Whose Lawyer Is It Anyway? Professional Responsibility When Conflicts Get Complicated

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IV. A PARTING POSTSCRIPT

I. INTRODUCTION: KEEP YOUR CLIENTS CLOSE . . . AND MAKE SURE THEY KNOW WHO THEY ARE

A. A Small Parable, in Two Parts[1]

1. You Get a Lawyer and You Get a Lawyer and You Get a Lawyer! And They're All Me!

Drumpf Syndrome (DS) is a rare hereditary neurological disorder that is poorly understood and difficult to control. By disrupting normal electrical impulses in the brain, DS has profound effects on its victims' cognitive functions. Some of those effects are almost amusing, such as a recurrent inability to spell common words or to distinguish between capital letters and lower-case ones. Others are more disturbing: DS sufferers are beset with paranoid delusions and are often pathological liars. As the disease progresses, its victims are prone to violent rages and often seek to enlist others in aggressive efforts to obtain "vengeance" against the victim's perceived enemies. Only a few of the most advanced centers in the world are able to treat DS patients. Advanced Academic Medical Center (AAMC) is one such center and is renowned for its DS care.

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[1]Portions of this essay originally appeared in different form in the author's earlier publications *Whose Lawyer Is It Anyway? Legal Ethics and Conflicts in the Academic Medical Center Setting*, available in the program materials from the American Health Lawyers Association's 2009 program on Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions, and *Legal Ethics: What Penn State and Lehman Brothers Can Teach Lawyers About Conflicts of Interest*, available in the program materials from the 2013 edition of the same program (and slightly revised for the 2016 Antitrust in Healthcare program jointly presented by the American Bar Association's Sections of Health Law and Antitrust Law and the American Health Lawyers Association). In particular, the two hypotheticals in this introductory section are somewhat modified versions of hypotheticals originally written by Jeff Sconyers, then of Seattle Children's Hospital and now of the University of Washington, as the author's co-presenter at the 2013 Academic Medical Centers program. As so modified, they are used here with the express permission of Mr. Sconyers.

Dr. Scott Cutlass, AAMC's Chair of Neurology and a specialist in DS, wants to prescribe pardonomine, a drug he used in his previous appointments in Paris and Toronto, to treat DS patients. Although there is no known cure for DS, European studies have shown that pardonomine (best known by its brand name, Krakenol®) can be effective in controlling a DS patient's paranoia and rages, critical steps in stabilizing the patient so that he or she may be more responsive to therapies aimed at reducing the severity of the disease's other symptoms. Although it is approved for use in the European Union and Canada, the FDA has not approved pardonomine for use in the United States due to its serious known side effects. Dr. Cutlass has studied these side effects and considers the drug to be an important, if risky, tool to help DS patients.

Dr. Cutlass asks Reid Dwayne, the AAMC Chief of Pharmacy, to buy and stock pardonomine for dispensing to DS patients. Dwayne explains the lack of FDA approval to Dr. Cutlass, but promises to look into possible solutions. Dwayne then comes to Prudence Blackstone, the AAMC general counsel, to explore the alternatives.

Working with Dr. Cutlass and Dwayne, Blackstone learns that although the manufacturer can't import pardonomine into the U.S. without FDA approval, it is not uncommon for U.S. patients to obtain drugs approved in other countries from foreign pharmacies that ship the drugs here. Use of the mails for importation of unapproved drugs is a felony, but the Postal Service typically just confiscates the package (if it manages to figure out what's happening) rather than bringing criminal charges. Blackstone reasons that sending the drug to AAMC for use by patients who elect to receive it after appropriate informed-consent disclosures should be treated similarly, since AAMC is only acting as the middleman. Blackstone finds no case where an academic medical center has faced any sanctions for participating in a similar arrangement. Blackstone does not consult with outside counsel on the issue, but informs both Dr. Cutlass and Dwayne of her conclusions as to the likely legality of the arrangement and the low risk of meaningful enforcement activity.

Dwayne and Dr. Cutlass develop a plan whereby AAMC will order pardonomine from a Canadian pharmacy and stock

it for use by DS patients. Dr. Cutlass will provide patients with a written explanation that the drug is not approved in the U.S., that it has serious side effects, and that it is their choice to obtain and use it. As part of the process, the patients (or their parents) will sign a waiver of liability. The AAMC pharmacy will then dispense the drug. Dwayne and Dr. Cutlass implement the plan; neither they nor Blackstone mention it to the CEO of AAMC.

Multiple criminal penalties under federal law apply to anyone who illegally imports drugs or uses the mails to do so. AAMC, Dwayne and Dr. Cutlass (at a minimum) could all face felony charges if the U.S. Postal Service, or the FDA as part of its enforcement activity, were to discover the pardonomine scheme. In addition, under state law Dr. Cutlass could face disciplinary action against his medical license, Dwayne could face action from the Board of Pharmacy on his pharmacist license, and AAMC could be subject to fines and license sanctions for obtaining and dispensing an unapproved drug. And then, of course, there is the grim prospect of tort litigation that could ensue on behalf of any patient injured by the drug.

All of this notwithstanding, Dr. Cutlass believes strongly that providing pardonomine to DS patients is his moral responsibility, and convinces Dwayne that AAMC must, in the interests of good patient care, stock and dispense the drug.

Time passes. A DS patient on pardonomine experiences a complete depression of all neurological function, collapses, and ultimately dies in the emergency room of Community Benefit Hospital across town. The death is completely unexpected for the CBH clinicians, and they report it to the local coroner. The coroner investigates and discovers via a toxicology screen that the patient was on pardonomine, an unapproved drug. The coroner reports her findings to the District Attorney, Burgerton Hamm, who is up for re-election this year. Hamm decides to make an example out of Dr. Cutlass and convenes a grand jury to consider homicide charges.

Hamm contacts Blackstone, saying that he considers AAMC to be a "mere repository of information", and would like AAMC's cooperation in the investigation. However, it's clear to Blackstone that Hamm could change his mind at any time and bring charges against AAMC. As a result,

Blackstone cooperates fully, providing all the internal correspondence and documentation about the pardonomine plan, including copies of emails between Dr. Cutlass and Dwayne from the AAMC mail server. To her credit, Blackstone then tells Dr. Cutlass that he's in a world of trouble and better get himself a good lawyer.

Hamm asks to have Dwayne speak to the grand jury. Blackstone talks to Dwayne and encourages him to do so, and to be open and honest, since Blackstone believes this strategy will best protect AAMC. Dwayne goes to the grand jury and tells all.

