SAD LAWYERING IN HAPPY VALLEY

Douglas R. Richmond*

I. INTRODUCTION

An attorney-client relationship is unique.[1] It is also extremely personal.[2] A lawyer is a client's agent.[3] Lawyers owe clients fiduciary duties.[4] Clients and their lawyers enjoy an attorney-client privilege that generally insulates their confidential communications involving legal advice against discovery.[5] Lawyers owe clients key ethical obligations,[6] including the so-called "four Cs": competence, communication, confidentiality, and conflict of interest avoidance or resolution.[7]

Lawyers normally have no trouble identifying their clients or understanding the nature of their representations. Prudent lawyers send clients engagement letters or agreements that identify the client and specify the scope of the representation, among other terms. But an attorney-client relationship may arise in the absence of an express contract between the lawyer and client.[8] In some instances, an attorney-client relationship may be implied or inferred from the parties' conduct.[9]

 Managing Director, Professional Services, Aon Commercial Risk Solutions, Overland Park, Kan. and Chicago, Ill. J.D., University of Kansas. Opinions expressed here are the author's alone.

1. Baum v. Duckor, Spradling & Metzger, 84 Cal. Rptr. 2d 703, 712 (Ct. App. 1999); Davis v. Scott, 320 S.W.3d 87, 90 (Ky. 2010).

2. *Davis*, 320 S.W.3d at 90.

3. *In re* Kaushas, 616 B.R. 57, 63 (Bankr. M.D. Pa. 2020) (applying Pennsylvania law); Contreras v. Dowling, 208 Cal. Rptr. 3d 707, 725 (Ct. App. 2016); Hoch v. Loren, 273 So. 3d 56, 58 (Fla. Dist. Ct. App. 2019); Selby v. O'Dea, 156 N.E.3d 1212, 1227 (Ill. App. Ct. 2020).

4. Graves v. Johnson, 359 P.3d 1151, 1154–55 (Okla. Civ. App. 2015); Arden v. Forsberg & Umlauf, P.S., 373 P.3d 320, 326 (Wash. Ct. App. 2016).

5. United States v. Sanmina Corp., 968 F.3d 1107, 1116 (9th Cir. 2020).

6. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2021) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

7. Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 914 (2004–2005) (referring to these duties as "core fiduciary obligations"); *see* LAWRENCE J. FOX & SUSAN R. MARTYN, FAIR FIGHT: LEGAL ETHICS FOR LITIGATORS 5–6 (2020) (flagging "the six Cs" and adding "client identification" and "deference to client control" to the duties listed above).

8. Bistline v. Parker, 918 F.3d 849, 864 (10th Cir. 2019) (applying Utah law).

9. Est. of Nixon v. Barber, 796 S.E.2d 489, 492 (Ga. Ct. App. 2017); *In re* Hodge, 407 P.3d 613, 648 (Kan. 2017); Patel v. Martin, 111 N.E.3d 1082, 1093 (Mass. 2018); State *ex rel.* Couns. for Discipline of the Neb. Sup. Ct. v. Chvala, 935 N.W.2d 446, 471 (Neb. 2019).

Implied attorney-client relationships may be created where the lawyer represents an organization but deals with employees of the organization concerning the matter who are fact witnesses or whose involvement in the matter are such that the lawyer must communicate with them to effectively represent the organization.[10] In their encounters, an employee may ask the lawyer for legal advice concerning the matter that the lawyer then gives without qualification. To use another example, a lawyer may recognize that an employee of an organizational client considers them to be their personal lawyer as well as the organization's lawyer in connection with the matter, but not correct the employee's mistaken belief.[11]

In other cases, lawyers may recognize that they have an attorney-client relationship with someone but believe that the scope of the representation is limited in a fashion that exempts them from duties they might otherwise owe the client.[12] Depending on the facts, however, the lawyer's belief may not be justified, because the client must give informed consent to the limitation, and the limitation must be reasonable under the circumstances.[13] Furthermore, within the confines of the limited scope representation, the lawyer still owes the client duties of competence, communication, confidentiality, conflict of interest avoidance or resolution, and diligence, though the limitation is a factor to be considered in gauging the lawyer's fulfillment of those duties.[14]

Lawyers who fail to appreciate that they are a party to an implied attorney-client relationship, or who do not understand the scope of their

10. Lucian T. Pera, *The Ethics of Joint Representation*, LITIG., Fall 2013, at 45, 47; Martyn, *supra* note 7, at 939.

11. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 14(1) (AM. L. INST. 2000) (stating that this scenario may give rise to an attorney-client relationship).

12. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2021) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

13. *Id.*

14. *See, e.g.*, *In re* Seare, 493 B.R. 158, 188 (Bankr. D. Nev. 2013) ("[T]he duty of competence both informs and survives any and all limitations on the scope of services.... The level of inquiry and investigation required to discharge the duty of competence may be somewhat relaxed, however, under a limited scope agreement." (citations omitted)); Colo. Bar Ass'n, Ethics Comm., Formal Op. 101, at 9 (rev. 2016) ("Attorneys must be aware that, even in the context of limited scope representation, all of the Colorado Rules of Professional Conduct apply, and the limited scope case should be conducted consistent with the attorney's professional obligations."); Or. State Bar Ass'n Bd. of Governors, Formal Op. 2011-183, at n.3 (2011), http://www.osbar.org/_docs/ethics/2011-183.pdf ("A limited-scope representation does not absolve the lawyer from any of the duties imposed by the [Rules of Professional Conduct] as to the services undertaken."); Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Resp. & Phila. Bar Ass'n, Pro. Guidance Comm., Formal Op. 2011-100, at 9 (2011)) (explaining that all professional conduct rules "which apply to any other engagement apply to a limited scope engagement" and listing several rules as examples).

representation of a client or their obligations within that scope, may find themselves in serious professional trouble if the representation does not go as anticipated.[15] No case illustrates these situations better than the Pennsylvania Supreme Court's 2020 decision in *Office of Disciplinary Counsel v. Baldwin*.[16] *Baldwin* is an outgrowth of "[t]he biggest scandal in the history of college sports"—the child sexual abuse scandal that arose out of former Pennsylvania State University (Penn State) assistant football coach Jerry Sandusky's serial molestation of boys from his youth charity, the Second Mile Foundation.[17] In addition to his Penn State affiliation, Sandusky abused at least two boys in university facilities.[18] Sandusky was convicted on multiple counts of child sexual abuse involving numerous victims and received a long prison sentence.[19] The consequences of the Sandusky scandal, however, extended well beyond its namesake's conviction and punishment.[20] Among those

15. *See, e.g.*, Yanez v. Plummer, 164 Cal. Rptr. 3d 309, 312–16 (Ct. App. 2013) (reasoning that there was a genuine issue of material fact as to whether an in-house lawyer's conduct was a substantial factor in causing a former employee's (and impromptu co-client's) termination and reversing summary judgment for the lawyer on the former employee's legal malpractice, breach of fiduciary duty, and fraud claims).

16. 225 A.3d 817 (Pa. 2020).

17. BILL MOUSHEY & BOB DVORCHAK, GAME OVER 144 (2012).

18. *Baldwin*, 225 A.3d at 822–23.

19. Erin Hogge, *Former Pennsylvania Supreme Court Justice Reprimanded for Handling of Jerry Sandusky Case*, DAILY COLLEGIAN (July 23, 2020), https://www.collegian.psu.edu/news/crime_courts/article_7977151c-cd15-11ea-af7c-43f1b8712890.html (stating that Sandusky was currently serving a 30-60-year prison sentence following his conviction on 45 counts of child sexual abuse); Barrett Sallee, *Police Investigating New Sexual Abuse Allegation Against Former Penn State Assistant Jerry Sandusky*, CBS SPORTS (Nov. 2, 2019, 2:30 PM ET), https://www.cbssports.com/college-football/news/police-investigating-new-sexual-abuse-allegation-against-former-penn-state-assistant-jerry-sandusky (reporting that Sandusky was convicted of forty-five counts of child sexual abuse and sentenced to thirty to sixty years in prison).

20. Among the most-publicized consequences of the scandal, Penn State fired its legendary football coach, the late Joe Paterno, for his alleged role in the underlying events. MOUSHEY & DVORCHAK, *supra* note 17, at 160–62. In addition, the National Collegiate Athletic Association (NCAA) fined Penn State $60 million; banned the football team from postseason play for four years; and vacated all of Penn State's football wins from 1998–2011, thereby effectively stripping Paterno of the distinction as the all-time winningest coach in Division I college football. Steve Yanda, *Penn State Football Punished by NCAA Over Sandusky Scandal*, WASH. POST (July 23, 2012), https://www.washingtonpost.com/sports/penn-state-football-punished-by-ncaa-over-sandusky-scandal/2012/07/23/gJQAGNeM4W_story.html. Subsequently, the NCAA effectively conceded that it had misplayed its hand in responding to the Sandusky scandal and, in 2014, lifted the sanctions on Penn State's football program two years early. Ben Novak, *Revisiting the Sandusky Scandal and Penn State: New Perspectives Changing the Narrative*, STATE COLLEGE (Jan. 28, 2020, 4:30 a.m. ET), https://www.statecollege.com/revisiting-the-sandusky-scandal-and-penn-state-new-perspectives-changing-the-narrative. In 2015, the retreating NCAA restored Paterno's vacated wins, re-establishing him as the winningest coach in college football history with 409 career victories. Susan Snyder, *Penn State Announces It Has Settled All Claims with Joe Paterno's Family*, PITT. POST-GAZETTE (Feb. 21, 2020, 1:54 p.m. ET), https://www.post-gazette.com/news/education

consequences was the professional discipline of Penn State's former general counsel, Cynthia Baldwin, an accomplished lawyer and distinguished public servant, who chaired the university's Board of Trustees[21] and served as a Pennsylvania Supreme Court Justice before becoming general counsel.[22] Baldwin's tragically confused performance as Penn State's general counsel and personal counsel for three senior Penn State administrators in connection with the grand jury investigation into Sandusky's crimes has emerged from Happy Valley as a cautionary tale for lawyers.[23]

This Article traces that cautionary tale in three parts. Part II discusses the facts of the Sandusky scandal in relation to Penn State. In particular, Part II examines Baldwin's concurrent representations of Penn State and three of its senior administrators who played key roles in the scandal. Part III thoroughly details Baldwin's disciplinary case, which ended in her public reprimand by the Pennsylvania Supreme Court in *Office of Disciplinary Counsel v. Baldwin*.[24] Finally, Part IV reviews Baldwin's conduct with an eye on lessons to be learned from her experience.

/2020/02/21/joe-paterno-penn-state-family-resolution/stories/202002210120. The scandal's monetary consequences for Penn State, however, were enduring and harsh. Apart from the NCAA fine, the university paid at least $109 million to settle claims by numerous men who alleged that Sandusky had sexually abused them as boys. Mark Scolforo, *Penn State Payouts on Sandusky Abuse Claims Now Top $100M*, INS. J. (Nov. 13, 2017), https://www.insurancejournal.com/news/east/2017/11/13/470977.htm. Penn State also settled a whistleblower lawsuit by Mike McQueary, a former assistant football coach, who, while a graduate assistant in 2001, alerted Paterno to Sandusky's seeming molestation of a boy in a Penn State locker room shower. Penn State settled with McQueary after he won a $12.3 million verdict, plus a $1.7 million fee award. *Id.* As of November 2017, Penn State's "overall Sandusky-related costs" exceeded $250 million. *Id.*

21. Hogge, *supra* note 19.

22. Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 820 n.1 (Pa. 2020).

23. Baldwin served as Penn State's general counsel and chief legal officer from February 15, 2010, until June 30, 2012. *Id.* Penn State's University Park campus, which is home to the football team, is in Centre County, Pennsylvania, in an area commonly referred to as "Happy Valley." There is, however, "no geographic place in Centre County formally designated 'Happy Valley.'" *Penn State Myths*, PENN STATE, https://www.dept.psu.edu/ur/about/myths.html (last visited Sept. 15, 2021). "Happy Valley" is an informal description of Penn State's location and is not officially recognized by the university. *Id.* "The University Park campus and the community of State College are located in the Nittany Valley" in Centre County. *Id.* "The origin of the name Happy Valley . . . is murky." *Id.* The name apparently gained popularity "in the late 1960s, about the time when network telecasts of Nittany Lions football games began, and thus might be attributed to sports writers and broadcasters." *Id.*

24. 225 A.3d 817 (Pa. 2020).

