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ATTORNEY-CLIENT PRIVILEGE

Government's Penn State Investigation Produces Lessons for In-House Counsel

BY TODD PRESNELL

The fallout at Penn State University in the wake of the Jerry Sandusky child-sexual-abuse scandal, including the victims' suffering, Sandusky's criminal conviction, the firing and subsequent death of legendary coach Joe Paterno, and the drastic NCAA sanctions against the university's athletic department, offered a plethora of life lessons for future conduct. But the story is not over, and an appellate court's strong criticism of how Penn State's former general counsel handled grand-jury subpoenas presents important lessons for in-house lawyers dealing with corporate officers.

The Pennsylvania Commonwealth charged Penn State's former president (Graham Spanier),[1] finance officer (Gary Schultz),[2] and athletic director (Timothy Curley)[3] with endangering the welfare of a child, failure to report child abuse, perjury, obstruction of justice, and conspiracy. These charges stemmed from the trio's response to allegations of Sandusky's sexual misconduct and their grand-jury testimony. The Pennsylvania appellate court quashed the charges of perjury, obstruction of justice, and conspiracy after ruling that the university's general counsel failed to provide *Upjohn* warnings and breached the attorney–client privilege by providing grand-jury testimony against these officials.

Commissions and Omissions

The Commonwealth's Office of Attorney General (OAG) subpoenaed Schultz, Curley and Spanier to testify before a grand jury investigating Sandusky incidents that occurred in 1998 and 2001. The university's general counsel, Cynthia Baldwin, a former Pennsylvania Supreme Court justice, accepted service of the subpoenas on behalf of Schultz and Curley, and agreed to advise and attend their grand-jury testimony. Baldwin would act similarly when Spanier's subpoena arrived, and her commissions and omissions ultimately resulted in the appellate court's serious findings.

Initial (Client?) Meeting

Baldwin met separately with Curley and Schultz to prepare for their upcoming grand-jury testimony, but never properly informed them of her lawyer role. Baldwin told these officials that they could retain their own lawyer, but also that she did not see a conflict and ''felt comfortable'' representing them regarding the subpoena. Baldwin did not advise either official of his Fifth Amendment right against self-incrimination.

[1] *Commonwealth v. Spanier*, 2016 WL 285663 (Pa. Super Ct. Jan. 22, 2016).

[2] *Commonwealth v. Schultz*, 2016 WL 285506 (Pa. Super. Ct. Jan. 22, 2016).

[3] *Commonwealth v. Curley*, 2016 WL 285707 (Pa. Super. Ct. Jan. 22, 2016).

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Baldwin ''did not provide anything akin to *Upjohn* warnings''[4] at this preparation meeting. Nor did she explain the difference between her representation of them in their individual capacities as opposed to their capacities as Penn State agents. While Baldwin explained that their discussions were not confidential, she did so in a limited sense, stating only that she may relay their comments to the university's Board of Trustees.

Preliminary OAG Interview

Prior to the officials' grand-jury testimony, OAG investigators met separately with Schultz and Curley. Baldwin joined these meetings and asked the investigator whether her ''clients'' were a target of the grand-jury investigation.

Pre-Testimony Discussions with Judge

The Grand Jury Supervising Judge met with the officials and Baldwin, and specifically asked Baldwin regarding her representation. Baldwin provided an opaque response, neither stating that she represented them in their university agency capacity nor disavowing that she represented them individually. The judge then advised the officials of their rights as grand-jury witnesses, and repeatedly referred to Baldwin as their counsel with whom they could refer during the testimony.

Grand Jury Testimony

A Pennsylvania statute provides witnesses appearing before an investigating grand jury with a right to assistance of counsel. Baldwin walked into the grand-jury room when Schultz and Curley testified, and sat beside them throughout their testimony.

During that testimony, Schultz and Curley indicated that Baldwin was their lawyer, but Baldwin did not explain whether she represented them in their agency capacity or individual capacity. The officials thereafter testified, inconsistently as it turned out, about their knowledge of the 1998 and 2001 Sandusky incidents, and the OAG subsequently charged them with perjury and failure to report child abuse.

OAG Subpoenas Baldwin

Schultz and Curley then retained individual lawyers who promptly notified Baldwin that the officials considered her their lawyer and instructed her not to reveal privileged communications. Despite repeatedly failing to expressly state the scope of her representation, Baldwin now responded that she represented the officials solely in their agency capacities.

Separately, the OAG was unhappy with Penn State's response to a subpoena *duces tecum*, and subpoenaed Baldwin to testify before the grand jury regarding the officials' responses to the document requests. The officials demanded that Baldwin not testify about their communications because she had been their lawyer and they did not waive the attorney-client privilege.

The privilege issue ostensibly became moot, however, when the OAG informed the judge that he would not seek testimony from Baldwin that implicated privileged communications between Baldwin and the officials. Yet, the OAG did just that—he asked Baldwin questions about the officials' responses to her regarding the subpoenaed information. And Baldwin, knowing the officials' claimed privilege, did not object and answered the questions. This testimony led the OAG to file additional charges against Schultz and Curley of endangering the welfare of a child, obstruction of justice, and conspiracy.

The Ruling

The officials moved to quash the perjury, obstruction of justice, and conspiracy charges because Baldwin breached the attorney-client privilege when she testified without authorization to waive the privilege. They also argued that Baldwin's purported representation in a limited, agency-only capacity during their grand-jury testimony constructively negated their assistance-of-counsel right.

In granting the motions to quash, the appellate court distinguished the concept of the scope of an in-house lawyer's representation of corporate employees[5] with the concept of when an employee and an in-house lawyer establish an individual attorney-client relationship.[6] The court found that, faced with a grand-jury subpoena in a criminal investigation, the officials sought representation from Baldwin and that it was ''beyond cavil'' that their meetings occurred for the purpose of rendering legal advice.[7] This situation did not involve discussions between an in-house lawyer and an employee regarding business operations or an investigation into business practices; the communications pertained to the officials' rights and responsibilities rather than Penn State's corporate rights.