Two weeks later, Hamm files charges of murder in the second degree against Dr. Cutlass and Dwayne. Dwayne's testimony to the grand jury was a major factor in the decision to charge the men. Thereafter, Dr. Cutlass's new lawyer and Dwayne's public defender each send strong letters to Blackstone, asserting that their respective clients have claims of attorney-client privilege with respect to their communications with Blackstone and demanding that Blackstone assert that privilege if and when called to testify.

2. It's Not Always What You Know. And It May Not Be Who You Know, Either

Prior to the proverbial stuff hitting the proverbial fan, Dr. Cutlass meets with Blackstone to discuss lobbying the FDA to change its approach to pardonomine and grant approval for compassionate use. As has perhaps already become evident, Blackstone isn't an FDA expert, and she decides to hire outside counsel for this project. After talking with colleagues at several other academic medical centers, Blackstone settles on Julie Rudiani from the firm of Upright & Sikorsky, whose long client list includes the top research universities around the country as well as eight of the 10 largest pharma and biotech companies. Rudiani has decades of experience working with the FDA, and in fact sometimes advises senior FDA leaders on proposed legislation pending before Congress because she understands the FDA process better than they do themselves. She currently is working on a very sensitive matter involving a powerful new drug on behalf of another client, Pharmaville, Inc., and knows how important it is to maintain a good working relationship with the agency.

Rudiani knows that FDA leaders hate having to respond to lawsuits claiming they aren't following their own regulations, especially after the public relations hit the FDA took over that whole coronavirus thing. Her effectiveness depends on her storied abilities to work with the regulators behind the scenes, rather than challenge them in public. Although she believes a strong case could be made in litigation for compelling the FDA to approve pardonomine based on the lack of other approved medicines to treat DS, she decides to proceed more informally, by contacting her friends at the FDA and explaining the need to make this life-saving drug available to these fragile DS patients. She doesn't mention that AAMC is in fact currently obtaining and providing the drug to patients, though Blackstone has told her about this plan.

While Rudiani's project of informal conversations is proceeding, at $1,000 an hour plus expenses, the DS patient mentioned above dies at Community Benefit Hospital. The Secretary of Health and Human Services finds out that AAMC was providing the drug despite its unapproved status, and instructs (a) the NIH to cut off all funding of research at AAMC and (b) CMS to launch an immediate investigation of AAMC's compliance with the Medicare Conditions of Participation. These actions do not conform to requirements of the Administrative Procedures Act. Rudiani again tells AAMC to rely on her relationships at the various agencies, rather than make a big stink by moving to enjoin the Secretary's actions for procedural defects.

Six months later, AAMC is forced to liquidate its entire endowment to fund continued research and clinical operations, since it now receives no NIH, Medicare or Medicaid funding. Meanwhile, Pharmaville's stock price has tripled on the public announcement that its groundbreaking new drug received an Emergency Use Authorization from the FDA.

A. Well, *You* Might Think It's a Conflict . . .

The revelation in late 2011 that Jerry Sandusky, a longtime assistant football coach at Pennsylvania State University, had allegedly engaged in a variety of activities constituting child sexual abuse and that numerous university officials, including legendary head football coach Joe Paterno, had been aware of this activity but had not disclosed it sent

ripples far beyond the college sports world. Similarly, the 2008 collapse of Lehman Brothers, one of the oldest and largest investment banks in the United States, is widely credited as a major precipitating event of the global financial crisis that has been one of the defining events of the past decade.

Not all that surprisingly, of the millions of words written about the Penn State scandal and the Lehman Brothers bankruptcy, relatively few have focused on the professional responsibility issues for lawyers arising from those tumultuous events. Yet, both of those matters illustrate certain key issues and challenges that face lawyers who represent complex client organizations, as well as lawyers who represent multiple clients involved in the same industry or sector – clients that may be competitors, adversaries, joint venturers or counterparties depending on the day of the week.

These issues and challenges may have particular relevance in the healthcare industry. A lawyer who represents health systems, academic medical centers, joint venture entities or accountable care organizations may find that disparate components of those enterprises all think of themselves as that lawyer's clients, regardless of the nature of the specific engagement or even of who is paying the lawyer's bills. This concern may be particularly acute when the lawyer is in-house counsel for one (or more) of the components, and thus may be perceived as a legal resource for all and sundry involved in the matter in question.

Beyond that, given the increasing complexity of the healthcare industry and the level of specialization and expertise demanded by healthcare clients, it is not uncommon for a single lawyer or law firm to serve as regular or special counsel to a wide variety of players in a particular industry niche – the "go-to counsel" for ambulatory surgery centers or independent diagnostic testing facilities or for-profit hospitals – or to be known as "the lawyer to see" on high-stakes Stark Law issues or complex reimbursement matters. The end result is that such a lawyer or law firm may be simultaneously representing competing client entities in unrelated matters or arguing one side of a legal issue in one forum while taking the opposite position in another.

In situations of these types, it is imperative for lawyers, whether inside or outside counsel, to be highly attentive to

applicable rules of ethics and professional responsibility and how they apply in what may be convoluted circumstances. Who is the lawyer's client in the matter at hand? How do the lawyer's responsibilities to other current and former clients affect the lawyer's representation of this particular client? What are the lawyer's obligations with respect to persons or entities who might reasonably perceive themselves to be clients, but as to which the lawyer believes no attorney-client relationship has been formed? What happens when the lawyer finds that he or she has more clients than he or she intended to have?

Through analysis of relevant examples from the Penn State and Lehman Brothers cases, this chapter will consider how some of those questions play out in the healthcare setting, where the overlapping and symbiotic (or not) relationships among players may make these types of issues even more difficult to address than they are in the ordinary course of professional life. Particularly in crisis situations – and don't healthcare clients all believe that they are in a state of perpetual crisis? – it may be critical to both the lawyer's ability to provide effective representation and the lawyer's ability to avoid becoming a target of regulatory (or even prosecutorial) action to understand, clearly and quickly, what his or her ethical obligations and limitations are.