II. THE SANDUSKY GRAND JURY INVESTIGATION OF PENN STATE AND BALDWIN'S RELATED ROLES

Baldwin stemmed from Baldwin's concurrent representation of Penn State and three senior university administrators in connection with the grand jury investigation into Sandusky's crimes that triggered the resulting scandal.[25] The three administrators were Graham Spanier, Penn State's President at the time; Gary Schultz, the university's Senior Vice President for Finance and Business at relevant times, who since retired; and Timothy Curley, Penn State's then-athletic director.[26]

The Pennsylvania Office of Attorney General (OAG) began presenting allegations of Sandusky's sexual abuse of boys from the Second Mile Foundation to an investigating grand jury in 2009.[27] As noted earlier, the grand jury heard evidence of two instances of abuse that occurred on the Penn State campus: one in 1998 and another in 2001.[28] The *Baldwin* court described the incidents and Penn State's response to them as follows:

> The 1998 incident involved an eleven-year-old boy. Sandusky took the victim to the East Area Locker Room on Penn State's campus, where they wrestled and then used exercise machines. Sandusky then insisted that they shower together. Sandusky put his arms around the victim and squeezed him, making the boy very uncomfortable. When Sandusky took the victim home, his mother asked why his hair was wet and became concerned upon learning of the joint shower. The next morning, she filed a report with the University Police Department. Centre County Children and Youth Services were also notified, but it referred the case to the Pennsylvania Department of Public Welfare, citing a conflict of interest due to its involvement with the Second Mile Foundation. . . .
>
> Tom Harmon was the Chief of Police of the University Police Department in 1998. As his department's investigation proceeded, Chief Harmon kept Schultz, who oversaw the University Police Department . . . , updated on its progress. Schultz, in turn, kept Curley and Spanier apprised of the investigation's progress, primarily through email messages. On June 9, 1998, Schultz sent Curley an email, on which Spanier was copied, informing him that the Centre

25. *Id.* at 820.
26. *Id.*
27. *Id.* at 822.
28. *Id.*

> County District Attorney had decided not to pursue criminal charges against Sandusky. . . .
>
> [I]n 2001, Michael McQueary, then a graduate assistant for the football team, witnessed Sandusky with a young boy in a locker room shower on the University's main campus. McQueary reported this incident to head football coach Joseph V. Paterno, who testified to the grand jury that McQueary described Sandusky as fondling or doing something of a sexual nature to a young boy in the shower. Paterno further testified that in turn he relayed this information to Schultz and Curley. Seven to ten days later, Schultz and Curley met with McQueary. McQueary . . . described to Schultz and Curley the sexual nature of what he had witnessed.
>
> Schultz then decided upon a plan that involved three parts. First, Curley would meet with Sandusky, tell him that they were aware of the 1998 incident, advise him to seek professional help, and prohibit him from ever again bringing boys into campus facilities. Second, the chair of Second Mile would be notified. And third, the matter would again be reported to the Pennsylvania Department of Public Welfare for investigation, as had been done in 1998. Curley responded that he would prefer not to report the matter to the public welfare department so long as Sandusky was cooperative with their efforts. Spanier was advised of the modified approach and agreed with the decision not to report the matter to an outside agency. Curley then executed the revised two-part plan, conducting separate meetings with Sandusky and a Second Mile representative.[29]

On December 28, 2010, Baldwin received a telephone call from the OAG regarding the grand jury investigation.[30] At the OAG's request, she accepted service of four subpoenas, three of which are relevant.[31] One was a subpoena duces tecum directed to Penn State seeking documents regarding "'Sandusky and incidents reported to have occurred on or about March 2002, and any other information concerning Jerry Sandusky and inappropriate contact with underage males both on and off University property.'"[32] The other two relevant subpoenas were

29. *Id.* at 822–23 (citations to the grand jury presentment and a footnote omitted).
30. *Id.* at 823.
31. *Id.* The fourth subpoena was directed to then-head football coach Joe Paterno. Paterno had his own counsel in connection with the grand jury investigation, however, so his subpoena and grand jury appearance were not Baldwin's concern. *Id.* n.6.
32. *Id.* at 823 (quoting the subpoena duces tecum).

directed to Curley and Schultz.[33] The subpoenas to Curley and Schultz summoned them to testify before the grand jury nine days later.[34]

Baldwin met with Curley and Spanier in Spanier's office, where she explained to Curley the grand jury's role, advised him that he could be represented by personal counsel, and told him that he should not be anxious, and should simply tell the grand jury the truth.[35] Spanier instructed Baldwin to accompany Curley to his appearance before the grand jury, apparently in conjunction with Curley's lament that he did not know any lawyers who might be able to represent him personally.[36] Baldwin would later testify that she told Curley and Spanier that, as Penn State's general counsel, she could not represent Curley, and that nothing he told her would be protected by the attorney-client privilege, but she evidently did not document that advice.[37]

According to Baldwin, she and Curley then met in her office and went through his recollection of Sandusky's conduct.[38] They discussed the 2001 incident, which Curley said had been described to him as horseplay.[39] Baldwin then met separately with Schultz, whose recall of the 2001 incident tracked Curley's.[40] There was no discussion with either man of the 1998 incident.[41] Curley and Schultz reportedly denied that they had any documents regarding Sandusky's conduct;[42] unfortunately, Baldwin had no one search their offices for such documents, nor did she order an electronic canvas of Penn State's computer system for related email messages.[43]

Based on these meetings, Baldwin concluded that she could represent both Curley and Schultz before the grand jury because their stories were consistent and their interests aligned with Penn State's.[44]

---

33. *Id.*
34. *Id.*
35. *Id.* at 823–24.
36. *Id.* at 824.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* n.7 (reporting that Baldwin did not then know about the 1998 incident).
42. *Id.* at 824.
43. *Id.* at 838.
44. *Id.* at 824. Although not developed in the opinion, Penn State had to consent to Baldwin's concurrent representation of Curley and Schultz. PA. RULES OF PRO. CONDUCT r. 1.13(e) (DISCIPLINARY BD. OF THE SUP. CT. OF PA. 2015) (stating that a lawyer for an organization may also represent its constituents subject to Rule 1.7, and that if the organization must consent to the dual representation, consent must be given by an appropriate official other than the person to be represented). Spanier arguably consented to Baldwin's representation of Curley on Penn State's behalf. The opinion does not make clear whether Penn State consented to Baldwin's representation of Schultz.

But, the OAG revealed inconsistencies between Curley's and Schultz's stories:

> [P]rior to the grand jury testimony of Curley and Schultz on January 12, 2011, both witnesses were interviewed, accompanied by [Baldwin], by an OAG investigator. The notes of these interviews reveal[ed] important differences in their recollection of events and, critically, they reveal[ed] a divergence from what [Baldwin] reported that these individuals told her when she met with them to determine whether she had a conflict of interest in representing them along with Penn State.
>
> Curley's interview notes [were] relatively consistent with his original description of events when he met with [Baldwin]. Curley indicated that (1) with respect to the 2001 incident, there was no indication that sexual acts had occurred, and that "it seemed to be something that could have been misconstrued and was inappropriate behavior at best;" (2) he did not report the 2001 incident to the police department "because he informed Spanier;" and (3) he had no knowledge of the 1998 incident or any other such matter involving Sandusky."
>
> *Schultz [stood] in sharp contrast. . . .* Schultz told the OAG investigator (1) that while McQueary's description of the 2001 incident was vague, "it was his impression based upon the information that he was provided that there was inappropriate sexual conduct between Sandusky and a minor;" (2) McQueary had related that "Sandusky may have grabbed genitals;" (3) he was aware of the 1998 incident involving Sandusky and a child and that he "was sure that Spanier knew of the 1998 incident."
>
> Both witnesses offered testimony before the grand jury that was substantially identical to these recited interview summaries. . . . Contrary to [Baldwin's] testimony that her interview with Schultz did not result in any report of sexual acts by Sandusky (and thus no knowledge of possible criminal wrongdoing), Schultz revealed in both his OAG interview and before the grand jury that he believed and understood that one or more sexual acts had in fact occurred. *Curley was consistent with his denial of any knowledge (much less involvement) in the 1998 incident, but Schultz was not. To the contrary, Schultz not only indicated that he knew about the 1998 incident, he also testified that Spanier was unquestionably aware of it*.[45]

45. *Baldwin*, 225 A.3d at 842–43 (citations to the record omitted) (emphasis added).

On January 12, 2011, Baldwin went with Curley and Schultz to their interviews by the OAG.[46] Later in the day, she accompanied the men to their grand jury appearances where[47] Curley and Schultz testified to the grand jury as outlined above.[48] Schultz's testimony also implicated Curley in the 1998 incident in addition to Spanier.[49]

In March 2011, OAG investigators interviewed Spanier in Baldwin's presence.[50] The OAG soon subpoenaed Spanier to appear before the grand jury.[51] Baldwin then met with Spanier and "found his testimony to be consistent with that of Curley and Schultz (even though their testimony was inconsistent with each other's), and thus determined that she could accompany Spanier during his grand jury testimony."[52] In his testimony before the grand jury in April 2011, Spanier recounted his knowledge of the 2001 incident involving Sandusky.[53] He said he learned that Sandusky was "horsing around" with a boy during a shower, but denied any knowledge of sexual overtones.[54] He testified that he told Curley and Schultz to inform Sandusky that he was no longer to bring boys into Penn State athletic facilities and to contact the chair of the Second Mile Foundation's board of directors.[55] Spanier denied knowing about the 1998 incident.[56]

In November 2011, Curley and Schultz were each charged with one count each of perjury and failure to report suspected child abuse.[57] Baldwin advised the men to hire personal counsel and, at their request, helped them do so.[58] She also urged Spanier to retain his own lawyer.[59] Curley's and Schultz's new lawyers wrote to Baldwin to advise her "that their clients each considered her to have been his personal attorney before the investigating grand jury and that they did not waive any claim of attorney-client privilege."[60] Baldwin, who now had her own lawyer,

46. *Id.* at 824.
47. *Id.*
48. *Id.* at 824–25.
49. *Id.* at 825–26.
50. *Id.* at 826.
51. *Id.*
52. *Id.* As with Curley and Schultz, Penn State was required to consent to Baldwin's representation of Spanier jointly with the university. PA. RULES OF PRO. CONDUCT r. 1.13(e) (DISCIPLINARY BD. OF THE SUP. CT. OF PA. 2015). A university official other than Spanier would have had to give such consent, but it is unclear whether that occurred.
53. *Baldwin*, 225 A.3d at 826.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

responded by denying Curley's and Schultz's privilege claims and "insist[ed] that as counsel for Penn State, she had acted solely in a corporate capacity with them before the grand jury and not in any individual capacity."[61]

In December 2011, Frank Fina, counsel for the OAG, complained to Baldwin that Penn State appeared to be stonewalling in response to the subpoena duces tecum.[62] He subtly threatened Penn State and those responsible for the university's recalcitrance with contempt of court and other sanctions.[63] The grand jury subpoenaed Baldwin to testify in October 2012.[64] Shortly before Baldwin's grand jury appearance, the supervising judge gathered the parties to discuss attorney-client privilege concerns voiced by Curley's and Schultz's lawyers.[65] Fina promised not to ask Baldwin about "confidential communications," and Penn State's counsel "agreed to waive any attorney-client privileges, except to the extent that such privileges existed between [Baldwin] and Curley and/or Schultz."[66]

Once before the grand jury, however, Fina plunged into Baldwin's privileged communications with her clients.[67] In response, Baldwin insisted that she tried to comply with the subpoena duces tecum, but Curley, Schultz, and Spanier "had lied to her about the existence of multiple documents that reflected their detailed knowledge and participation in the 1998 and 2001 incidents."[68] She also disclosed the content of multiple private conversations she had with Curley, Schultz, and Spanier.[69]

