms in 2017 for their guilty pleas on similar charges.

From my legal ethics perspective, the most important recent development was the issuance of a Pennsylvania state bar ethics report and recommendation in late 2018 concerning Cynthia Baldwin, Penn State's former general counsel. That report focused on some of the disturbing ethical issues relating to Baldwin's conduct during the scandal that I raised in this 2014 blog post.

Although the 2018 ethics report concludes that Baldwin did not technically violate any legal ethics rules, it paints a troubling picture of an attorney who allowed her loyalty to her organizational client to become tainted by her relationships with that organization's senior employees. It also adopts an unusual and potentially problematic interpretation of the "Upjohn" warnings that organizational attorneys use to remind employees that they represent the organization and not individual employees.

Today's blog post analyzes that ethics report and explains how it provides important professional responsibility lessons for all attorneys who represent organizations, be they local governments, universities, or private corporations.

In my first Penn State blog post, I raised two basic questions about Baldwin's conduct. First, did she appropriately keep her client—the Penn State University Board of Trustees—informed about the scandal and its potential impact on the university? Second, did she inadvertently lead three senior Penn State executives—President Graham Spanier, Vice President Gary Schultz, and Athletic Director Tim Curley—to believe that she was representing them individually while also representing the university?

The 2018 ethics report ignored the first question entirely, a major failing that I discuss below. Instead, the report focused exclusively on the second question. The panel investigated whether Baldwin created attorney-client relationships with the three executives and, if so, whether she violated her duty of confidentiality owed to those executives when she provided grand jury testimony against them.

Baldwin originally denied that she represented the executives individually or led them to believe that she did. She claimed that when they were first called to testify before a grand jury she informed the executives that she represented Penn State and that "they could get their own lawyer" if they wanted to. Nevertheless, she accompanied all three into the grand jury room and allowed herself to be identified as their attorney during their testimony.

The three executives argued that Baldwin's conduct led them to believe that she was representing them individually and that her subsequent grand jury testimony against them violated their attorney-client privilege and Baldwin's duty of confidentiality. A Pennsylvania appellate court agreed and dismissed charges of perjury and obstruction of justice that were based on Baldwin's testimony.

The 2018 ethics report reached a very different conclusion. It determined that Baldwin led the executives to believe that she was representing them as individuals in addition to her representation of Penn State. The duty of confidentiality arising from those individual attorney-client relationships under N.C. Revised Rule of Professional Conduct 1.6 normally would have precluded Baldwin from testifying against the executives to the grand jury.

However, the ethics report concluded that Baldwin's testimony was permitted under two exceptions to the duty of confidentiality in Rule 1.6. That rule permits an attorney to violate her duty of confidentiality owed to a client in order "to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used"(Rule 1.6(a)(4)) or "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." (Rule 1.6(a)(6))

According to Baldwin, after three executives testified to the grand jury about what they allegedly knew of the 2001 child abuse allegations Baldwin came to believe that they had perjured themselves. Baldwin also believed that they had committed obstruction of justice when they failed to produce documents concerning those allegations in response to a grand jury subpoena. The ethics report concluded that Baldwin was justified to testify against her individual clients because it was reasonable for her to assume that her legal services had been used as part of their criminal and fraudulent conduct (Rule 1.6(a)(4)) and that she herself might face criminal or ethical charges as a result (Rule 1.6(a)(6)).

This conclusion contradicts the PA court of appeals' finding in the criminal case against the three PSU executives. How did the ethics report explain that contradiction? Not very well, in my view.

The ethics report first attempted to distinguish the two inconsistent rulings by observing that Baldwin was not a party to the criminal case. True, but the facts were the same, so I'm not sure how the change in parties should change the result.

The ethics report then claimed that the questions at issue in the two proceedings were very different. In the criminal case, the court was charged with determining if the criminal defendants "were entitled to have the information [Baldwin] disclosed in her Grand Jury testimony maintained in confidence." (Page 37 of the ethics report.) To me, that is simply a different way to phrase the question addressed in the ethics report, which was whether Baldwin had a duty not to share the individuals' confidential information with the grand jury.

This weak effort to circumvent the appellate court's finding is just one example of the mental gymnastics the ethics report engaged in to reach the questionable conclusion that Baldwin did not violate any ethics rules.