The following sections will present a brief discussion of selected facts (or purportedly factual allegations) from the Penn State and Lehman Brothers matters, a review of relevant ethics rules, and some consideration of how similar circumstances might play out in a healthcare setting. In that regard, the reader should bear in mind two important preliminary points:

- The discussion of ethics rules in this paper is based on the American Bar Association's Model Rules of Profession Conduct and the comments thereto.[2] The Model Rules, adopted by the American Bar Association's House of Delegates, form the basis of the professional responsibility rules in every state. However, jurisdictions differ

[2]MODEL RULES OF PROFESSIONAL CONDUCT (2020) ("Model Rules"), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

greatly as to the degree to which they have adopted the Model Rules: some have adopted the rules but not the comments, some have adopted an earlier version of the Model Rules but have not adopted one or more amendments approved by the ABA, some have significantly modified provisions of the Model Rules, and so on and so forth. Accordingly, a lawyer facing a situation like those described here should consult the specific rules of professional responsibility in force in the jurisdiction(s) in which he or she is licensed. Any analysis set forth in this essay may or may not hold true (assuming, that is, that it does anyway) in a state which has not adopted the current version of the Model Rules and the associated comments.

- The discussion of specific facts and allegations in this essay is based on publicly available accounts. In many cases, there may be substantial disagreement as to the accuracy or completeness of those accounts, as well as to the proper interpretation of those facts (whether proven or alleged). Any facts or allegations discussed in this essay have been selected for pedagogical purposes, and, even if they happen to be true, are not intended to provide a complete and accurate picture of the events in question. Accordingly, no inference is intended, and none should be drawn, that any lawyer, law firm or legal department discussed in this paper engaged in any sort of professional misconduct or other unsavory behavior, except to the extent that some tribunal of appropriate jurisdiction has made such a determination.[3] Unfortunately for the lawyers, law firms and legal departments mentioned, they just happened to have their activities more widely publicized than most, and thus become easy real-life hypotheticals for commentators on professional responsibility to utilize.

II. JUST THE ALLEGED FACTS, MA'AM: IN WHICH WE ILLUSTRATE THE PROBLEMS

A. Penn State: The Cynthia Baldwin Saga

General counsel are ordinarily as ego-driven as the next

[3]Which, of course, has in fact occurred in the case described in Section II.A below.

lawyer (oh, let's be honest; thanks in part to years of flattery from business-seeking outside lawyers, general counsel are frequently much more ego-driven than the next lawyer). Thus, the average general counsel may well look forward to the day when he or she is prominently featured in the media – perhaps a flattering biographical article in a trade magazine, or a behind-the-scenes account of how the GC saved the deal or settled the class action. On the other hand, the general counsel is unlikely to welcome media coverage involving headlines such as "General Counsel Cited for Missteps"[4] or "General Counsel's Role in Inquiry Called into Question"[5] or "Harsh Verdict on General Counsel Outlined in Investigation Report".[6] Headlines such as those, however, faced former Penn State General Counsel Cynthia Baldwin in the long-running scandal surrounding the university's handling of child sexual abuse allegations against former assistant football coach Jerry Sandusky (and the almost equally long-running chronicle of Ms. Baldwin's professional activities with respect thereto).[7]

Ms. Baldwin arrived at her position at Penn State by a somewhat unusual route. In January 2010, she was named as Vice President, General Counsel and Chief Legal Officer

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[4]*See* Paula Reed Ward, *Penn State's general counsel cited for missteps*, https://www.post-gazette.com/news/state/2012/07/15/Penn-State-s-general-counsel-cited-for-missteps/stories/201207150174 (July 15, 2012).

[5]*See* Jeremy Roebuck, *Penn State counsel's role in Sandusky inquiry called into question*, https://www.inquirer.com/philly/education/20120726_Penn_State_counsel_s_role_in_Sandusky_inquiry_called_into_question.html (July 26, 2012).

[6]*See* Catherine Dunn, *A Harsh Verdict on Penn State's GC Outlined in Freeh Report*, https://www.law.com/corpcounsel/almID/1202563042078/?slreturn=20210015194222 (July 16, 2012).

[7]The tragic events leading to the ultimate indictment and conviction of Jerry Sandusky have been widely publicized in news accounts, books and websites and, the specifics not being particularly relevant to the present discussion, will not be recounted here. For what is by many accounts a scholarly and reasonably objective study by an academic sports historian, see RONALD A. SMITH, WOUNDED LIONS: JOE PATERNO, JERRY SANDUSKY, AND THE CRISES IN PENN STATE ATHLETICS (2016); for an argument that Sandusky was at least to some degree the victim of a miscarriage of justice, see MARK PENDERGRAST, THE MOST HATED MAN IN AMERICA: JERRY SANDUSKY AND THE RUSH TO JUDGMENT (2017). As far as the history of Ms. Baldwin's role in the drama, that is the subject of the first portion of this essay and the sources cited herein.

of the university, becoming its first full-time general counsel. She was, however, no stranger to Penn State, having served as Chair of the university's Board of Trustees from 2004 to 2007. Her background also included two years as an Associate Justice on the Pennsylvania Supreme Court, 16 years as a trial court judge, and stints as a lawyer in the Pennsylvania Attorney General's office and with the Pittsburgh office of Duane Morris LLP.[8] It is safe to say, however, that impressive as it is, this background likely did not prepare her for the critical attention and media coverage given to her role in the Sandusky affair.[9]

This section will focus on two specific areas in which particular attention has been focused on Ms. Baldwin: her interactions with the corporate governance structure at Penn State concerning the Sandusky investigation (as such interactions were portrayed in an independent investigation report relating to the matter and in various subsequent sources), and her involvement with the grand jury investigating university officials' involvement in the alleged cover-up of Sandusky's misdeeds (which sheds additional light on the first issue).

1. Chain of Command: Cynthia Baldwin, President Spanier and the Board of Trustees

As the Sandusky scandal emerged in 2011, the Penn State Board of Trustees formed a Special Investigations Task Force that, in turn, engaged the law firm of Freeh Sporkin & Sullivan, LLP ("FSS") as "Special Investigative Counsel". Under the direction of former FBI Director and federal judge Louis Freeh, FSS was engaged "to lead an independent investigative review into all aspects of the University's actions with regard to the allegations of child abuse involving

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[8] *See, e.g.,* "Cynthia Ackron Baldwin", https://fulbright.org/about/board-of-directors/cynthia-ackron-baldwin/; "The Honorable Cynthia Baldwin", http://www.thehistorymakers.com/biography/honorable-cynthia-baldwin.

[9] An Internet discussion forum known as the "WebSleuths Crime Sleuthing Community" has a subtopic entitled "All Things Cynthia Baldwin". As of January 15, 2015 (the date of the most recent post in the forum), there were 142 posts, dating back to late July 2012, under that subtopic, suggesting (at least at that time) a level of interest among the online community not common to most general counsels. *See* www.websleuths.com/forums/showthread.php?t=180131.