Less than a week after Baldwin testified, the OAG charged Curley and Schultz with additional crimes, including endangering the welfare of children, obstruction of justice, and conspiracy to commit obstruction of justice.[70] On the same day, Spanier was charged with those three crimes, perjury, and failing to report suspected child abuse.[71]

The criminal cases against Curley, Schultz, and Spanier proceeded, and in 2014, they moved to preclude Baldwin from testifying in their

61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 826–27.
67. *See* Commonwealth v. Schultz, 133 A.3d 294, 328 (Pa. Super. Ct. 2016) (accusing Fina of striking "foul blows").
68. *Baldwin*, 225 A.3d at 827.
69. *Id.*
70. *Id.*
71. *Id.*

criminal trials.[72] They lost in the trial court but won on appeal.[73] In addition to finding that Baldwin's grand jury testimony was improper and breached the attorney-client privilege, the appellate courts quashed all perjury, obstruction of justice, and conspiracy charges against the three men.[74] Rather than appealing those rulings, the OAG reached plea agreements with Curley and Schultz, whereby they each pled guilty to one count of endangering the welfare of children.[75] Curley received three months in jail, followed by months of house arrest and then two years of probation.[76] Schultz received two months in jail, plus months of house arrest, followed by two years of probation.[77] Curley and Schultz were also fined $5,000 and ordered to complete 200 hours of community service.[78]

Spanier opted for a trial.[79] Curley and Schultz testified for the prosecution.[80] The jury found Spanier guilty on one count of endangering the welfare of children.[81] He was sentenced to two months in jail, followed by house arrest for two to ten months.[82] He was also fined $7,500 and ordered to perform 200 hours of community service.[83] He fought on, however, and a federal court vacated his conviction through a writ of habeas corpus because the revised statute under which he was convicted did not take effect until after his alleged crime.[84] Unfortunately for Spanier, his win was short-lived; in December 2020, the U.S. Court of Appeals for the Third Circuit reversed the district court's grant of his habeas corpus petition.[85]

72. *Id.*

73. Commonwealth v. Curley, 131 A.3d 994, 1007 (Pa. Super. Ct. 2016); Commonwealth v. Schultz, 133 A.3d 294, 325 (Pa. Super. Ct. 2016); Commonwealth v. Spanier, 132 A.3d 481, 498 (Pa. Super. Ct. 2016).

74. *Curley*, 131 A.3d at 1007; *Schultz*, 133 A.3d at 325, 328; *Spanier*, 133 A.3d at 498.

75. *Baldwin*, 225 A.3d at 827–28.

76. Geoff Rushton, *Spanier, Curley and Schultz Get Jail Time*, STATE COLLEGE (June 2, 2017), https://www.statecollege.com/spanier-curley-and-schultz-get-jail-time/.

77. *Id.*

78. *Id.*

79. *Baldwin*, 225 A.3d at 828.

80. *Id.*

81. *Id.*

82. Rushton, *supra* note 76.

83. *Id.*

84. Spanier v. Libby, No. 3:19-CV-523, 2019 WL 1930155, at *20 (M.D. Pa. Apr. 30, 2019), *rev'd sub nom.*, Spanier v. Dir. Dauphin Cnty. Prob. Servs., 981 F.3d 213, 215, 231 (3d Cir. 2020).

85. *Spanier*, 981 F.3d at 215, 231.

III. THE CASE AGAINST BALDWIN, RESULTING FINDINGS, AND DISCIPLINE

In 2017, Pennsylvania's Office of Disciplinary Counsel (ODC) charged Baldwin with violating four Pennsylvania Rules of Professional Conduct in connection with her representation of Penn State, Curley, Schultz, and Spanier: (1) Rule 1.1, which mandates competent representation; (2) Rule 1.7(a), which governs concurrent client conflicts of interest; (3) Rule 1.6(a), which generally prohibits lawyers from revealing information relating to clients' representations; and (4) Rule 8.4(d), which prohibits lawyers from engaging in conduct prejudicial to the administration of justice.[86] The Pennsylvania Supreme Court's Disciplinary Board found that Baldwin violated all four rules and recommended that she be publicly censured.[87] The case then reached the Pennsylvania Supreme Court.[88]

A. Baldwin Had Personal Attorney-Client Relationships with Curley, Schultz, and Spanier

To evaluate the ODC's Rule 1.1 and 1.7(a) charges, the Pennsylvania Supreme Court first examined Baldwin's professional relationships with Curley, Schultz, and Spanier before and during their grand jury testimony.[89] The three men asserted that Baldwin represented them individually with no limitations, while Baldwin contended that "she represented them only in a representative capacity in their roles as employees and representatives of Penn State."[90] She claimed that neither Curley nor Schultz ever asked her to represent them individually and that she gave all three men so-called *Upjohn* or corporate *Miranda* warnings.[91]

---

86. Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 820 (Pa. 2020).
87. *Id.* at 828.
88. *Id.* at 820–21, 828–29.
89. *Id.* at 829.
90. *Id.*
91. *Id.* at 830. To avoid the creation of unwanted attorney-client relationships and to dispel potential confusion around confidentiality, lawyers conducting internal investigations for organizations deliver so-called corporate *Miranda* warnings or *Upjohn* warnings to employees of the organization they interview in the process. In these warnings, lawyers typically inform employees that:

> (1) they represent the organization and not the employee; (2) the interview is intended to enable the lawyer to provide legal advice to the organization, and that the interview is therefore covered by the organization's attorney-client privilege; (3) it is important for the employee to keep the subject and content of the interview confidential to protect the

The weight of the evidence, however, compelled the conclusion that Baldwin had full-bore attorney-client relationships with Curley, Schultz, and Spanier.[92] For example, before Curley and Schultz testified to the grand jury, Baldwin informed the supervising judge that she represented the men but "did not plainly indicate either that she viewed herself as representing these administrators solely in an agency capacity or that she represented them in their personal individual capacities."[93] At the outset of Curley's testimony, the OAG's lawyer asked him to introduce his lawyer and Curley responded: "My counsel is Cynthia Baldwin."[94] Baldwin did not correct Curley, clarify her role, or describe her allegedly limited representation of him.[95] Schultz and Spanier similarly introduced Baldwin to the grand jury as their lawyer, and again, Baldwin neither corrected them nor clarified that she represented them solely in their capacities as Penn State administrators.[96] As a result, the court concluded that Baldwin represented Curley, Schultz, and Spanier in their individual capacities before the grand jury.[97] For that matter, there was no evidence that Baldwin ever informed the men she represented them only in their capacities as Penn State administrators.[98]

If that were not enough, witnesses who appear before a Pennsylvania grand jury are entitled to be represented by counsel and the supervising judge must warn them of their entitlement to counsel and to obtain rulings as to whether they must answer potentially self-incriminating questions.[99] Curley, Schultz, and Spanier were so cautioned in Baldwin's presence.[100] It was thus "impossible to conclude in light of the seriousness and solemnity of the warnings administered by the supervising judge that the [men] believed anything other than their personal interests were being protected by [Baldwin]."[101] In the same vein, knowing that she was the only lawyer present when the judge

---

> organization's attorney-client privilege; and (4) the decision to assert or to waive the privilege is the organization's alone to make, and that it may do so without consulting the employee.

Douglas R. Richmond, *Navigating the Lawyering Minefield of Internal Investigations*, 63 VILL. L. REV. 617, 631 (2018).

92. *Baldwin*, 225 A.3d at 832 (referring to "the entirety . . . of the record").
93. *Id.* at 831.
94. *Id.* at 832.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 833–34 (quoting the Disciplinary Board Report at 29-30).
99. *Id.* at 834.
100. *Id.*
101. *Id.*

administered the grand jury warnings to Curley, Schultz, and Spanier, Baldwin had to appreciate that she was representing them personally.[102]

Finally, a Pennsylvania Rule of Criminal Procedure confines grand jury attendance to grand jurors and their alternates, the prosecutor, a stenographer, the witness, and the witness' lawyer.[103] A Pennsylvania statute entitles grand jury witnesses to have their lawyers present when testifying.[104] "Curley, Schultz, and Spanier were each compelled to testify pursuant to a subpoena directed to them individually (not in their corporate capacities as a representative of Penn State), and thus . . . they were each entitled to personal counsel."[105] In a nutshell, if Baldwin did not represent the three men personally, she could not have entered the grand jury room without the supervising judge's permission.[106] Because neither the OAG's lawyer nor the grand jurors ever requested such permission, everyone involved must have believed that Baldwin represented Curley, Schultz, and Spanier in their personal capacities.[107]

B. Baldwin Violated Her Duty of Competence

The *Baldwin* court agreed with the Disciplinary Board that Baldwin violated her duty of competence under Rule 1.1 because "she failed to exercise the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of her clients before the grand jury, and further failed to properly advise and advocate on their behalf, to their detriment."[108] Baldwin had no criminal law experience.[109] She had never represented a client in a grand jury proceeding.[110] She did not consult with a lawyer experienced in these areas in preparing for Curley's, Schultz's, or Spanier's grand jury testimony or in responding to the subpoena duces tecum to the university.[111] Quite simply, Baldwin never appreciated "the magnitude of the challenge that she was

102. *Id.*
103. *Id.* at 835 (citing PA. R. CRIM. P. 231(A)).
104. *Id.* (quoting 42 PA. CONS. STAT. § 4549(c) (2021)).
105. *Id.*
106. *Id.* (citing PA. R. CRIM. P. 231(B)).
107. *Id.*
108. *Id.* at 837 (quoting the Disciplinary Board Report). Rule 1.1 of the Pennsylvania Rules of Professional Conduct provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." PA. RULES OF PRO. CONDUCT r. 1.1 (DISCIPLINARY BD. OF THE SUP. CT. OF PA. 2021).
109. *Baldwin*, 225 A.3d at 837.
110. *Id.*
111. *Id.*

facing."[112] Had she known better, she would have seen that by subpoenaing Curley, Schultz, and Spanier, the grand jury investigation was expanding into the roles that Penn State constituents may have played in enabling or obscuring Sandusky's crimes—especially any crimes committed on the Penn State campus.[113] On a personal level, Curley's, Schultz's, and Spanier's grand jury testimony potentially opened them to major criminal liability.[114] As Penn State representatives, their testimony also risked exposing the university to criminal prosecution and staggering civil liability.[115]

Despite the gravity of affairs, Baldwin did very little to prepare Curley, Schultz, and Spanier for their grand jury testimony.[116] She separately met with each of them once, gave an overview of the grand jury process, and told them to tell the truth when they testified.[117] She neither reviewed the likely types of questions that the OAG or the grand jury would likely ask, nor coached them on how best to respond to such questions.[118] Even more fundamentally, she never informed them of their right to invoke their privileges against self-incrimination or alerted them to the sort of crimes with which they might be charged if they did not assert their Fifth Amendment privileges.[119]

Baldwin defended her lack of preparation by saying that Curley and Schultz lied to her when they denied any wrongdoing.[120] But that argument ignored her inability to manage Penn State's response to the grand jury subpoena duces tecum or to grasp the importance of doing so with respect to her individual clients.[121]

> Concurrent with the representations of Curley and Schultz, [Baldwin] was representing Penn State with regard to its response to the subpoena duces tecum. While it is questionable whether an attorney can ever blindly rely on statements by a client regarding events that occurred years prior to anticipated testimony, it was below any reasonable standard of care to do so here where another client may have been in possession of relevant documents. The duty to investigate becomes all the more important when, as here, counsel undertakes the representation of multiple clients, one of which is a

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 837–38.
116. *Id.* at 838.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 838–39.