Decidedly Inadequate

The court ruled that Baldwin did not ''adequately explain'' her role and, while the officials knew she was the university's general counsel, it is ''unreasonable to conclude'' that, as laypersons, they understood that she represented them only in an agency capacity.[8] The court found ''decidedly inadequate'' Baldwin's telling the officials that she may reveal their conversations to the Board of Trustees. In fact, Baldwin's foreshadowing of communications with the trustees suggests conduct consistent with the common-interest doctrine rather than the lack of an impenetrable privilege.

The court held that ''Baldwin did not provide anything akin to *Upjohn* warnings.''[9] And because of this failure, the officials ''reasonably believed she represented'' them and the privilege therefore protected their communications. ''Consequently, Ms. Baldwin breached that privilege by testifying before the grand jury with respect to such communications.''[10]

And the court held that Baldwin's representation did not protect their Fifth Amendment rights. Because of

[4] *Schultz*, 2016 WL 285506 at * 25.

[5] The trial court had relied on *In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp*., 805 F.2d 120 (3d Cir. 1988), for this concept, but the appellate court found this concept inapt in these circumstances.

[6] The appellate court relied on *Commonwealth v. Mrozek*, 657 A.2d 997, 998 (Pa. Super. 1995), for this concept.

[7] *Schultz*, 2016 WL 285506, at *23.

[8] *Id.*

[9] *Id.* at *24.

[10] *Id.* at *25.

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this conduct, the court quashed the charges of perjury, obstruction of justice, and conspiracy.

Lessons Learned

The Commonwealth must forego pursuit of serious charges related to child sexual abuse. Beyond the societal implications, the case serves as a stark reminder of the importance of corporate counsel understanding the attorney-client relationship, the implications of the privilege, and how to handle conversations with corporate officers.

Object to Privilege-Piercing Questions

Even though she disagreed (wrongly as it turned out) that she was their individual attorney, Baldwin was clearly aware that Schultz and Curley asserted the attorney-client privilege before she provided grand-jury testimony. The OAG broke its promise not to ask privilege-piercing questions, but Baldwin failed to object to these questions or refuse to answer on privilege grounds. In-house lawyers faced with similar questions, most often in a deposition setting, should remain cognizant of their confidentiality and privilege obligations. Good judgment calls for retaining independent counsel to accompany the in-house lawyer to any testifying events.

Understand a Conflict of Interest

Upon accepting service of the subpoenas, Baldwin cavalierly told Schultz and Curley that there was no conflict of interest and that she ''felt comfortable'' representing them. Corporate counsel must understand that failing to advise corporate officers of their role as company lawyers may create a conflict of interest that would cause irreparable damage.

Sense an Oncoming Attorney-Client Relationship

The court's decision highlights the distinction between representing corporate officers in an agency capacity and representing them in an individual capacity. When beginning discussions with corporate officers in these delicate situations, the in-house lawyer should consider whether her conduct is creating an attorney-client relationship. If the focus turns quickly to the officer's concern over his individual conduct rather than general business practices, then the in-house lawyer should sense the establishment of an attorney-client relationship and move quickly to *Upjohn* warnings.

The Privilege Exists Prior to Upjohn Warnings

The court reminds us that the attorney-client privilege protects discussions between an attorney and a putative client. In this context, the privilege could protect an officer's communications with an in-house attorney that occur prior to receipt of the *Upjohn* warning. For this reason, early use of the *Upjohn* warning is highly important.

They Know I'm the Company's Lawyer

Although corporate officers are often sophisticated business persons who regularly deal with lawyers, in-house counsel should resist the urge to assume that these officers know the difference between representation in an individual capacity versus an agency capacity. As the court explained, ''it is unreasonable to conclude'' that an officer's awareness of the lawyer's company role precludes an individual attorney–client relationship.[11]

Understand Common-Interest Doctrine

Some situations call for corporate officers—with their own counsel—and the corporation to enter into a common-interest agreement under which they can share privileged information without the fear of waiver. This legal concept is intuitive to corporate officers, and the Baldwin matter reminds us that officers may have a ''we are in this together'' mindset absent clear direction about representation. In-house lawyers should provide the *Upjohn* warning and then, if necessary, approach the officer's counsel about an information-sharing agreement.

Upjohn Warnings

In-house lawyers must avoid ''decidedly inadequate'' *Upjohn* warnings by keeping these concepts in mind when interviewing corporate officers:

- The in-house lawyer should inform the officer that she represents the corporation, not the officer; that the interview is confidential and conducted for the purpose of counsel's rendering legal advice to the company; and that the attorney-client privilege protects the discussion.
- A partial warning about confidentiality is insufficient. The warning should specifically inform the officer that the corporation may, in its sole discretion, waive the privilege and disclose the conversation to third parties, including government-enforcement agencies.
- If given verbally, the in-house lawyer should prepare and read the warning from a script to ensure consistency, and then attach the script to counsel's interview notes or summary memorandum.
- Consider having more than one lawyer present during the interview to refute any subsequent claim by the employee that counsel failed to provide the warning.
- Consider asking the officer to sign a written acknowledgement that counsel gave the warning or simply signing a statement that lists the warnings given. The risk with this approach is that seeking a writing may produce a chilling effect on the officer's willingness to provide candid comments.
- If the officer asks whether he ''needs a lawyer,'' counsel should, consistent with ethical rules, inform him that he cannot advise him whether to obtain counsel but that he has the right to do so.

[11] *Id.* at *23.