[Sandusky]".[10] Seven months later, FSS released the damning document that came to be known as "the Freeh Report".[11]

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[10]*See* Press Release, "Former FBI director Freeh to conduct independent investigation", https://news.psu.edu/story/153530/2011/11/21/administration/former-fbi-director-freeh-conduct-independent-investigation (Nov. 21, 2011).

[11]FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY, JULY 12, 2012, *available at* www.documentcloud.org/documents/396512-report-final-071212.html ("Freeh Report"). The Freeh Report has been criticized by, among others, lawyers for former Penn State President Graham Spanier, lawyers for Cynthia Baldwin, and some members of the Penn State Board of Trustees. *See, e.g., Spanier lawyer rips Freeh report*, http://espn.go.com/college-football/story/_/id/8292444/ex-penn-state-nittany-lions-president-graham-spanier-lawyer-blasts-freeh-report (Aug. 2013, 2012); Statement of Charles DeMonaco, attorney for Cynthia Baldwin, https://images.law.com/image/cc/BaldwinStatement.pdf; Mike Dawson, *Penn State trustee Lubrano calls for refund on Freeh report*, www.centredaily.com/news/local/education/penn-state/article42817152.html (Feb. 24, 2013); Lori Falce, *Penn State trustees reject further investigation of Freeh report, Sandusky abuse*, www.mcall.com/news/nationworld/pennsylvania/mc-pa-penn-state-trustees-reject-freeh-review-1029-20141029-story.html (Oct. 29, 2014).

The family of Coach Joe Paterno devoted significant resources to producing a rebuttal to the Freeh Report, although that was primarily aimed at refuting the Freeh Report's allegations about Coach Paterno's knowledge of Sandusky's misdeeds and did not particularly address the issues of concern in this paper. *See* KING & SPALDING, CRITIQUE OF THE FREEH REPORT: THE RUSH TO INJUSTICE (Feb. 2013), *available at* https://www.espn.com/pdf/2013/0210/espn_otl_FINAL%20KING&SPAULDING2.pdf. (For a brief, irreverent discussion of the dueling reports, see Ben Goldfarb, *Report vs. Report: Standing at the Urinal*, www.nittanyturkey.com/2013/02/11/report-vs-report-standing-at-the-urinal/ (blog post) (Feb. 11, 2013)). A group identifying itself as "Penn Staters for Responsible Stewardship" (in its own words, "an organization of alumni, students, community members, university members, parents of students and supporters of the University") published a "Review of the Freeh Report" dated Sept. 13, 2012 that purported to identify a number of what it characterized as "key failures" of the report. *See* https://ps4rs.org/freeh-report/ and the files linked thereto.

Most recently, a group of then-current and former Penn State trustees sued the University for access to the materials underlying the Freeh Report and thereafter prepared its own report, entitled "Report to the Board of Trustees of the Pennsylvania State University on the Freeh Report's Flawed Methodology and Conclusions, June 29, 2018", which is available at https://www.scribd.com/document/399416472/Report-to-the-Board-of-Trustees-of-the-Pennsylvania-State-University-on-the-Freeh-Report-s-flawed-methodology-and-conclusions#from_embed. That report, the release of which was not authorized by the Board of Trustees, was leaked

The Freeh Report spread a gracious helping of blame throughout the Penn State leadership, from the Athletics Department to the Board of Trustees. Objectively speaking, Ms. Baldwin's turn in the Freeh spotlight was relatively small, but the criticisms directed at her were significant. For purposes of the present discussion, the most important of those criticisms relate to Baldwin's decisions with respect to handling of the grand jury investigation of Sandusky and others at Penn State and her communications with then-President Graham Spanier and the Board of Trustees concerning the investigation. To consider the Freeh Report's analysis of Ms. Baldwin's purported acts and omissions, it is helpful to review a brief chronology of those acts and omissions, as they were outlined in the Report:[12]

- In January 2010, shortly before Ms. Baldwin came on board as General Counsel that February, Penn State received a grand jury subpoena seeking employment and personnel records on Sandusky. The university referred the matter to the law firm that essentially served as its outside general counsel.
- On December 22, 2010, one of the outside lawyers called Ms. Baldwin to advise her that a representative from the Pennsylvania Attorney General's office had told outside counsel that the grand jury would seek testimony from "some very important people" at the university.

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some months later to WJAC, a Johnstown, Pennsylvania television statement, which made it public. *See* Gary Sinderson, *New report says Freeh report "flawed"*, https://wjactv.com/news/local/new-report-says-freeh-report-flawed (Feb. 11, 2019); Elissa Hill, *Trustees' Report on Freeh Report Flaws Leaked*, https://onwardstate.com/2019/02/11/trustees-report-on-freeh-report-flaws-leaked/ (Feb. 11, 2019); Chip Minemyer, *Freeh Report again challenged, but not shot down*, https://www.tribdem.com/news/chip-minemyer-freeh-report-again-challenged-but-not-shot-down/article_d3485dca-315e-11e9-b70d-ff413fd71752.html, Feb. 16, 2019. For the procedural background of the lawsuit brought by the current and former trustees, see In re Application by Nonprofit Corporation Trustees to Compel Inspection of Corporate Information, 157 A.3d 994 (Pa. Commw. Ct. 2017).

This essay does not seek to evaluate the merits of the Freeh Report, but merely uses its findings (and some of the information that has emerged in response thereto) for purposes of discussion.

[12]As will be discussed in the next subsection, disclosures that began emerging in the fall of 2012 cast a different spin on some of the items discussed in the chronology.

