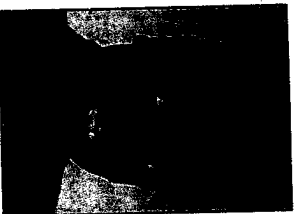


Questions Surround Penn St. GC's Role Before Grand Jury

ANALYSIS



BALDWIN

Following the news that Penn State University General Counsel Cynthia Baldwin was allowed into the grand jury proceedings of two former university administrators whom she now claims she was not individually representing, several criminal defense attorneys posed the same question: how?

The answer to that question, along with what it means for the upcoming trials of former Athletic Director Tim Curley and former Vice President of Business and Finance Gary

Penn State continues on 8

Penn State

continued from 1

Schultz, varied among legal observers. Both Schultz and Curley face charges of failure to report sex abuse and perjury stemming from statements they made to grand jurors last year. According to their testimony to the grand jury, both Curley and Schultz thought Baldwin was their attorney at the hearings.

Baldwin has labeled the whole thing a misunderstanding, the Harrisburg *Patriot-News* first reported. Baldwin's take on how everything unfolded came from Washington attorney Lanny Davis, who also represents Penn State and who Baldwin has authorized to speak on her behalf. Davis told the *Patriot-News* and *The Legal* that, when Baldwin told supervising Judge Barry Feudale and representatives from the Office of the Attorney General in Feudale's chambers that she represented the university, nobody objected to her listening to the administrators' testimony.

Then, Davis told *The Legal*, when the administrators testified that Baldwin was their attorney, she did not think it was "appropriate" to interrupt the proceedings and clarify.

"It struck her as they are confused and it struck her as not appropriate to interrupt," Davis said in an interview. "That's the

judgment she made and it was a good-faith judgment not to interrupt the proceeding."

Following the news, some sources interviewed by *The Legal* said the state's grand jury law on rights of counsel is clear. Represent a witness, or wait outside, criminal defense lawyers said the law provides. Sources questioned whether Baldwin's appearance was an indicator of Penn State's influence over a massive sex-abuse scandal that, as prosecutors allege, both Schultz and Curley could have stopped but did not.

Philadelphia defense attorney Richard Q. Hark said it was "generally indicative of the power and sway" Penn State had over the proceedings.

"A corollary would be allowing an attorney for the Catholic Church to be present at grand jury proceedings against certain high-level priests that are the targets of, and testifying before, the grand jury and then being able to report back to the church," Hark said.

But if Penn State ever wielded control over its exposure, that has since unraveled. The scandal, which hit firestorm status after the state charged former assistant coach Jerry Sandusky with 40 counts of sex abuse, has since led to the ouster of former President Graham Spanier, as well as the university's most revered figure, former head football coach Joe Paterno. Paterno died last month. Asked to respond to the questions raised

by *The Legal's* sources regarding Baldwin's presence in the grand jury room, Davis said Baldwin would have been second-guessed had she interrupted to clarify her role or had she remained silent, as he said she did.

"If you're asking me to respond to some expert quarreling with Cynthia Baldwin being in the room, tell them to take their case to the judge," Davis said in an interview.

When contacted by *The Legal*, Feudale, the supervising judge, declined to comment on his impression of Baldwin's role or how she gained access to the proceedings.

"The primary responsibility of the grand jury judge is to ensure secrecy," Feudale told *The Legal* when asked about the apparent misunderstanding.

So why was Baldwin, an attorney representing Penn State — an interested third party — allowed inside?

"I don't give interviews regarding grand jury proceedings," he then said.

In two developments this week, Schultz and Curley filed motions asking the state to drop the charges against them. Curley, through his attorney, Caroline Roberto, argued in a motion to quash filed Monday that the story of key witness Mike McQueary could not be corroborated without the testimony of Paterno.

Schultz followed suit Tuesday, petitioning

Penn State continues on 9

Penn State

continued from 8

for a writ of habeas corpus on grounds that prosecutors cannot corroborate McQueary's testimony. Schultz also argued that statements he made to the grand jury about his understanding of the story McQueary told him — that McQueary's account was "not that serious" and did not amount to a crime — were patently ambiguous and warranted a dismissal of the perjury charge. Schultz, through his attorney Tom Farrell, further argued that his statements to the grand jury could not amount to perjury because they were his opinions, or "unschoolered conclusions of law," rather than a false assertion of fact.

He filed a separate motion to join Curley's motion to dismiss both charges.

McQueary has testified, both before the grand jury and in open court, that he saw Sandusky sexually assault a boy in a Penn State locker room in 2002. He reported the incident to Paterno, who told McQueary to report what he'd seen to Schultz and Curley.

