PSU Ethics Case Brings Conduct Rules' Clarity Into Question

By **Matt Fair**

After Pennsylvania's highest court agreed that Pennsylvania State University's ex-general counsel should face discipline over attorney-client conflicts and privilege violations during the Jerry Sandusky sex abuse investigation, legal ethics experts are mulling whether changes to professional conduct rules could prevent similar mistakes in the future.

The Pennsylvania Supreme Court ruled Wednesday that Cynthia Baldwin ran afoul of rules governing conflicts of interest as she worked on behalf of Penn State throughout the Sandusky probe while also providing legal counsel to three top administrators who went on to face criminal charges in the case.

While professional conduct rules in Pennsylvania require corporate counsel to warn individual corporate employees when their interests in a legal matter are at odds, experts said they saw room to more clearly delineate when and how such warnings take place.

"In so many ways, the rules could be clearer and more specific — they are imperfect and sometimes give us conflicting guidance," said Ellen Brotman of Philadelphia-based Brotman Law, who specializes in attorney disciplinary cases. "There are times when I feel like it would be nice to have more notice of what a rule violation looks like before you sanction an attorney."

In Baldwin's case, she ended up facing disciplinary charges after working individually with Graham Spanier, Gary Schultz and Timothy Curley — who served, respectively, as Penn State's president, vice president and athletic director — after the administrators were subpoenaed to testify before a grand jury investigating sex assault claims against onetime assistant football coach Sandusky.

The three men were all ultimately charged with perjury, conspiracy and obstruction of justice for allegedly lying to investigators and grand jurors about their knowledge of Sandusky's conduct.

Baldwin became a witness during the investigation herself and provided testimony to the grand jury about conversations she'd had with Spanier, Schultz and Curley.

A Pennsylvania appeals court eventually threw out many of the charges against Spanier, Schultz and Curley after finding that Baldwin's allegiance to the university meant that the three administrators had been effectively denied counsel during their individual dealings with the grand jury.

Baldwin maintained during subsequent disciplinary proceedings that she'd clearly told Spanier, Schultz and Curley that her loyalty was ultimately with the university and that she couldn't represent the administrators in a personal capacity — statements known as Upjohn warnings — but the Supreme Court ruled in a 71-page opinion Wednesday that she hadn't

gone far enough.

In particular, the justices pointed to warnings about the possibility of self-incrimination that the grand jury supervising judge provided to the administrators as they took the stand during the state attorney general's investigation into Sandusky.

"It is impossible to conclude in light of the seriousness and solemnity of the warnings administered by the supervising judge that the [administrators] believed anything other than their personal interests were being protected by respondent," the court said. "It cannot be fathomed that respondent did not understand that she was representing them personally."

In effectively undertaking the dual representation, the justices said, Baldwin had ignored the clear possibility of conflicts between her client — the university — and the administrators.

Currently, the state's rules of professional conduct require corporate counsel to provide individual corporate employees with Upjohn warnings only in situations where the attorney "knows or reasonably should know" that their interests in a legal matter are adverse.

That leaves a substantial amount of wiggle room for potential conflicts to go unaddressed, University of North Carolina School of Government professor Christopher McLaughlin told Law360.

He pointed to a possible scenario where an organization and an employee's interests start out aligned but could later become adverse.

"Right now, the rule is pretty narrowly drawn to say if the interests aren't adverse at the outset, then I don't have to give the warning," he said. "It seems to be you could broaden the rule to say a warning is needed when the interests are adverse or there's a reasonable probability of them becoming adverse."

Brotman said that leaving it to corporate counsel to identify when there was a potential likelihood of a conflict put attorneys in a perilous position.

"When you're approaching an issue and you're talking to your employees about it, you have to be careful about whether you're going to find out something that's going to put the organization in conflict with the interests of the person," she said. "It's difficult and it's scary, because what often can happen is you only realize you've crossed the line after you cross the line."

She suggested another potential tweak to the rules that would require Upjohn warnings any time a corporate employee is tapped as a witness in a government proceeding.

"If the rules said that whenever one of your employees is called as a witness to testify about activities at the organization, there's a conflict, that would be clear," she said.

At the same time, however, she said that the case law provided by the justices in deciding Baldwin's disciplinary case provided clear guidance on the court's position about the need for strong Upjohn warnings.

“I think the Supreme Court is clearly saying now that there’s a potential conflict when individuals in an organization are subpoenaed to testify or are sought as witnesses in an investigation, whether it’s a criminal or compliance or regulatory or administrative matter,” she said.

In addition to providing clearer guidance on when Upjohn warnings become necessary, McLaughlin suggested another rule change to clarify how such warnings should be delivered to ensure that nonattorney corporate employees understand they aren’t being personally represented and aren’t protected by attorney-client privilege.

“That, to me, is really important,” he said. “Explaining the identity of the client may mean something to me because I spend all my time thinking about these kinds of things, but I’m not certain it really explains what it means if you’re a layperson.”

He said the rule could include bullet points indicating what information needs to be conveyed as part of any warning, specifically that the employee is not protected by attorney-client privilege and has no control over the release of otherwise confidential material.

But Bradley Arant Boult Cummings LLP partner Todd Presnell countered that making the rules too prescriptive would rob corporate counsel of a significant amount of flexibility in handling potentially sensitive internal investigations.

“My concern with amending the rules to require Upjohn warnings in particular instances is that there is no one-size-fits-all remedy,” he said. “I think the rule needs to be broad enough to allow lawyers to exercise good judgment in each situation, otherwise I think there’d be Upjohn warnings given when there’s really no need for it.”

He added that giving needless Upjohn warnings could frighten corporate employees out of sharing vital information.

“You want those employees and representatives to be candid with you, and when Upjohn warnings are given without the need for it, it can chill those conversations,” he said. “So you have to be able to balance that and make the right decision in each situation.”

Bruce Ledewitz, a professor at Duquesne University School of Law, said that the clear error Baldwin committed in failing to recognize the possible conflict in appearing with the administrators at their grand jury appearances did little to suggest that changes to the rules were needed.

“This wasn’t some extremely unusual or difficult matter of law or ethics; it was crystal clear,” he said. “It was almost a classic instance of a potential conflict — when you have a situation in which the institution might not be liable but the officer is, then obviously you have a conflict.”

--Editing by Aaron Pelc.