The most tortuous leap of logic demonstrated by the ethics report—and the reason I think all organizational attorneys should care about this ethics opinion—is its unusual interpretation of the "Upjohn warnings" given by Baldwin and her deputies to the three executives. Also known as "corporate Miranda warnings," these disclaimers are usually intended to remind an organization's employees that the organization's attorney represents the organization and not individual employees.

The ethics report found evidence that Baldwin and her deputies did in fact give Upjohn warnings to the three executives. But instead of terminating any reasonable belief by the executives that Baldwin represented their individual interests as well as those of Penn State, the warnings, according to the ethics report, *confirmed* that Baldwin could represent the individuals jointly with the university. The ethics report interpreted Baldwin's Upjohn warning—"I represent the university. I don't represent you individually. To the extent your interests align with that of the university, I can provide you with counsel"—to mean that Baldwin was promising to represent the university and the individuals unless and until a conflict arose. In other words, the Upjohn warnings had the opposite of their usual intended effect.

This conclusion should get the attention of every organizational attorney who ever has the need to issue Upjohn warnings—which is to say, every organizational attorney. Baldwin's seemingly unintentional joint representation of both the organization and the organization's employees provides substantial motivation for organizational attorneys to tighten up the language of their Upjohn warnings. It should be crystal clear whether the message of the Upjohn warning is, "I am *not* representing you and the organization jointly" or "I *am* representing you and the organization jointly unless and until a conflict arises."

Based on her defense to the ethics charges, Baldwin apparently thought she was sending the first message. The ethics

report says that the individuals heard the second. She could have avoided that misinterpretation by making her Upjohn warning more explicit. Other organizational attorneys should review the language of their Upjohn warnings to make sure they are sending the intended message.

As I mentioned, the ethics report makes no mention of Baldwin's duties to Penn State, her original client. This is a dramatic failure, for several reasons.

First, Baldwin's joint representation of the individual executives had material consequences for Penn State. By creating attorney-client relationships with the individual employees, Baldwin ended Penn State's unilateral control of confidential and privileged information. The employees, not just Penn State, would have the right to determine when and how confidential information could be shared with third parties.

The joint client relationships also raised the possibility that Baldwin would be disqualified from representing either Penn State or the individuals if a conflict later arose. (See my discussion of attorney disqualifications in my earlier NC Bar Journal article on the Penn State scandal.) Baldwin's failure to obtain Penn State's informed consent for this joint relationship seems to be an obvious violation of her professional obligations under Rule 1.2 (allocation of authority between client and lawyer) and Rule 1.4 (communication).

Second, ample evidence suggests that Baldwin failed to satisfy her obligations under Rule 1.13 to keep the Penn State board informed about the scandal. Baldwin repeatedly deferred to the Penn State president as the scandal expanded and permitted him to control the timing and the substance of the information about the scandal shared with the board. When the president finally agreed to update the board about the impact of the scandal on Penn State, he ordered Baldwin out of the room. She complied, completely abdicating her responsibility to ensure that her client had the information needed to make important legal decisions.

As their subsequent criminal convictions have proven, Penn State's senior executives were thinking more about their personal interests than about Penn State's interests as the scandal developed. Baldwin had a duty to make sure the board knew the full scope and the potential legal ramifications of the scandal. She failed to do so.

The failure of the ethics report to address this issue is inexplicable and should not lead observers to conclude Baldwin acted appropriately toward Penn State. Far better for other organizational attorneys to view Baldwin's conduct as an example of what *not* to do when their client faces a major crisis.

Links

- www.pennlive.com/news/2019/03/state-board-recommends-public-censure-for-penn-state-attorney-in-sandusky-case.html
- www.pacourts.us/assets/opinions/Supreme/out/J-63-2019MO.pdf?cb=1
- www.post-gazette.com/news/crime-courts/2019/02/21/Penn-State-Graham-Spanier-appeal-denied-Pennsylvania-Supreme-Court/stories/201902210176
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- assets.documentcloud.org/documents/5023558/Baldwin-HC-Report-Public-Version-C1-C3.pdf
- www.nytimes.com/2016/01/23/sports/ncaafotball/some-charges-against-former-penn-state-officials-thrown-out.html
- www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-16-confidentiality-of-information/
- www.crowell.com/PDF/ABAUjohnTaskForceReport.pdf
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