- On December 28, 2010, Ms. Baldwin spoke with two prosecutors, who told her that the grand jury planned to subpoena testimony from head football coach Joe Paterno, athletic director Tim Curley and vice president Gary Schultz. According to Baldwin, she asked if Penn State or its employees were targets of the investigation and was told that the investigation focused on Sandusky. The Report noted that "Baldwin did not seek the assistance of an attorney experienced in addressing criminal investigations or conducting internal investigations at that time." That same day, Ms. Baldwin informed Spanier about the investigation and met with Spanier and Schultz.
- On January 3, 2011, Ms. Baldwin met with Paterno and Curley, but did not otherwise investigate the matter or begin collecting emails that might be relevant to the grand jury investigation.
- On January 11, 2011, Ms. Baldwin updated Spanier, reporting that he was "surprised to hear of the subpoenas but . . . not excited over the matter".
- The next day, Paterno, Curley and Schultz testified before the grand jury, accompanied by Ms. Baldwin (a matter that will be discussed separately below).
- On February 15, 2011, Ms. Baldwin interviewed a number of assistant football coaches about Sandusky. The next day, she was present as state investigators interviewed eight coaches. The investigators also told her that they wanted to interview Spanier.
- On March 22, 2011, state investigators interviewed Spanier, with Ms. Baldwin present. Two days later, Spanier received a grand jury subpoena.
- On March 31, 2011, a local newspaper, the *Patriot-News* out of Harrisburg, reported that Sandusky was the subject of a grand jury investigation involving alleged child sexual abuse and that Paterno, Schultz and Curley had testified before the grand jury. The next day, a Trustee emailed Spanier asking for details and inquiring whether the Board of Trustees should be briefed. Spanier replied by email, copying Ms. Baldwin and Board Chair Steve Garban, indicating that "grand jury secrecy" might prevent the Board from being briefed and that he would inquire with Ms. Baldwin about what

might be permissible. Ms. Baldwin emailed Spanier the next day, indicating that grand jury secrecy was not an issue and offering to "put together something for Spanier to provide to the Board".

- On April 13, 2011, the same Trustee emailed Spanier again. Spanier replied that Ms. Baldwin would make a report at the next Board meeting, and then emailed Ms. Baldwin to complain about the Trustee's persistent inquiries. That same day, Spanier testified before the Grand Jury, with Ms. Baldwin present. A few days later, Board Chair Garban met with Spanier and Ms. Baldwin; Ms. Baldwin recalled that she assumed that Spanier and Garban would relay relevant information to the rest of the Board.
- On May 12, 2011, Ms. Baldwin briefed the Board on the Sandusky investigation. Ms. Baldwin recalled that she had reported on the matter for 20 minutes before Spanier told her to leave. Some Trustees, however, recalled that the briefing had been "a three to five minute, 'oh by the way' presentation, at the end of the day". In a January 2012 affidavit, Ms. Baldwin stated that she had described the grand jury process in some detail, told the Board that Curley, Schultz, Paterno and Spanier "had been interviewed" by the grand jury, that they had been asked about a 2002 incident involving Sandusky, that there had been a 1998 incident involving Sandusky that had been investigated by authorities but as to which no charged had been filed, and that Penn State "did not appear to be a focus of the investigation". Some Trustees indicated that Ms. Baldwin's report had not adequately disclosed the details of the investigation, and had obscured or omitted information that would have made it clearer to the Trustees that the investigation did in fact present institutional issues for Penn State – in particular, that four senior officials had been subpoenaed by the grand jury. The Freeh Report concluded that "Spanier and Baldwin significantly downplayed the nature of the Sandusky investigation and the potential damage it could cause the University".
- The Sandusky matter was apparently not discussed at all in the next two Board meetings, in July and September 2011.

- In late October 2011, Ms. Baldwin learned that Curley and Schultz were to be indicted. Ms. Baldwin met with the two men and Spanier on the evening of October 27. The next day, Spanier drafted a statement pledging "unconditional support" to Curley and Schultz and sought input from Ms. Baldwin and others on the statement.
- On October 28, 2011, Spanier and Ms. Baldwin met with Garban. Ms. Baldwin stated that she understood that Garban would pass information about the charges on to the other Trustees; Garban, however, maintained that Spanier had minimized the significance of the investigation. Thereafter, Garban told two other Trustees about his meeting, but no other Trustees were informed until after Sandusky, Curley and Schultz were indicted on November 4. On Saturday, November 5, a Board member emailed Spanier and Garban asking when the Board would be briefed, and Baldwin suggested by email that Spanier tell the Trustee that Spanier was briefing Garban and the full Board would be briefed the following week. Spanier then issued his "unconditional support" statement.
- Ultimately, the Board met by conference call on November 5, 2011. One Trustee suggested that an independent investigation be commenced. Baldwin emailed Spanier and told him that, if an outside firm were hired for an independent investigation, "we will never get rid of this group in some shape or form. The Board will then think that they should have such a group."[13]

As interpreted by commentators, the Freeh Report's principal criticisms of Ms. Baldwin were that (a) she lacked experience in criminal investigations and internal investigations but did not engage experienced counsel to assist her, (b) she and Spanier conspired to minimize the significance of the investigation to the Board and withhold or obfuscate relevant information needed by the Board, and (c) she and Spanier sought, in particular, to deflect requests by individual Trustees for greater transparency and for an indepen-

[13]*See* Freeh Report at 82 – 92, 97 and Exhibit 10A. All items indicated as direct quotes in the above chronology are quotes from the text of the Report, but not necessarily direct quotes from statements made at the time of the original events recounted.

dent internal investigation.[14] Indeed, if the account in the Freeh Report is accurate, it would not be unreasonable for an observer to conclude that Ms. Baldwin may have become unable to differentiate between her real (in the sense of her professional responsibility obligations) client – the university as an institution, acting through its Board of Trustees – and her "practical" client – the university president to whom she reported and on whose day-to-day support she necessarily depended.[15]

As will be discussed below, subsequent information called into question the accuracy, or at least the completeness, of

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[14]*See generally, e.g.*, Dunn, *Harsh Verdict*; Ward, *Missteps*; Jeff Blumenthal, *Penn State's former general counsel Baldwin criticized in Freeh report*, www.bizjournals.com/philadelphia/blog/jeff-blumenthal/2012/07/penn-states-former-general-counsel.html?page=all (July 16, 2012). After the Report was released, Ms. Baldwin's counsel generally disputed the accuracy of the Report as it related to Ms. Baldwin, but stated that in light of ongoing proceedings, Ms. Baldwin would not comment publicly on specific allegations or conclusions. *See* Statement of Charles DeMonaco, attorney for Cynthia Baldwin, www.law.com/image/cc/BaldwinStatement.pdf. In fairness to Ms. Baldwin, it should be noted that the Freeh Report was even more scathing in its criticism of the Penn State Board of Trustees for its failure to take appropriate steps to investigate and inform itself about the Sandusky matter.

[15]As discussed below, Spanier himself was ultimately indicted for his alleged role in covering up Sandusky's misdeeds. *See, e.g.,* Mike Dawson, '*Conspiracy of silence': Former Penn State President Graham Spanier charged in Jerry Sandusky case; additional charges for Curley, Schultz*, https://www.centredaily.com/news/local/education/penn-state/jerry-sandusky/article42813252.html (Nov. 1, 2012).