Following discrepancies between McQueary's testimony and that of the two administrators, the state brought charges against Schultz and Curley.

Paterno testified before the grand jury but was not charged with any wrongdoing. According to the *Patriot-News*, Baldwin was not present for those proceedings.

Other legal observers said that no judge would have allowed Baldwin into the proceedings if it was clear she did not represent either of the men personally. Prosecutors, had they known she was there as a representative of Penn State, would have objected, observers said.

And, according to Davis, the prosecutors

were aware Baldwin was Penn State's lawyer and did not object.

Nils Frederiksen, spokesman for the state Attorney General's Office, said that state law prohibited him from commenting on the matter.

"Officially, the only thing we can say is we are prohibited by law from discussing grand jury matters," Frederiksen said.

Other sources offered theories on the exchange between Baldwin and the tribunal.

"The judge interpreted it to believe that she represented [Schultz and Curley] as agents of the university," said Dennis Cogan, a Philadelphia criminal defense attorney.

If Davis has it correct — "I'm basing my comments on what I'm told by Cynthia Baldwin," he said — attorneys interviewed by *The Legal* were split on what Baldwin's role in the grand jury room in January 2011 would mean for the trials of Schultz and Curley.

Some criminal defense attorneys said the biggest impact would be felt by Baldwin who, according to the *Patriot-News*, did not bring up the subject of representation with the administrators at the grand jury hearing. According to Davis, Baldwin did tell both men they could get their own attorney after she received their grand jury subpoenas in December 2010.

According to Davis, representatives from the Attorney General's Office called Baldwin to let her know that Schultz, Curley and Paterno were all going to be served subpoenas.

"As a courtesy," Davis said in an interview, Baldwin offered to give the men their subpoenas rather than letting them go through, "as he put it, the "traumatic and embarrassing experience" of being served.

"It does not make the university counsel their lawyer," Davis said of the courtesy. The *Patriot-News* quoted Davis as saying

that, at that point, Baldwin felt she had fulfilled "what she believed her obligation is."

But Philadelphia criminal defense attorney Michael J. Engle said the impact of her presence could run deeper. In fact, the defendants could have a "viable motion" to dismiss the perjury charges, Engle said, because they directly stemmed from their comments to grand jurors.

"It creates a taint to the grand jury process and the report and charges that flow from that presentation," Engle said.

According to Engle, the immediate past president of the Pennsylvania Association of Criminal Defense Lawyers, the process by which Pennsylvania attorneys are allowed access to grand jury proceedings is always the same. It goes like this:

An attorney clarifies representation to his or her client and to the state prosecutors before the proceedings. Then, the role of counsel is clarified on the record in front of the supervising grand jury judge before witnesses testify. Then it is clarified a third time before grand jurors and state prosecutors.

"It is always the same," Engle said. "There is a standard protocol they ask these people about identifying counsel."

Asked if the judge would have set aside state grand jury laws in allowing Baldwin inside, Engle said:

"Anything is possible ... I just can't imagine a supervising grand jury judge allowing that to happen. If that happened, it was a gross miscarriage of justice. I find it hard to believe that representatives from the Office of the Attorney General and the supervising grand jury judge would ignore the Grand Jury Act and allow an attorney who does not represent a witness in the grand jury room."

Pennsylvania grand jury law states that "a witness subpoenaed to appear and testify

before an investigating grand jury ... shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in the presence of the investigating grand jury." The law does not, however, extend similar rights to an attorney for an interested third party.

One provision in the law — 42 C.S. Section 4945(c)(4) — stipulates that attorneys should not represent multiple clients before a grand jury if representing one client means harming another.

But in a proceeding where Baldwin claimed to have represented a party that should have never had counsel in the room, how do you address that conflict?

"There is clearly a risk of conflict between [Schultz and Curley's] interests and Penn State's interests," said Widener University School of Law professor Jules Epstein.

Was Penn State technically a party? Epstein could not say. On whether there was a conflict, at that point, between Schultz and Curley, Epstein said maybe not.

It is not completely clear whether Schultz and Curley were targets of the grand jury heading into the proceedings, although sources have told *The Legal* they were not. According to Epstein, that would have changed things.

In fact, Epstein said, "it would seem incumbent on prosecutors" to raise a conflict of interest if they had actually targeted the two administrators.

A spokesperson for Farrell and Roberto, Schultz and Curley's attorneys, respectively, declined to comment on Baldwin's role in the grand jury room and the effect it would have on the administrators' trials.

Baldwin would not comment on the record for *The Legal*.

Ben Present can be contacted at 215-557-2315 or bpresent@alm.com. Follow him on Twitter @BPresentTL.