> sophisticated institutional client with massive document retention capabilities.
>
> Despite the urgent need, . . . [Baldwin] conducted little or no independent investigation prior to accompanying Curley and Schultz into the grand jury room. She did not, for instance, interview any members of their staff to inquire regarding their knowledge of prior Sandusky investigations. She also did not have anyone search their offices for relevant documents. . . . [E]leven months after Schultz's grand jury testimony (in which he indicated that prior to his retirement he had kept notes regarding Sandusky matters, but thought they had "probably been destroyed"), a file containing said notes (with incriminating details regarding the 1998 and 2001 incidents) remained in his prior office. This file was later obtained by the OAG.
>
> Most importantly, prior to producing [Curley, Schultz, and Spanier] for testimony before the grand jury, [Baldwin] failed entirely to coordinate a search of any of the electronically stored data, including emails, on Penn State's computers. . . . [Baldwin] had both an obligation to advise Curley, Schultz and Spanier and an obligation to comply with the subpoena duces tecum served on Penn State. . . . Penn State "had in place a well-defined historical practice and procedure for responding to subpoenas," and . . . "[s]ubpoenas that might encompass electronically stored data (such as emails and documents stored on a computer or network drive) would routinely be sent to the specialized unit called the "SOS." The SOS included "information technology professionals [who were] trained and dedicated to assembling responsive electronically stored data in response to litigation needs or other legal process." Remarkably, . . . this "well-defined historical practice and procedure" was not implemented. . . .[122]

Information critical to Baldwin's ability to concurrently represent Penn State and the three administrators was readily accessible in Penn State's computer servers all along.[123] Without the information—which she never attempted to collect—Baldwin could not reasonably conclude the possibility of concurrent representations.[124] Nor could she properly advise Curley, Schultz, and Spanier on whether they should invoke their privileges against self-incrimination when they appeared before the grand jury, or how they might best couch their testimony if they opted

122. *Id.* (footnote and citations to the record omitted).
123. *Id.* at 840.
124. *Id.*

to testify.[125] Accordingly, as noted earlier, the court concluded that Baldwin failed to competently represent her clients in violation of Rule 1.1.[126]

C. Baldwin Had Multiple Conflicts of Interest

By agreeing to concurrently represent Penn State, Curley, Schultz, and Spanier, Baldwin committed multiple violations of Rule 1.7(a) of the Pennsylvania Rules of Professional Conduct, which provides that absent consent, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[127] Rule 1.7(a) states that a lawyer has a concurrent conflict of interest if:

> (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[128]

Again, Baldwin argued that she knew of no potential conflicts of interest because Curley, Schultz, and Spanier lied to her.[129] But even if that were so, their dishonesty did not change the fact that there was a significant risk her representation of Penn State may be materially limited by her representation of them.[130] After all, Baldwin either knew, or reasonably should have known, that Curley's, Schultz's, and Spanier's conduct could expose Penn State to civil liability, criminal liability, or both.[131] "It was obviously in Penn State's interest to avoid these pitfalls and thus, if necessary, to disassociate itself" from the three administrators.[132]

Baldwin also failed to recognize the significant risk that her representation of either Curley, Schultz, or Spanier might be materially limited by her responsibilities to one or both of the other two.[133] For instance, Spanier, as Penn State's president, might have wanted to distance himself from the decisions made by his subordinates with far

125. *Id.*
126. *Id.*
127. PA. RULES OF PRO. CONDUCT r. 1.7(a) (DISCIPLINARY BD. OF THE SUP. CT. OF PA. 2021).
128. *Id.*
129. *Baldwin*, 225 A.3d at 841.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

more involvement in formulating the university's responses to Sandusky's reported misconduct.[134] "Schultz and Curley likewise were entitled to personal counsel who would develop a defense unconstrained by consideration of the other's defense given their varying levels of decision making."[135] With the benefit of advice from separate counsel, either Curley or Schultz might have decided that it was in his interest to cooperate with the OAG to the detriment of the other.[136]

Material variations in Curley's, Schultz's, and Spanier's recall of events surfaced before any of them went before the grand jury.[137] The OAG investigator exposed these inconsistencies during their interviews before their grand jury testimony—interviews Baldwin attended.[138] These discrepancies raised vivid conflict of interest red flags.[139] If nothing else, after their OAG interviews, Baldwin should have informed Curley and Schultz that she could not represent either of them and sought a continuance of their grand jury appearances so they could engage personal counsel.[140] In other words, even if Curley's and Schultz's recollections of events were nearly identical when they initially met with Baldwin, such that she wrongly but honestly concluded that she could represent them both, their statements in the OAG interviews so altered the picture that Baldwin should have known to withdraw as their lawyer. Schultz's interview also disqualified Baldwin from further representing Spanier because Schultz's recall of events linked Spanier to the 1998 incident, which Spanier had always denied knowing about.[141] Curley also indicated in his OAG interview and grand jury testimony that Spanier knew of Sandusky's on-campus crimes.[142] Although it should have been clear from the start that Curley, Schultz, and Spanier needed separate counsel, the information revealed in the OAG interviews preceding their grand jury testimony "cried for the conclusion that each required experienced personal counsel."[143]

134. *Id.* at 841–42.
135. *Id.* at 842.
136. *Id.* (quoting Pirillo v. Takiff, 341 A.2d 896, 899 (Pa. 1975)).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* The court would have been required to grant the continuance. 42 PA. CONS. STAT. § 4549(c)(1) (2021).
141. *Baldwin*, 225 A.3d at 843.
142. *Id.*
143. *Id.*

D. Baldwin Violated Her Duty of Confidentiality

Baldwin's confidentiality obligations became an issue when she testified before the grand jury in October 2012.[144] By then, she, Curley, and Schultz had all left Penn State's employ.[145] Curley and Schultz had been criminally charged and had retained new lawyers.[146] "Contending that [Baldwin] had represented their clients in their personal capacities, counsel for Curley and Schultz had both advised the supervising judge . . . that they were asserting claims of attorney-client privilege with respect to all communications with [Baldwin]."[147] In a conference with the supervising judge, the OAG's lawyer, Fina, said that he would not inquire into Baldwin's communications with Curley, Schultz, or Spanier, such that related privilege issues could be determined at a future date.[148]

As it turned out, Fina either changed or misrepresented his plans.[149] He elicited testimony from Baldwin about her conversations with Curley and Schultz regarding compliance with the subpoena duces tecum; Curley's and Schultz's email messages regarding the 1998 and 2001 incidents and her related conversations with them; Schultz's file on Sandusky and her associated conversations with him; her discussions with Spanier, including their preparation for his grand jury testimony and his knowledge of the 1998 and 2001 incidents; and her reactions to Spanier's media appearances connected with the Sandusky scandal, as a result of which she concluded that he lied to her.[150] From Curley's, Schultz's, and Spanier's perspectives, Baldwin's grand jury testimony was disastrous:

> Just four days after [Baldwin's] testimony the grand jury recommended criminal charges against Spanier, and the OAG charged him with failure to report suspected child abuse, perjury, obstruction of justice, endangering the welfare of children, and conspiracy related to these crimes. . . . Simultaneously, the grand jury recommended additional criminal charges against Curley and Schultz, and the OAG filed charges against them for endangering the welfare of children, obstruction of justice and conspiracy related to

144. *Id.* at 844.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. Off. of Disciplinary Couns. v. Fina, 225 A.3d 568, 569–72 (Pa. 2020) (Wecht, J., concurring).
150. *Baldwin*, 225 A.3d at 845–48.

> obstruction of justice, perjury and endangering the welfare of children.[151]

Based on Baldwin's grand jury testimony, the court concluded that she repeatedly violated her ethical duty of confidentiality.[152] Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct "prohibits an attorney from disclosing any information relating to a representation, except in circumstances where the client consents to disclosure or where disclosures are impliedly authorized in order to carry out the representation."[153] Curley, Schultz, and Spanier never consented to Baldwin's disclosure of their conversations.[154] Baldwin's disclosures were not impliedly authorized to carry out their representations.[155] Although her disclosures may have been necessary to her representation of Penn State concerning the university's compliance with the subpoena duces tecum, "the 'representation' at issue with respect to 'implied authorization' under Rule 1.6(a) is the representation of the client 'whose information is protected by Rule 1.6.'"[156]

In defending herself, Baldwin leaned on the doctrine of waiver in the attorney-client privilege context.[157] She met a skeptical court.[158]

In Spanier's case, for example, Baldwin argued that he waived his attorney-client privilege when he spoke publicly about the Sandusky scandal after he left the Penn State presidency but before she testified to the grand jury.[159] In short, Baldwin contended that "the mere fact of Spanier's public comments waived the attorney-client privilege and she alone could make the determination that his privilege was destroyed."[160] But, according to the court, that was an "untenable proposition."[161] Determining whether a client has waived the attorney-client privilege

151. *Id.* at 848 (citation to the record omitted).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 848–49.
156. *Id.* at 849 (quoting ABA Comm. on Ethics & Pro. Resp., Formal Op. 08-450 (2008)).
157. *Id.* Of course, "[t]he confidentiality provisions of Rule 1.6 provide broader protection[] than does the attorney-client privilege." *Id.* at 843 (footnote omitted).
158. As the *Baldwin* court explained, Baldwin offered "no legal analysis to explain the alleged interplay between the attorney-client privilege, an evidentiary privilege, and the duty of confidentiality embodied in . . . Rule 1.6(a)." *Id.* at 849. Nor did she articulate how the waiver of an evidentiary privilege could support "an ex post facto defense to a disciplinary claim when the client, the holder of the claim, was not heard in the evidentiary proceedings before the allegedly waived communication [was] discussed." *Id.*
159. *Id.* at 849–50.
160. *Id.* at 850–51.
161. *Id.* at 851.

requires some form of evidentiary proceeding in which the client can maintain the privilege and the party alleging waiver can make its case.[162] A lawyer "cannot rely on her self-determined and potentially self-serving conclusion that she has been relieved of her duty of confidentiality."[163]

Baldwin further argued that Curley, Schultz, and Spanier waived their attorney-client privilege by attacking her advice and conduct in documents filed in their criminal cases.[164] First, this argument failed because the offending filings post-dated Baldwin's grand jury testimony.[165] Second, the self-defense exception to the duty of confidentiality contained in Pennsylvania Rule 1.6(c)(4),[166] and similarly recognized in attorney-client privilege law,[167] did not apply because at the time Baldwin testified before the grand jury, she had no idea that her lawyering might be criticized in subsequent proceedings.[168] "In reality, [Baldwin] was required to defend herself in subsequent legal proceedings *because of* her disclosure of confidences."[169]

Baldwin also defended her conduct based on Pennsylvania Rule 1.6(c)(3),[170] which allows a lawyer to reveal client information "to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used[.]"[171] It was her position that Curley, Schultz, and Spanier used her to conceal documents from the OAG and, as a result, excused her duty of confidentiality.[172] But her argument ignored the facts that Curley, Schultz, and Spanier were never served with subpoenas duces tecum and that Baldwin responded to Penn State's subpoena duces tecum as the university's lawyer.[173] Furthermore, her

162. *Id.* at 850–51; *see* Harris Davis Rebar, LLC v. Structural Iron Workers Loc. Union No. 1 Pension Tr. Fund, No. 17 C 6473, 2019 WL 447622, at *6 (N.D. Ill. Feb. 5, 2019) ("[T]he existence of the privilege is for the Court, not counsel, to determine.").

163. *Baldwin*, 225 A.3d at 851.

164. *Id.* at 851–52.

165. *Id.* at 852.

166. PA. RULES OF PRO. CONDUCT r. 1.6(c)(4) (DISCIPLINARY BD. OF THE SUP. CT. OF PA. 2015) (outlining when a lawyer may reveal information relating to a client's representation to defend or justify the lawyer's conduct).

167. *See* Hill, Kertscher & Wharton, LLP v. Moody, 839 S.E.2d 535, 539–40 (Ga. 2020) (discussing waiver of the attorney-client privilege in legal malpractice cases); EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 730 (6th ed. 2017) ("When a malpractice action is brought against an attorney, the privilege claim is waived as to all the attorneys who worked on the matter being litigated and as to which the malpractice claim is made.").

168. *Baldwin*, 225 A.3d at 852.

169. *Id.* (substituting bold type for italics).