Although Curley and Schultz both pled guilty to misdemeanor child endangerment charges, Spanier went to trial and was convicted in 2017, likewise on misdemeanor child endangerment charges. Two years later, a federal district court, acting on Spanier's petition for a writ of habeas corpus, threw out that conviction, accepting Spanier's argument that he had been inappropriately charged under a 2007 law for acts allegedly having occurred in 2001. Spanier v. Libby, No. 3:19-CV-523, 2019 WL 1930155 (M.D. Pa. April 30, 2019). The following year, however, the Third Circuit reversed that decision. Spanier v. Director Dauphin County Probation Services, 981 F.3d 213 (3d Cir. 2020). At the time of this writing, Pennsylvania prosecutors were seeking an order to have Spanier report to jail to begin serving his sentence. *See* Charles Thompson, *Ex-Penn State President Graham Spanier should report to jail after losing latest appeal, prosecutors say*, *available at* https://www.pennlive.com/news/2021/01/ex-penn-state-president-graham-spanier-loses-latest-appeal-of-conviction-attorney-general-moves-for-enforcement-of-prison-term.html (Jan. 13, 2021).

the Freeh Report's account of these events. Further, even if the Report's tale were scrupulously accurate, the right thing to do is typically much more easily determined after the fact than it is in the heat of a crisis. Nonetheless, for purposes of discussion, some of the later parts of this essay will assume the Report's accuracy and analyze some of the professional responsibility implications arising from the factual allegations contained in the Report. First, however, there is a more fundamental set of issues that is raised by Ms. Baldwin's interactions with the grand jury: Who is the lawyer's client, how many clients may the lawyer have, what are the lawyer's duties when the lawyer and the putative client do not have a common understanding of their professional relationship, and what if the putative client turns out actually to be a real client, like it or not?

2. We're All In This Together, Right? Cynthia Baldwin and the Grand Jury

As noted above, in January 2011 Curley and Schultz testified before the grand jury investigating the Sandusky case. The circumstances of that testimony gave rise to a most tangled web indeed, from the standpoint of the criminal proceedings relating to the matter and from a professional responsibility (and potential liability) standpoint. The curious circumstances were outlined in a report from the *Patriot-News* newspaper about a year later:

> When top Penn State officials Tim Curley and Gary Schultz testified before a grand jury in the Jerry Sandusky child sex abuse investigation, both men apparently thought they had an attorney.
>
> She was Cynthia Baldwin, in-house legal counsel for Penn State University.
>
> It is reflected in the transcript of their testimonies:
>
> "Good morning, my name is Tim Curley."
>
> "Do you have counsel with you?"
>
> "Yes I do. . . . My counsel is Cynthia Baldwin."
>
> Schultz was asked: "You are accompanied today by counsel, Cynthia Baldwin. Is that correct?"
>
> "That is correct."
>
> But Baldwin says she was not representing either man, according to Lanny Davis, the high-profile Washington lawyer

hired to represent Penn State in the wake of the Sandusky scandal.[16]

As the story emerged, the situation looked even stranger. According to a transcript of the grand jury proceedings, when Curley and Schultz appeared before the supervising judge of the grand jury, the following colloquy took place:

> MR. BARKER [of the Pennsylvania Attorney General's office]: Judge, we're here on Notice 29. We have some witnesses to be sworn, Mr. Curley and Mr. Schultz.
>
> JUDGE FEUDALE [the supervising judge]: Represented by?
>
> MS. BALDWIN: My name is Cynthia Baldwin, general counsel for Pennsylvania State University.
>
> JUDGE FEUDALE: Will you be providing representation for both of those identified witnesses?
>
> MS. BALDWIN: Gary [Schultz] is retired but was employed by the university and Tim [Curley] is still an employee.[17]

Now, this is a bit of a curious dialogue. The supervising judge was clearly asking who represented Curley and Schultz, whereupon Ms. Baldwin introduced herself. The judge then asked a yes-or-no question, "Are you the lawyer for both of these guys?", to which Ms. Baldwin then gave a not-entirely-responsive answer, but an answer that seems clearly to imply her desire that the judge understand that she was representing both men.[18] On the face of it, this appears to have been what Curley and Schultz understood as

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[16]Sara Ganim, *Special Report: Penn State counsel Cynthia Baldwin's role before grand jury could affect Tim Curley and Gary Schultz's perjury case, experts say*, www.pennlive.com/midstate/index.ssf/2012/02/penn_state_legal_counsel_cynth.html (Feb. 2, 2012). The same reporter had initially identified questions concerning Ms. Baldwin's purported representation of Curley and Schultz in late 2011. Sara Ganim, *Did legal adviser for ousted Penn State officials have a conflict of interest?*, www.pennlive.com/midstate/index.ssf/2011/11/did_legal_adviser_for_ousted_p.html (Nov. 19, 2011).

[17]Commonwealth of Pennsylvania Thirtieth Statewide Investigating Grand Jury, In re: Notice No. 29, Transcript of Proceedings of Grand Jury, Jan. 12, 2011, 9:04 a.m., at 7-8 ("Jan. 12 Grand Jury Transcript 9:04"). This transcript is included as part of Exhibit B to Motion of Gary Charles Schultz and Timothy Mark Curley to Preclude Testimony of Attorney Cynthia Baldwin, Commonwealth of Pennsylvania v. Gary Charles Schultz and Timothy Mark Curley, No. G-07-1146135, Court of Common Pleas of Dauphin Co., Penn., Crim. Div., filed Nov. 20, 2012 ("Schultz-Curley Motion to Preclude").

[18]As was later noted by the Superior Court of Pennsylvania, "Ms. Baldwin did not expressly state that she represented [either Schultz or

well; transcripts of the actual testimony of both men reflect the exchanges quoted in the news story cited above – i.e., that each man stated that Cynthia Baldwin was his lawyer.[19]

So, on January 12, 2011, the record would indicate a situation that, although perhaps inadvisable, was rather straightforward. Cynthia Baldwin, the internal General Counsel of Penn State, was representing two individual grand jury witnesses who were current or former employees of Penn State. That appears to be what the supervising judge understood, what the prosecutors understood, and what the witnesses understood. Again, one could argue that that was inadvisable, since any conflicts of interest that might develop between either of the witnesses and each other or between either of them and Penn State might have had the effect of disqualifying Ms. Baldwin from representing anyone in the matter, but there seems to have been no suggestion on the record that Ms. Baldwin had not undertaken to represent both men.[20]

A year later, however, Ms. Baldwin apparently denied that

Curley] solely in an agency capacity [i.e., as agents of Penn State], nor did she indicate that she did not represent [either of them] in his individual capacity." Commonwealth v. Schultz, 133 A.3d 294, 302 (Pa. Super. 2016) ("Schultz Superior Court Order"); Commonwealth v. Curley, 131 A.2d 994, 997 (Pa. Super. 2016) ("Curley Superior Court Order") (the identical language, but for the names, appeared in both orders).

[19]*See* Commonwealth of Pennsylvania Thirtieth Statewide Investigating Grand Jury, In re: Notice No. 29, Transcript of Proceedings of Grand Jury, Jan. 12, 2011, 11:20 a.m., at 3 ("Jan. 12 Grand Jury Transcript 11:20") and Commonwealth of Pennsylvania Thirtieth Statewide Investigating Grand Jury, In re: Notice No. 29, Transcript of Proceedings of Grand Jury, Jan. 12, 2011, 12:02 p.m., at 3 ("Jan. 12 Grand Jury Transcript 12:02"). Both of these transcripts are likewise included in Exhibit B to Schultz-Curley Motion to Preclude.

[20]As noted in the Freeh Report, Ms. Baldwin also accompanied Spanier in his grand jury appearance in April 2011. No transcript of that proceeding was made public for some time, although at least one news story stated that Spanier had identified Ms. Baldwin as his counsel, and Spanier asserted in a court filing that she had represented him at the proceeding and in an earlier interview with representatives of the Pennsylvania Attorney General. *See* Roebuck, *Former Penn State Legal Counsel*; Motion of Graham B. Spanier to Preclude Testimony of Attorney Cynthia Baldwin, Commonwealth of Pennsylvania v. Graham B. Spanier, No. MJ-123-3-CR-0000419-2012, Court of Common Pleas of Dauphin Co., Penn., Crim. Div., filed Nov. 20, 2012, at ¶¶ 2 – 4 ("Spanier Motion to Preclude").

she had ever represented Curley or Schultz[21] and asserted that she had been present at their grand jury testimony solely to represent the interests of Penn State. These assertions were contained in statements made by Lanny Davis, engaged as a spokesman by the university. Davis, purporting to be speaking on behalf of Ms. Baldwin, told reporters that Ms. Baldwin had accepted subpoenas on behalf of Curley, Schultz, Spanier and Paterno as a courtesy, had driven Curley and Schultz to the grand jury hearing as a courtesy, had told the supervising judge she represented Penn State and received his permission to attend the grand jury hearing in that capacity, and did not remember hearing either Curley or Schultz identify her as his lawyer. Further, Davis apparently stated that "[e]ven if [Ms. Baldwin] had [heard the witnesses say that] . . . 'at that moment in time she would not feel it appropriate to speak up and correct it with witnesses

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Ultimately, the Spanier transcript was obtained by a media outlet and made public in late 2013. See www.scribd.com/doc/192201096/Graham-Spanier-grand-jury-testimony-from-April-13-2011 (copy of transcript); Charles Thompson, *Unsealed documents show strategy for preserving Cynthia Baldwin's testimony in alleged Sandusky cover-up case*, www.pennlive.com/midstate/index.ssf/2013/12/documents_show_prosecutors_str.html (Dec. 18, 2013). According to the transcript, Spanier was asked if he were represented by counsel, to which he replied "Yes . . . Cynthia Baldwin sitting behind me" (Transcript p. 3, lines 10-14). Unbeknownst to Spanier, however, only moments before, and outside Spanier's presence, the supervising judge had asked Ms. Baldwin whom she represented, to which she responded, "The university." The judge asked, "The university solely?", to which she replied, "Yes, I represent the university solely." Notwithstanding that discussion, the supervising judge "did not colloquy Spanier regarding the scope or type of representation he was being afforded by Ms. Baldwin", nor did the prosecutor, who had been present for the discussion "express concern over Ms. Baldwin['s] being present for Spanier's [grand jury] testimony", even though it would not have been customary for counsel who did not represent a witness to be present for that witness's testimony. *See* Commonwealth v. Spanier, 132 A.3d 481, 484 – 485 (Pa. Super. 2016) ("Spanier Superior Court Order").

[21]The initial coverage concerning Ms. Baldwin's role focused on Curley and Schultz and not on Spanier because Spanier was not indicted until several months after the original indictments of Curley and Schultz, which was also several months after the questions about whom Ms. Baldwin represented first became public.

being questioned.' Davis said she would have remained silent in the moment out of deference to the grand jury process."[22]

When this story broke, it excited considerable comment in the local media and the legal trade press, as well a fair amount of criticism and questions by those interested in legal ethics, especially after the release of the Freeh Report.[23] Significant questions were raised as to, among other things, whether Ms. Baldwin had had an obligation to clarify to Curley and Schultz that she was not in fact representing them, whether she should have advised them to obtain individual counsel and/or plead the Fifth Amendment at the grand jury proceeding, and whether, if she were not their counsel, she should have been permitted to be present at all when they were questioned by the grand jury.[24] Through her

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[22]Ganim, *Cynthia Baldwin's Role*. The statements attributed to Lanny Davis in the Ganim article must largely be regarded as balderdash, since they include assertions that are directly contradicted by the official transcripts of the grand jury proceedings – e.g., that before the Curley and Schultz appearances, Ms. Baldwin told the supervising judge that she represented Penn State and that the judge "said, 'You may listen if you wish.' ", neither of which statements appear in the transcripts. Whether the balderdash was in fact provided to Davis by Ms. Baldwin or was improvised by Davis on the spot is open to speculation; the author's personal speculations on that are available by telephone.

[23]*See, e.g.,* Ganim, *Cynthia Baldwin's Role* (noting issues raised by Professor Geoffrey Hazard, a well-known commentator on legal ethics, and former Pennsylvania Attorney General Walter Cohen, later identified as a witness to be called by Curley and Schultz); Ganim, *Legal Adviser for Ousted Penn State Officials* (noting Hazard's comments that dual representation of Penn State and the individuals raised serious potential conflict-of-interest issues); Roebuck, *Former Penn State Legal Counsel*; John Dean, *Talking With an Expert About Serious Attorney-Client Privilege Confusion During the Penn State Child-Abuse Scandal*, Verdict (blog), http://verdict.justia.com/2012/07/27/talking-with-an-expert-about-serious-attorney-client-privilege-confusion-during-the-penn-state-child-abuse-scandal (July 27, 2012). Yes, it's the same John Dean.