170. *Id.*

171. PA. RULES OF PRO. CONDUCT r. 1.6(c)(3) (DISCIPLINARY BD. OF THE SUP. CT. OF PA. 2015).

172. *Baldwin*, 225 A.3d at 852–53.

173. *Id.*

grand jury testimony did not rectify Curley's, Schultz's, or Spanier's criminal acts.[174] By the time Baldwin revealed her clients' confidential communications, Penn State had delivered all of its responsive documents to the grand jury.[175] Any rectification had already been accomplished.[176] And, as the *Baldwin* court caustically observed, "Rule 1.6(c)(3) does not authorize disclosure by an attorney to gratuitously incriminate a client."[177]

Finally, Baldwin argued for the permissibility of her disclosures under Rule 1.6(c)(4) because at the time of her testimony before the grand jury, "she understood that the OAG suspected her of obstruction of justice in connection with Penn State's production of documents in response to the subpoena duces tecum."[178] That simply was not the case.[179] As she acknowledged, the OAG's implicitly threatening letter regarding Penn State's delay in responding to the subpoena duces tecum focused on the university's failures, not hers.[180] Again, by the time she testified, Penn State had largely complied with the subpoena duces tecum.[181] To the extent she ever understood that the investigation targeted her, she acquired that knowledge long after she testified.[182]

E. Baldwin Violated the Rule 8.4(d) Prohibition on Conduct Prejudicial to the Administration of Justice

Baldwin's ethical violations ultimately prevented the Commonwealth from prosecuting Curley, Schultz, and Spanier for multiple crimes.[183] Consequently, she was held to have engaged in conduct that was prejudicial to the administration of justice in violation of Rule 8.4(d).[184]

174. *Id.* at 854.
175. *Id.*
176. *See id.* ("When the disclosure does not serve the purpose of preventing, mitigating or rectifying the consequences of the use of the client's services, disclosure is not authorized." (footnote omitted)).
177. *Id.*
178. *Id.* at 855.
179. *See id.* ("The record does not reflect, however, that at the time of her grand jury testimony [Baldwin] knew that she was under suspicion or faced any criminal liability.").
180. *Id.*
181. *Id.*
182. *Id.* (testifying to that effect in her disciplinary hearing).
183. *Id.* at 856.
184. *Id.*

F. Baldwin's Discipline

Turning to the appropriate measure of discipline, the court explained that the Disciplinary Board had recommended a public censure because Baldwin posed no public or professional threat, she had a spotless disciplinary record, and her misconduct did not involve dishonesty.[185] In making its recommendation, the Disciplinary Board compared Baldwin's misconduct to prior disciplinary cases for either a single ethics violation or a limited number of violations.[186] The court, however, considered those cases to be unreliable guideposts given the unique nature of Baldwin's case.[187] As the court explained:

> [T]he present situation involves a high profile case subject to intense public scrutiny in which [Baldwin] failed in her responsibilities to four clients by undertaking their representations in a highly specialized forum implicating the criminal laws in which she had no prior experience and without consulting with experienced counsel to guide or advise her. She failed to prepare herself or her clients for their grand jury testimony. She also failed to conduct any proper investigation into potential conflicts of interests between her clients. . . . [S]he impermissibly revealed many client confidences, which in turn led to criminal charges being filed against her clients. . . . [A]s a result of her disclosures of client confidences . . . , certain criminal charges against the Penn State administrators were not able to be prosecuted. In sum, her simultaneous representations of Penn State, Curley, Schultz and Spanier reflected incompetence, violated her obligation to avoid conflicts of interest, resulted in the revelation of client confidences, and prejudiced the proper administration of justice in cases with significant personal and public effect.[188]

Although Baldwin had an exemplary professional record, her lack of remorse offset this mitigating factor. Refusing responsibility for her actions, she blamed her failures "on everyone involved," pointedly including Curley, Schultz, and Spanier.[189] The court, therefore, settled on a public reprimand to be administered by the Disciplinary Board as a

185. *Id.*
186. *Id.*
187. *Id.* at 857.
188. *Id.* at 857–58 (footnote and citations to the record omitted).
189. *Id.*

sanction.[190] The Disciplinary Board delivered Baldwin's public reprimand in July 2020.[191]

IV. LESSONS LEARNED

Assuming the accuracy of the events described by the *Baldwin* court, it is hard to imagine other lawyers making as many mistakes as Baldwin did in her role in the fallout from the Sandusky scandal. At the same time, Baldwin was a respected lawyer and former judge, so it would be imprudent to write off her sad performance as uniquely aberrant and assume there is nothing to be learned from her travails.

A. The Creation of Implied Attorney-Client Relationships

Baldwin's problems were rooted in her de facto attorney-client relationships with Curley, Schultz, and Spanier. Foundationally, an attorney-client relationship may be implied when (1) a person seeks the lawyer's advice or assistance; (2) the requested advice or assistance relates to matters within the lawyer's professional competence; and (3) the lawyer expressly or impliedly agrees to provide or actually furnishes the desired advice or assistance.[192] In some instances, the third element may be established by proof of detrimental reliance, meaning that the person seeking legal services reasonably relied on the lawyer to provide them, and the lawyer, despite recognizing the person's reliance, made no effort to nullify it.[193]

To determine whether an implied attorney-client relationship exists, courts concentrate on the would-be client's expectations and especially the reasonableness of the person's belief "'that he is consulting a lawyer in that capacity and has manifested intention to seek professional legal advice.'"[194] Yet, a putative client's unilateral belief that

190. *Id.* at 859.

191. Craig R. McCoy, *Attorney Cynthia Baldwin was Formally Reprimanded for Her Handling of the Jerry Sandusky Scandal at Penn State*, PITT. POST-GAZETTE (July 22, 2020, 1:09 PM), https://www.post-gazette.com/news/crime-courts/2020/07/22/Attorney-Cynthia-Baldwin-was-formally-reprimanded-for-her-handling-of-the-Jerry-Sandusky-scandal-at-Penn-State/stories/202007220110.

192. State *ex rel.* Couns. for Discipline of the Neb. Sup. Ct. v. Chvala, 935 N.W.2d 446, 471–72 (Neb. 2019); Slota v. Imhoff & Assocs., P.C., 949 N.W.2d 869, 878 n.12 (S.D. 2020) (quoting Keegan v. First Bank of Sioux Falls, 519 N.W.2d 607, 611 (S.D. 1994)).

193. Cesso v. Todd, 82 N.E.3d 1074, 1078–79 (Mass. App. Ct. 2017) (quoting DeVaux v. Am. Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983)); *Chvala*, 935 N.W.2d at 472.

194. Diversified Grp., Inc. v. Daugerdas, 139 F. Supp. 2d 445, 454 (S.D.N.Y. 2001) (quoting Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978)).

an attorney-client relationship exists is not enough to establish one.[195] A putative client's subjective belief that an attorney-client relationship has been formed must be accompanied by facts indicating that the person's belief is objectively reasonable.[196] A person's belief that an attorney-client relationship exists is not objectively reasonable where the lawyer expressly disclaims such a relationship and thereafter acts consistently with the disclaimer.[197] The lesson for a lawyer who does not want an attorney-client relationship with someone is to (1) expressly decline to represent the person when initially approached; (2) document that decision in a letter or email message; (3) thereafter avoid communications or conduct that might suggest an attorney-client relationship; and (4) if necessary, disavow the existence of an attorney-client relationship if someone implies or states that one exists notwithstanding the prior steps.

Returning to *Baldwin*, Baldwin should have flatly declined to represent Curley, Schultz, and Spanier. The conflicts of interest between them and with Penn State should have been obvious to her. She should have informed Spanier that she could not accompany Curley to his grand jury appearance when Spanier instructed her to do so rather than ineffectively sprinkling a few drops of cold water on the idea as she claimed to have done.[198] If Baldwin truly informed the men that she could not represent them personally as she purported, she never documented that advice. Worse, she later (1) indicated to the judge supervising the grand jury that she represented the men without clarifying that she represented them only in an agency capacity; (2) did not clarify or explain her representation of the men when the supervising judge read the men their rights as grand jury witnesses; (3) accompanied the men into the grand jury room and remained there for

195. *In re* Rescue Concepts, Inc., 556 S.W.3d 331, 339 (Tex. App. 2017).

196. Hinerman v. Grill on Twenty First, LLC, 112 N.E.3d 1273, 1275–76 (Ohio Ct. App. 2018); O'Kain v. Landress, 450 P.3d 508, 516 (Or. Ct. App. 2019).

197. *See, e.g.*, Seaman v. Schulte, Roth & Zabel LLP, 111 N.Y.S.3d 266, 267 (App. Div. 2019) ("The course of conduct among the parties . . . , particularly the repeated communications from defendants to plaintiff clearly disclaiming an attorney-client relationship . . . , refute plaintiff's general allegations that Frunzi was his attorney in connection with the negotiation and execution of the postnuptial agreement in question[.]"); Bohn v. Cody, 832 P.2d 71, 75 (Wash. 1992) ("In light of Cody's disclaimers of any attorney/client relationship and in light of the Bohns' inability to show that Cody acted inconsistently with these statements, we conclude that Lucille Bohn's subjective belief was not reasonably based on the attending circumstances, and no attorney/client relationship was formed.").

198. *See* Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 824 (Pa. 2020) ("[Baldwin] further testified that Spanier, in Curley's presence, instructed [her] to go with Curley to the grand jury; that she told them she was general counsel and could not be Curley's personal attorney; that nothing Curley said would be confidential; and that Curley could retain a personal attorney.").

their testimony—something only a lawyer for a witness could do; and (4) when the men introduced her to the grand jury as their lawyer, she neither denied that characterization nor attempted to limit the scope of her representation.[199]

Based on the facts recited in the *Baldwin* opinion, the court logically concluded that Baldwin represented Curley, Schultz, and Spanier personally. Indeed, no other conclusion was possible.

B. Limited Scope Representations

Baldwin's principal defense against Curley's, Schultz's, and Spanier's claims that she represented them personally was that while she indeed represented them, she did so "only in a representative capacity in their roles as employees and representatives of Penn State."[200] Although it is possible for a lawyer to limit the scope of her representation of a client, any limitation must be reasonable under the circumstances, and the client must give informed consent.[201] Baldwin cleared neither hurdle.

With respect to the reasonableness of Baldwin's proposed limitation on Curley's, Schultz's, and Spanier's representations, it remains unclear how Baldwin calculated that she could represent them only in a representative capacity as Penn State employees or representatives. Curley's, Schultz's, and Spanier's alleged criminal conduct was part and parcel of their Penn State administrative responsibilities.[202] It was, and is, impossible to distinguish between their personal and official roles in the criminal side of the Sandusky affair.[203] This was not a civil rights case under 42 U.S.C. § 1983, for example, where the three men were being sued in their personal and official capacities by Sandusky's victims and it might have been possible to distinguish their defenses based on those capacities.[204] But even assuming, for the sake of argument, that it was reasonable to demarcate Curley's, Schultz's, and Spanier's personal and official capacities with respect to conduct relevant to the grand jury, Baldwin was not

199. *Id.* at 831–36.

200. *Id.* at 829.

201. MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2021).

202. *See Baldwin*, 225 A.3d at 822–23 (outlining the factual basis for Curley's, Schultz's, and Spanier's alleged criminal liability), 824–26 (discussing Curley's, Schultz's, and Spanier's OAG interviews and grand jury testimony).

203. *Id.*

204. *See* Johnson v. Bd. of Cnty. Comm'rs, 85 F.3d 489, 493 (10th Cir. 1996) (explaining the difference between personal and official capacity suits).

empowered to undertake their official capacity representations at her sole discretion.[205] Rather, she was duty-bound to obtain the men's informed consent to her limited scope representation.[206] "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[207]

Baldwin never explained to Curley, Schultz, or Spanier the claimed difference between her representation of them personally and her representation of them as Penn State administrators.[208] Although the men knew of Baldwin's position as Penn State's general counsel, that knowledge did not equal awareness that she was representing them exclusively in their official Penn State capacities.[209] Indeed, it would be nonsensical to conclude that the men grasped "this critical distinction when there [was] no evidence to suggest that at the relevant time, the OAG and the supervising grand jury judge, experts in the law, were able to distinguish Ms. Baldwin's representation . . . as being so limited."[210] By extension, if Baldwin never explained to Curley, Schultz, or Spanier the difference between personal and agency representations, it was impossible for her to have obtained their informed consent to limited scope representations.[211]

If Baldwin had adequately explained her claimed limited scope representation to the men, and its probable effect on their involvement in the grand jury investigation, there would have been no reason for them to consent to the arrangement. The alleged limitation on their representations was unreasonable. In fact, such representation would have been "equivalent to no representation at all."[212] After all, consent to Baldwin's purported limited scope representation would have meant appearing before the grand jury as a possible target of criminal prosecution unrepresented by counsel (despite a statutory right to counsel) and without immunity—in effect, legally naked.

---

205. *Id.* at 493–94.
206. MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2021).
207. *Id.* r. 1.0(e).
208. Commonwealth v. Curley, 131 A.3d 994, 1007 (Pa. Super. Ct. 2016); Commonwealth v. Schultz, 133 A.3d 294, 325 (Pa. Super. Ct. 2016); Commonwealth v. Spanier, 132 A.3d 481, 496 (Pa. Super. Ct. 2016).
209. *Curley*, 131 A.3d at 1007; *Schultz*, 133 A.3d at 323; *Spanier*, 132 A.3d at 496.
210. *Curley*, 131 A.3d at 1007.
211. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 18 (AM. BAR ASS'N 2021) (discussing informed consent in connection with concurrent conflicts of interest).
212. Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 836 (Pa. 2020).

C. Conflicts of Interest

Lawyers' representation of multiple clients in a single matter is a regular source of conflicts of interest.[213] Some courts accordingly encourage lawyers to resolve all doubts against joint representations.[214] The representation of co-defendants in criminal cases is particularly fraught with conflicts of interest.[215]

Concurrent client conflicts of interest are governed by Model Rule of Professional Conduct 1.7, which provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

213. *Conflicts of Interest in Joint Representations*, AON LOSS PREVENTION BULL. 20-06 (Aon Pro. Servs. Prac., Chicago, IL), Sept. 2020, at 1.

214. *In re* Marriage of Wixom & Wixom, 332 P.3d 1063, 1072 (Wash. Ct. App. 2014).

215. *See* JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 14:1, at 577 (3d ed. 2005) ("The potential for a conflict of interest developing in a multiple representation situation is enormous and inevitable.").

> (4) each affected client gives informed consent, confirmed in writing.[216]

Baldwin involved Rule 1.7(a)(2) material limitation conflicts.[217] Material limitation conflicts ordinarily require careful study of the facts of each matter.[218]

Baldwin had many obvious material limitation conflicts.[219] Although Penn State, Curley, Schultz, and Spanier were all interested in denying wrongdoing and in avoiding civil liability or criminal penalties, the alignment of their interests ended there. For example, Spanier might have been well-advised to put some distance between himself and Curley and Schultz and the 1998 and 2001 incidents.[220] Schultz needed to distance himself from Curley and the two incidents.[221] Curley could have incriminated both Schultz and Spanier in the 2001 incident.[222] Schultz could have incriminated Curley and Spanier in the 1998 incident.[223] Any of the three might have wanted to avoid or mitigate any criminal liability by becoming a cooperating witness and testifying against one or both of the other two.[224] Penn State might have understandably wanted to disavow the actions of all three men.[225] If the men testified without grants of immunity, Penn State likely would not have wanted them to assert their Fifth Amendment rights against self-incrimination, which would have made the university appear complicit in Sandusky's crimes.

Baldwin's conflicts did not automatically preclude her representation of Penn State and the three administrators, however, if each of her clients would have consented to the common

---

216. MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2021).

217. *Baldwin*, 225 A.3d at 840–41.

218. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 cmt. c(iv) (AM. L. INST. 2000) ("Whether there is adverseness, materiality, and substantiality in a given circumstance is often dependent on specific circumstances that are ambiguous and the subject of conflicting evidence.").

219. *See Baldwin*, 225 A.3d at 841–43 (discussing Baldwin's conflicts of interest).

220. *See id.* at 841–42 ("Spanier, by virtue of his position as President of the University, faced potential criminal liability and was entitled to personal counsel who would seek to isolate him from first level decisions.").

221. *See id.* at 842 (explaining that Curley and Schultz were entitled to personal counsel who would develop individual defenses for them given their different levels of decision making).

222. *Id.* at 824–25.

223. *Id.* at 822, 843.

224. *Id.* at 842 (quoting Pirillo v. Takiff, 341 A.2d 896, 899 (Pa. 1975)).

225. With respect to Curley and Schultz, Spanier reportedly "told his staff [that] one option would be to take a strict public relations stand, distancing the university and himself from them." MOUSHEY & DVORCHAK, *supra* note 17, at 150. He instead prepared a media statement that expressed "unconditional support" for both men. *Id.* Spanier apparently did not consult with Penn State's Board of Trustees before releasing that statement. *See id.* at 149–50 (indicating that Spanier crafted the statement alone).

representation.[226] A client can consent to a conflict of interest under Model Rule 1.7(b) if three conditions are met. First, the lawyer must reasonably believe that she can competently and diligently represent each affected client.[227] Second, the representation must not be "prohibited by law."[228] Third, the representation cannot "involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal[.]"[229] Unless these three requirements are satisfied, the lawyer should not even attempt to obtain the client's informed consent to the conflict, confirmed in writing, which is the fourth and final step necessary for the lawyer to proceed with the representation.[230]

In *Baldwin*, the consent analysis starts and stops with Model Rule 1.7(b)(1), which requires the lawyer to reasonably believe that they can competently and diligently represent each affected client.[231] If the lawyer cannot pass this initial test, client consent is impossible; the lawyer cannot even seek the client's consent to the conflicted representation.[232] Model Rule 1.7(b)(1) imposes an objective standard.[233] Accordingly, a lawyer's subjective, good faith belief that they can fulfill their professional obligations to the affected clients despite any competing interests or obligations is immaterial.[234]

In view of the many conflicts of interest between and among Curley, Schultz, Spanier, and Penn State, no lawyer could reasonably believe that an attorney could competently and diligently represent all four clients. In fact, no lawyer could reasonably believe that he or she could competently and diligently represent more than one of the four.

226. *See* Johnson v. Clark Gin Serv., Inc., No. 15-3290, 2016 WL 7017267, at *11 (E.D. La. Dec. 1, 2016) ("When a lawyer represents more than one client, . . . the question of consentability must be resolved as to each client." (footnote omitted)); State *ex rel.* Horn v. Ray, 325 S.W.3d 500, 507 (Mo. Ct. App. 2010) ("The question of consentability must be resolved as to each client.").

227. MODEL RULES OF PRO. CONDUCT r. 1.7(b)(1) (AM. BAR ASS'N 2021).

228. *Id.* r. 1.7(b)(2).

229. *Id.* r. 1.7(b)(3).

230. *Id.* r. 1.7(b)(4) (requiring "informed consent, confirmed in writing").

231. *Id.* r. 1.7(b)(1). "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." *Id.* r. 1.0(h).

232. Carnegie Cos. v. Summit Props., Inc., 918 N.E.2d 1052, 1067 (Ohio Ct. App. 2009).

233. People v. Mason, 938 P.2d 133, 136 (Colo. 1997); *In re* Stein, 177 P.3d 513, 519 (N.M. 2008); Ferolito v. Vultaggio, 949 N.Y.S.2d 356, 363 (App. Div. 2012).

234. *In re Stein*, 177 P.3d at 519; *see, e.g.*, So v. Suchanek, 670 F.3d 1304, 1310–11 (D.C. Cir. 2012) (rejecting as irrelevant the lawyer's subjective belief that no conflict existed in a joint representation).

D. Competent Representation

Model Rule 1.1 expresses the fundamental tenet of professional responsibility that a lawyer must "provide competent representation to a client."[235] This is a mandatory obligation.[236] Where a lawyer represents multiple clients in a matter, the lawyer owes each client a duty of competent representation. "Competent representation requires the legal knowledge, skill, thoroughness[,] and preparation reasonably necessary for the representation."[237] When evaluating a lawyer's competence, relevant factors include:

> [T]he relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.[238]

Not every mistake or misjudgment by a lawyer translates to incompetence that subjects the lawyer to discipline.[239] A lawyer's mere negligence does not necessarily violate Model Rule 1.1.[240] Rather, a lawyer's conduct crosses the line from negligence to incompetence within the meaning of Rule 1.1 when he or she fails to "possess or acquire the knowledge necessary for the representation" or neglects to "investigate the facts and law as required to represent the client's interests."[241] Courts evaluate lawyers' competence according to an objective standard.[242]

A lawyer need not be experienced in a particular type of matter to competently handle such a case or transaction.[243] Many legal skills transcend substantive practice areas.[244] There is a first time for

235. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2021).
236. State *ex rel.* Okla. Bar Ass'n v. Koss, 452 P.3d 427, 432 (Okla. 2019).
237. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2021).
238. *Id.* cmt. 1.
239. *See, e.g.*, *In re* Evans, 902 A.2d 56, 70 (D.C. 2006) ("Mere careless errors do not rise to the level of incompetence."); Barrett v. Va. State Bar, 634 S.E.2d 341, 347 (Va. 2006) ("Disciplining an attorney on the basis of incompetent representation under Rule 1.1 . . . involves attorney performance that extends significantly beyond mere attorney error.").
240. *In re* Alexander, 300 P.3d 536, 543 (Ariz. 2013); *see also In re* Askew, 225 A.3d 388, 394–95 (D.C. 2020) (stating that the District of Columbia version of Rule 1.1 is intended to "address failures that constitute a 'serious deficiency' in an attorney's representation of a client").
241. *In re Alexander*, 300 P.3d at 543.
242. *Id.*
243. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2021).
244. *Id.*

everything, and it is acceptable for a lawyer to accept a novel matter and in the course of the representation achieve related competence.[245] All that said, lawyers who represent clients in unfamiliar practice areas without suitable study, planning, or preparation risk violating Rule 1.1.[246]

Here, Baldwin had never handled a criminal case before the investigating grand jury beckoned Curley, Schultz, and Spanier.[247] She had never represented a client before a grand jury.[248] Baldwin could have overcome her lack of experience and expertise by associating with a lawyer who had the experience and knowledge that she lacked or by hiring a law firm with a government investigation or white-collar crime practice to take the lead in the matter, but she did not do so.[249] Along the same lines, there was no evidence that she undertook the study or preparation necessary to achieve competence in connection with the grand jury investigation.[250]

Baldwin displayed her lack of pertinent experience when she prepared Curley and Schultz for their grand jury testimony by simply telling them to tell the truth when they testified.[251] Although she certainly could not advise them to testify falsely,[252] she needed to inform them of their Fifth Amendment rights against self-incrimination, what sort of crimes they could be charged with depending on their possible testimony, and whether invoking their Fifth Amendment rights was their best course of action. She gave no such advice.[253]

Baldwin had three months after Curley and Schultz testified to prepare Spanier for his grand jury testimony.[254] She apparently advised him no better or differently than she did Curley and Schultz despite the additional time to arm herself with knowledge.[255]

---

245. *See id.* ("A lawyer can provide adequate representation in a wholly novel field through necessary study.").

246. *See, e.g.*, Iowa Sup. Ct. Att'y Disciplinary Bd. v. West, 901 N.W.2d 519, 524 (Iowa 2017) (finding that a lawyer who principally practiced criminal law violated Rule 1.1 in handling a probate matter; the lawyer admitted that he lacked the knowledge to handle the probate matter competently); *In re* Sylvester, 144 P.3d 697, 702 (Kan. 2006) (concluding that a criminal lawyer violated Rule 1.1 when he mishandled a patent matter and rejecting the lawyer's claim that his skill as a criminal lawyer should mitigate his discipline inasmuch as he was practicing outside his principal area of expertise).

247. Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 837 (Pa. 2020).

248. *Id.*

249. *Id.*

250. *Id.* at 857 n.27.

251. *Id.* at 838.

252. MODEL RULES OF PRO. CONDUCT r. 3.4(b) (AM. BAR ASS'N 2021).

253. *Baldwin*, 225 A.3d at 838.

254. *Id.*

255. *Id.*

It is possible, perhaps, that Baldwin did not advise Curley, Schultz, and Spanier about their Fifth Amendment rights not because she was ignorant of the issue but because of the conflict of interest associated with that choice. As noted earlier, Penn State, which Baldwin also represented, likely would not have wanted three senior administrators to assert their Fifth Amendment rights against self-incrimination in connection with Sandusky's crimes on campus. Their assertions of those rights—especially Spanier's—would have been devastating from a public relations perspective if their grand jury testimony leaked to the press. Baldwin might have thought it better for Penn State for Curley, Schultz, and Spanier to simply "tell the truth" to the grand jury. But that rationale would have had to assume the men would never say anything self-incriminating, which leads back to Baldwin's grossly deficient efforts to check their stories and to gather email messages, notes, and any other documents related to the 1998 and 2001 incidents before the men testified to the grand jury.

Continuing, but still eyeing Baldwin's laxity, she mishandled Penn State's response to the subpoena duces tecum by not involving the SOS in locating responsive documents.[256] Although Baldwin had only been Penn State's general counsel for around ten months when the grand jury subpoenas arrived,[257] she surely knew the SOS existed and, if not, others in her office must have.[258] Again, her efforts at collecting documents from her individual clients that might have aided their representations—either because the documents contained exculpatory information or because they contained damaging information that might have caused the men to assert their rights against self-incrimination—were at best apathetic.[259] In fact, her conduct might have been much worse: Schultz reportedly "told Baldwin he might have a file on Sandusky still in his office, and that it 'might help refresh [his] memory' to review its contents. But . . . Baldwin told him not to 'look for or review any materials.'"[260]

Baldwin's grand jury testimony in obvious breach of her duty of confidentiality and disregard of Curley's, Schultz's, and Spanier's attorney-client privileges was an error that much less experienced lawyers would not be expected to make. Her testimony was also ruinous

256. *Id.* at 839–40.

257. Baldwin became Penn State's general counsel on February 15, 2010. *Id.* at 820 n.1.

258. Baldwin's grand jury testimony suggests that she knew about the SOS. *See id.* at 839 ("Now, we have, of course, IT people, and we have other people who will help to get that information ....").

259. *Id.* at 838–39.

260. Ralph Cipriano, *A System of Justice "Systematically Destroyed"*, BIG TRIAL (June 13, 2018, 5:43 PM), https://www.bigtrial.net/2018/06/a-system-of-justice-systematically.html.

for her clients: it produced additional criminal charges against Curley and Schultz and sealed Spanier's criminal prosecution.[261]

In summary, Baldwin performed so deficiently in so many respects that the Pennsylvania Supreme Court properly concluded that her conduct crossed the line from negligence to incompetence.[262] She probably could have avoided all the problems that plagued her if, upon receiving the grand jury subpoenas, she had engaged experienced counsel in representing clients in connection with government investigations or white-collar criminal matters to advise her. Those lawyers certainly would have told her that Curley, Schultz, and Spanier needed separate lawyers and would have helped her marshal the university's resources, such as SOS, to respond to the subpoena duces tecum. It is a shame for all concerned that she never sought such assistance.

E. Confidentiality and the Attorney-Client Privilege

The Pennsylvania Supreme Court disciplined Baldwin for violating her ethical duty of confidentiality, but her grand jury testimony also breached Curley's, Schultz's, and Spanier's attorney-client privileges.[263] Lawyers' duty of confidentiality and the attorney-client privilege are separate doctrines, as a comment to Model Rule 1.6 explains:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.[264]

Lawyers must understand both the privilege and their ethical duty of confidentiality.

---

261. *Baldwin*, 225 A.3d at 848.

262. *See id.* at 857–58 (summarizing Baldwin's missteps).

263. Commonwealth v. Curley, 131 A.3d 994, 1007 (Pa. Super. Ct. 2016); Commonwealth v. Schultz, 133 A.3d 294, 324 (Pa. Super. Ct. 2016); Commonwealth v. Spanier, 132 A.3d 481, 498 (Pa. Super. Ct. 2016).

264. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2021).

1. The Attorney-Client Privilege

The attorney-client privilege attaches to "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client."[265] "Privileged persons" include the client or prospective client, the lawyer, their agents who facilitate communications between them, and agents of the lawyer who assist in the client's representation.[266]

The attorney-client privilege belongs to the client.[267] When lawyers invoke the privilege, they do so as their clients' agents—not as holders of the privilege.[268] Similarly, if a lawyer waives the privilege, she does so only as the client's agent.[269] The client alone is empowered to waive the attorney-client privilege.[270]

The privilege attaches to initial consultations between attorneys and prospective clients, even if the client does not ultimately retain the attorney.[271] Thereafter, the client may invoke the privilege any time during the attorney-client relationship or after the relationship terminates.[272]

Although the attorney-client privilege is a vitally important doctrine, courts narrowly or strictly construe the privilege because it

---

265. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000).

266. *Id.* § 70.

267. Knox v. Roper Pump Co., 957 F.3d 1237, 1248 (11th Cir. 2020) (quoting Cox v. Adm'r U. S. Steel & Carnegie, 17 F.3d 1386, 1414 (11th Cir. 1994)); Fiduciary Tr. Int'l of Cal. v. Klein, 216 Cal. Rptr. 3d 61, 67 (Ct. App. 2017); Ross v. Ill. Cent. R.R. Co., 129 N.E.3d 641, 653 (Ill. App. Ct. 2019); Att'y Grievance Comm'n of Md. v. Powers, 164 A.3d 138, 151 (Md. 2017); Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll., 832 S.E.2d 223, 236 (N.C. Ct. App. 2019) (quoting *In re* Miller, 584 S.E.2d 772, 788 (N.C. 2003)); Burnham v. Cleveland Clinic, 89 N.E.3d 536, 541 (Ohio 2016); Commonwealth v. McCullough, 201 A.3d 221, 242 (Pa. Super. Ct. 2018); *In re* Mt. Hawley Ins. Co., 829 S.E.2d 707, 712 (S.C. 2019); Arnoldy v. Mahoney, 791 N.W.2d 645, 657 (S.D. 2010); Pagliara v. Pagliara, 614 S.W.3d 85, 88 (Tenn. Ct. App. 2020); *In re* Cook, 597 S.W.3d 589, 597 (Tex. App. 2020).

268. EPSTEIN, *supra* note 167, at 26.

269. *See, e.g.*, S.F. Residence Club, Inc. v. Baswell-Guthrie, 897 F. Supp. 2d 1122, 1216 (N.D. Ala. 2012) ("The principle that the client, and not the attorney, owns the privilege, means that [the clients] had the right to waive the privilege, and that waiver may be effected through their attorney, *i.e.*, their agent.").

270. Affiniti Colo., LLC v. Kissinger & Fellman, P.C., 461 P.3d 606, 614 (Colo. App. 2019); State v. Miller, 427 P.3d 907, 935 (Kan. 2018); *Crosmun*, 832 S.E.2d at 236; *In re Cook*, 597 S.W.3d at 597; Krahenbuhl v. Cottle Firm, 427 P.3d 1216, 1220 (Utah Ct. App. 2018).

271. Bivins v. Stein, 759 F. App'x 777, 783 (11th Cir. 2018); State v. Fodor, 880 P.2d 662, 669 (Ariz. Ct. App. 1994); Bank of Am., N.A. v. Super. Ct., 151 Cal. Rptr. 3d 526, 543–44 (Ct. App. 2013); Popp v. O'Neil, 730 N.E.2d 506, 511 (Ill. App. Ct. 2000); Lovell v. Winchester, 941 S.W.2d 466, 467 (Ky. 1997); Mixon v. State, 224 S.W.3d 206, 212 (Tex. Crim. App. 2007).

272. *See* O'Boyle v. Borough of Longport, 94 A.3d 299, 309 (N.J. 2014) (observing that the privilege survives the attorney-client relationship); CCL Acad., Inc. v. Acad. House Council, 231 A3d 884, 888 (Pa. Super. Ct. 2020) ("Notably, the attorney-client privilege does not end when representation ceases.").

limits full disclosure of the truth.[273] For example, the attorney-client privilege generally does not protect a client's identity.[274] It does not shield from discovery the mere fact that an attorney-client relationship exists or when the relationship began.[275] While the privilege shields the content of attorney-client communications from disclosure, it does not prevent disclosure of the facts communicated.[276] Those facts remain discoverable by other means.[277]

2. Lawyers' Ethical Duty of Confidentiality

In addition to the confidentiality of lawyer-client communications protected by the attorney-client privilege, lawyers owe clients a duty of confidentiality under rules of professional conduct. Model Rule of Professional Conduct 1.6(a) states that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is authorized to carry out the representation or the disclosure is permitted by [Rule 1.6(b)]."[278] Like the attorney-client privilege, lawyers' duty of confidentiality attaches to initial consultations even if no attorney-client relationship results,[279] and continues after a representation concludes.[280]

---

273. *In re* Pac. Pictures Corp., 679 F.3d 1121, 1126 (9th Cir. 2012); Harrington v. Freedom of Info. Comm'n, 144 A.3d 405, 413 (Conn. 2016); Hill, Kertscher & Wharton, LLP v. Moody, 839 S.E2d 535, 539 (Ga. 2020); Ctr. Partners, Ltd. v. Growth Head GP, LLC, 981 N.E.2d 345, 356 (Ill. 2012); *In re* Bryan, 61 P.3d 641, 656 (Kan. 2003); Clair v. Clair, 982 N.E.2d 32, 40 (Mass. 2013); Nelson v. City of Billings, 412 P.3d 1058, 1069 (Mont. 2018); Ambac Assur. Corp. v. Countrywide Home Loans, Inc, 57 N.E.3d 30, 34 (N.Y. 2016).

274. Margules v. Beckstedt, 142 N.E.3d 325, 331 (Ill. App. Ct. 2019).

275. *See, e.g.*, Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 142, 145 (2d Cir. 2016) (stating that "the fact of representation" is not privileged); Wise v. S. Tier Express, Inc., No. 2:15-cv-01219-APG-PAL, 2017 WL 8219076, at *1 (D. Nev. July 10, 2017) ("[T]he dates when [the plaintiff] contacted and hired his attorney are not privileged."); State *ex rel.* Koster v. Cain, 383 S.W.3d 105, 119 (Mo. Ct. App. 2012) (noting that the existence of an attorney-client relationshipis generally not privileged).

276. SodexoMAGIC, LLC v. Drexel Univ., 291 F. Supp. 3d 681, 685 (E.D. Pa. 2018); *Ex parte* Alfa Ins. Corp., 284 So. 3d 891, 907 (Ala. 2019); Collins v. Braden, 384 S.W.3d 154, 159 (Ky. 2012); Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct., 399 P.3d 334, 341 (Nev. 2017); W. Horizons Living Ctrs. v. Feland, 853 N.W.2d 36, 41 (N.D. 2014); DeCurtis v. Visconti, Boren & Campbell, Ltd., 152 A.3d 413, 424 (R.I. 2017); Snow, Christensen & Martineau v. Lindberg, 299 P.3d 1058, 1070 (Utah 2013); Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1191 (Wash. 2016).

277. *Collins*, 384 S.W.3d at 159.

278. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2021).

279. Factory Mut. Ins. Co. v. APComPower, Inc., 662 F. Supp. 2d 896, 899 (S.D. Mich. 2009); *see* MODEL RULES OF PRO. CONDUCT r. 1.18 (AM. BAR ASS'N 2020) (establishing lawyers' duty of confidentiality to prospective clients).

280. City & Cnty. of S.F. v. Cobra Sols., Inc., 135 P.3d 20, 25 (Cal. 2006); Dunlap v. People, 173 P.3d 1054, 1070 (Colo. 2007); Elkind v. Bennett, 958 So. 2d 1088, 1090–91 (Fla. Dist. Ct. App. 2007); Keller v. Loews Corp., 894 N.Y.S.2d 376, 377 (App. Div. 2010); Cont'l Res., Inc. v. Schmalenberger,

Lawyers' ethical duty of confidentiality is broader than the confidentiality regimes of the attorney-client privilege and work product doctrine,[281] as the *Baldwin* court noted in connection with the privilege.[282] Model Rule 1.6 prevents lawyers from disclosing information that is neither attorney-client privileged nor immune from discovery as work product.[283] Furthermore, a lawyer's duty of confidentiality under Model Rule 1.6(a) attaches not merely to information communicated in confidence by the client to the lawyer or vice versa, but to all information related to the representation, regardless of the source.[284]

Lastly, it is important to remember that lawyers' duty of confidentiality does not have the evidentiary effect of the attorney-client privilege or work product immunity.[285] For example, lawyers may not rely on their duty of confidentiality to resist a subpoena seeking client communications,[286] or to avoid testifying at depositions.[287] A court order compelling a lawyer's testimony or commanding the lawyer to produce documents "vitiates" the lawyer's duty of confidentiality.[288] On the other side of the coin, but in the same vein, a Rule 1.6(b) exception to the duty of confidentiality that would permit a lawyer to reveal otherwise confidential information does not excuse a lawyer's duty to keep that information confidential under the attorney-client privilege.[289]

3. Baldwin and Beyond

Returning to *Baldwin*, perhaps the most disturbing aspect of the case is Baldwin's grand jury testimony about her private conversations with Curley, Schultz, and Spanier. For example, when answering

656 N.W.2d 730, 735 (N.D. 2003); Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 262 (Ohio 1998); Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc., 797 N.W.2d 789, 812 n.68 (Wis. 2011) (quoting T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953)).

281. *In re* Rules of Pro. Conduct & Insurer Imposed Billing Rules & Procs., 2 P.3d 806, 822 (Mont. 2000).

282. Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 843 (Pa. 2020).

283. *See generally* Doe v. Md. Bd. of Soc. Workers, 840 A.2d 744, 749 (Md. Ct. Spec. App. 2004) (explaining that the term "confidential" is not synonymous with "privileged" or "immune").

284. State v. Tensley, 955 So. 2d 227, 242 (La. Ct. App. 2007); State *ex rel.* Okla. Bar Ass'n v. McGee, 48 P.3d 787, 791 (Okla. 2002); State v. Meeks, 666 N.W.2d 859, 868 (Wis. 2003); ABA Comm. on Ethics & Pro. Resp., Formal Op. 480, at 3 (2018); MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2021).

285. Adams v. Franklin, 924 A.2d 993, 999 n.6 (D.C. 2007).

286. *In re* Grand Jury, 475 F.3d 1299, 1306 (D.C. Cir. 2007).

287. *See, e.g.*, *Adams*, 924 A.2d at 999–1000 (rejecting the lawyer's claim that the Rule 1.6 duty of confidentiality expanded the scope of the attorney-client privilege).

288. *Id.* at 998.

289. State v. Boatwright, 401 P.3d 657, 660–62 (Kan. Ct. App. 2017).

questions about her efforts to respond to the subpoena duces tecum served on the university, she testified that the three men lied to her about the existence of numerous documents that evidenced their knowledge of the 1998 and 2001 incidents.[290] She later testified in detail regarding Spanier's knowledge of the incidents as revealed in her conversations with him, including his descriptions of the 1998 and 2001 incidents.[291] Shockingly, when asked by the OAG's counsel about "Spanier's representations to [her] through this lengthy period of the investigation[,]" she responded that he was "not a person of integrity. He lied to me."[292] She offered this testimony even though none of the men waived their attorney-client privileges or confidentiality rights.[293] To the contrary, Curley and Schultz had expressly insisted on the protection of their attorney-client privileges when Baldwin testified before the grand jury.[294]

Although lawyers may testify about certain information concerning a client, they generally may not reveal the subject of client communications.[295] Lawyers must "protect the attorney-client privilege to the maximum possible extent on behalf of their clients."[296] Lawyers' duty of confidentiality requires them to invoke the attorney-client privilege on clients' behalf.[297] All attorney-client privileged communications necessarily relate to the client's representation and therefore are confidential under Model Rule 1.6(a).[298]

Baldwin attempted to justify her violations of her clients' attorney-client privileges and simultaneous breaches of her duty of confidentiality on various baseless theories, but her privilege-related arguments were doomed by her unilateral determination that the men

290. Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 827 (Pa. 2020).
291. *Id.* at 846–48.
292. *Id.* at 848.
293. *Id.*
294. *Id.* at 844.
295. Head v. State, 299 S.W.3d 414, 445 (Tex. App. 2009).
296. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 173 (4th Cir. 2019); *see also* Breton v. Comm'r of Corr., 899 A.2d 747, 751 (Conn. Super. Ct. 2006) ("The attorney-client privilege belongs to the client, however, not the attorney, although *it is incumbent upon the attorney to protect that privilege zealously in his or her client's interest.*" (emphasis added)).
297. Woodbury Knoll, LLP v. Shipman & Goodwin, LLP, 48 A.3d 16, 33 (Conn. 2012); State v. Gonzalez, 234 P.3d 1, 11 (Kan. 2010).
298. *Gonzalez*, 234 P.3d at 11.

had waived their privileges.[299] She did not have that power or right.[300] "Absent an evidentiary proceeding in which the privilege and waiver issues can be adjudicated, an attorney cannot rely on her self-determined and potentially self-serving conclusion that she has been relieved of her duty of confidentiality."[301] Only the client may waive the attorney-client privilege.[302] Again, her claims that exceptions to her ethical duty of confidentiality permitted her to testify as she did failed on the facts.[303]

Looking beyond *Baldwin*, lawyers must be sure to invoke their clients' attorney-client privileges when the facts support it absent a contrary instruction by the client. In doing so, a lawyer must appreciate that the party asserting the attorney-client privilege bears the burden of establishing its application to particular communications.[304] There is no blanket attorney-client privilege covering all communications between a client and lawyer.[305] Once the party asserting the privilege establishes that it applies to a communication, the burden generally shifts to the

299. *See, e.g.*, *Baldwin*, 225 A.3d at 850–51 ("[Baldwin] takes the position that the mere fact of Spanier's public comments waived the attorney-client privilege and she alone could make the determination that his privilege was destroyed."), 851–52 (arguing that Curley and Schultz waived their privileges by criticizing Baldwin's performance as their lawyer in court filings in their criminal cases).

300. *Id.* at 851; *see* Harris Davis Rebar, LLC v. Structural Iron Workers Loc. Union No. 1 Pension Tr. Fund, No. 17 C 6473, 2019 WL 447622, at *6 (N.D. Ill. Feb. 5, 2019) ("[T]he existence of the privilege is for the Court, not counsel, to determine.").

301. *Baldwin*, 225 A.3d at 851.

302. *Woodbury Knoll*, 48 A.3d at 32–33; Att'y Grievance Comm'n of Md. v. Powers, 164 A.3d 138, 151 (Md. 2017).

303. *Baldwin*, 225 A.3d at 852–56.

304. United States v. Ivers, 967 F.3d 709, 715 (8th Cir. 2020); Clements v. Bernini *ex rel.* County of Pima, 471 P.3d 645, 650–51 (Ariz. 2020); O&C Creditors Grp., LLC v. Stephens & Stephens XII, LLC, 255 Cal. Rptr. 3d 596, 609 (Ct. App. 2019); Fox v. Alfini, 432 P.3d 596, 600 (Colo. 2018); Harrington v. Freedom of Info. Comm'n, 144 A.3d 405, 413 (Conn. 2016); *In re* Appraisal of Dole Food Co., 114 A.3d 541, 561 (Del. Ch. 2014) (quoting Moyer v. Moyer, 602 A.2d 68, 72 (Del. 1992)); Nemours Found. v. Martinez Arroyo, 292 So. 3d 6, 8 (Fla. Dist. Ct. App. 2019); Margules v. Beckstedt, 142 N.E.3d 325, 331 (Ill. App. Ct. 2019); Collins v. Braden, 384 S.W.3d 154, 161, 163 (Ky. 2012); Maldonado v. Kiewit La. Co., 152 So. 3d 909, 927 (La. Ct. App. 2014); Harris Mgmt., Inc. v. Coulombe, 151 A.3d 7, 16 (Me. 2016); Clair v. Clair, 982 N.E.2d 32, 40–41 (Mass. 2013); State *ex rel.* AMISUB, Inc. v. Buckley, 618 N.W.2d 684, 694 (Neb. 2000); Canarelli v. Eighth Jud. Dist. Ct., 464 P.3d 114, 120 (Nev. 2020); Bhandari v. Artesia Gen. Hosp., 317 P.3d 856, 860 (N.M. Ct. App. 2013); Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 34 (N.Y. 2016); Glob. Textile All., Inc. v. TDI Worldwide, LLC, 847 S.E.2d 30, 34 (N.C. 2020); State v. Tench, 123 N.E.3d 955, 999 (Ohio 2018); BouSamra v. Excela Health, 210 A.3d 967, 982–83 (Pa. 2019); *In re* Mt. Hawley Ins. Co., 829 S.E.2d 707, 713 (S.C. 2019); *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004); Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1191 (Wash. 2016); State *ex rel.* HCR Manorcare, LLC v. Stucky, 776 S.E.2d 271, 282 (W. Va. 2015); Dishman v. First Interstate Bank, 362 P.3d 360, 367 (Wyo. 2015).

305. *In re* LeFande, 919 F.3d 554, 563 (D.C. Cir. 2019) (quoting *In re* Lindsey, 158 F.3d 1263, 1270 (D.C. Cir. 1998)); DCP Midstream, LP v. Anadarko Petrol. Corp., 303 P.3d 1187, 1199 (Colo. 2013).

party seeking to overcome the privilege to establish a waiver,[306] although some courts hold that the party asserting the privilege bears the burden of establishing that it was not waived.[307] Lawyers should never assume or presume that the attorney-client privilege has somehow been waived or that an exception to the privilege applies. Those are decisions for the court to make.

Lawyers must also properly perform ministerial acts that accompany the assertion of the attorney-client privilege. For example, lawyers must timely prepare privilege logs that satisfy local court rules lest they inadvertently waive the privilege through their failure to comply.[308]

V. CONCLUSION

The Sandusky scandal rocked bucolic Happy Valley and exacted a substantial toll on Penn State. On a personal level, three senior administrators who played roles in the scandal paid the heavy price of criminal conviction. Their misdeeds were amplified by the sad performance of their lawyer, Penn State general counsel Cynthia Baldwin. Baldwin, an accomplished lawyer and distinguished former judge, made critical errors and misjudgments in the three administrators' representations and her concurrent representation of Penn State. She was overmatched from the moment that the grand jury investigating Sandusky's crimes turned its attention to Penn State's role in them and she never recovered. Baldwin ultimately paid for her multiple mistakes in the form of a public reprimand imposed by the Pennsylvania Supreme Court. In retrospect, it is easy to see how and where she erred. Other lawyers need to learn from her mistakes and avoid her misfortune and the collateral consequences.

306. *Fox*, 432 P.3d at 600; *BouSamra*, 210 A.3d at 983; Andrews v. Ridco, Inc., 863 N.W.2d 540, 547 (S.D. 2015); McAfee v. State, 467 S.W.3d 622, 643 (Tex. App. 2015); State *ex rel.* Med. Assur. of W. Va., Inc. v. Recht, 583 S.E.2d 80, 89 (W. Va. 2003).

307. *See, e.g.*, United States v. Bolander, 722 F.3d 199, 222 (4th Cir. 2013); *In re* Grand Jury Investig., 902 N.E.2d 929, 932 (Mass. 2009); *Ambac Assur. Corp.*, 57 N.E.3d at 34–35; Walton v. Mid-Atl. Spine Specialists, P.C., 694 S.E.2d 545, 549 (Va. 2010).

308. EPSTEIN, *supra* note 167, at 1527.