[24]Contrary to the case in many jurisdictions, Pennsylvania procedure allows counsel for a grand jury witness to be present in the grand jury room during questioning of the witness. *See* PA. R. CRIM. PRO. R. 231(A). However, it does not appear that either formal rules or local practice allows for counsel for other interested parties to be present.

counsel, Ms. Baldwin insisted that she had represented only the university and had acted properly at all times.[25]

However, things really got interesting on November 1, 2012. On that date, the grand jury indicted Curley and Schultz on additional charges and indicted Spanier as well.[26] That indictment made public for the first time that Ms. Baldwin had in fact given testimony against the three men to the grand jury. Among the allegations apparently derived from Ms. Baldwin's testimony:

- Spanier had directed that Ms. Baldwin accompany Curley and Schultz to their grand jury appearances.
- Spanier, Curley and Schultz had repeatedly misrepresented to Ms. Baldwin that they did not possess any information or documents relating to Sandusky's alleged misconduct.
- Spanier had required Ms. Baldwin to inform him on an ongoing basis of all information regarding the grand jury proceedings.
- Before being interviewed by state investigators, Spanier had, in Ms. Baldwin's view, "extensively discussed the substance of Curley [*sic*] and Schultz's grand jury testimonies from January 2011 with each of those individuals".
- Ms. Baldwin had "repeatedly instructed Spanier that he was free to discuss the investigation and the substance of his testimony before the Grand Jury" with the Board of Trustees.
- Ms. Baldwin was "stunned" when Spanier directed her

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[25]*See* Statement of Charles DeMonaco, attorney for Cynthia Baldwin, www.law.com/image/cc/BaldwinStatement.pdf.

[26]Grand Jury Presentment, Nov. 1, 2012, *available at* https://assets.documentcloud.org/documents/497492/spanier-grand-jury-presentment.pdf ("November Indictment"). All three men were indicted for endangering the welfare of children, for obstruction of justice and for criminal conspiracy. Spanier was additionally indicted for perjury and for failure to make a mandatory child abuse report. Curley and Schultz had previously been indicted for perjury and failure to report. (NB: Technically, as a matter of Pennsylvania procedure, the presentment is not an indictment; it is a recommendation by the grand jury that a criminal complaint be brought. As a practical matter, there is no substantive distinction that is relevant to the matter at hand, and "indictment" is more self-explanatory. Therefore, that term is used in this essay.)

to leave the room after her presentation to the Board in May 2011.

- Spanier had "repeatedly informed" Ms. Baldwin and others that he had no knowledge about Sandusky's activities in 1998 or the investigation then conducted by the Penn State police.[27]

Thus, to summarize, the public record suggests that Ms. Baldwin (a) had appeared at the grand jury questioning of Curley, Schultz and Spanier, (b) at a minimum, had affirmatively led the supervising judge to believe that she was acting as counsel for Curley and Schultz, (c) according to their sworn testimony, was believed by Curley and Schultz to be representing them, (d) according to news reports, court filings and his own sworn testimony, was also believed by Spanier to be representing him, and (e) testified before the grand jury with regard to communications had by each of the three men with her prior to their respective grand jury appearances, which testimony was used to support the indictment of the three men, but (f) denied, through her personal counsel and through an outside lawyer-spokesman hired by Penn State, that she represented any client other than Penn State itself.[28]

As one might expect on these facts, when the November

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[27]November Indictment at 21 – 32. A transcript of Ms. Baldwin's grand jury testimony was later obtained and released by media outlets. *See* Thompson, *Unsealed documents*. Interestingly, the grand jury presentment noted that Penn State's "well-defined historical practice and procedure for responding to subpoenas" had not been followed with respect to the Sandusky grand jury subpoenas and that "no independent efforts were made to search the paper files of" Spanier, Curley or Schultz, *see* November Indictment at 23 – 24, but did not attribute any responsibility for such failures to Ms. Baldwin notwithstanding her apparent role as the university's lawyer in charge of the subpoena responses.

[28]As was eventually disclosed, immediately prior to Ms. Baldwin's grand jury testimony, the supervising judge held a conference with the prosecutor, Penn State's new general counsel, and Ms. Baldwin's counsel, but which did not include the personal attorneys who had by then been hired by Curley, Schultz and Spanier. At that conference, Penn State's general counsel, who had previously confirmed that Penn State waived any privilege as to its own communications with Ms. Baldwin, noted that Penn State could not waive any privilege that might belong to Curley or Schultz individually (Spanier had not yet been indicted, and so had not had occasion formally to assert any individual privilege at that point). The prosecutor, Chief Deputy Attorney General Frank Fina, assured the

2012 indictment issued, things started to hit the fan. Even before the new indictment was made public, Curley and Schultz had filed pre-trial motions asserting that Ms. Baldwin had represented them at the grand jury proceedings, had not appropriately explained any potential conflict of interest (including conflicts arising from her representation of Penn State and conflicts arising from differences in the recollections of Curley and Schultz that potentially affected their relative positions before the grand jury) or limitations on her representation, had not advised them to consider asserting their Fifth Amendment rights, and had not competently represented them before the grand jury. In addition, the men charged prosecutorial misconduct in that, they alleged, the prosecutor from the Attorney General's office knew that Ms. Baldwin's alleged conflict of interest would taint the proceedings but did not raise the issue with the presiding judge. The appropriate remedy, they suggested,

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supervising judge that the prosecution was "willing to put [Ms.] Baldwin in the grand jury without addressing any of the issues related to the testimony of Mr. Schultz and Mr. Curley and conversations she had with them about that testimony and put that – put those matters on hold until we get a Court determination regarding the privilege and we can address that later on." Relying on that statement, the supervising judge allowed the examination of Ms. Baldwin to proceed "with the stipulation that [the prosecutor] communicated that [he was] not going to get into an inquiry as to her representation and what that meant with regard to Mr. Curley, Mr. Schultz, and perhaps, as [the prosecutor had] said, also Mr. Spanier." However, in the actual grand jury examination of Ms. Baldwin (for which, consistent with normal Pennsylvania practice, the judge was not present), "a number of the [prosecutor's] questions to Ms. Baldwin before the grand jury precisely implicated potential confidential communications [with Curley, Schultz and Spanier]." *See* Schultz Superior Court Order at 304—307; Thompson, *Unsealed documents.*

As part of the rather protracted and complicated aftermath of the Curley/Schultz/Spanier cases, the Supreme Court of Pennsylvania, acting upon the recommendation of its Disciplinary Board, suspended the license of Fina, the prosecutor, for a year and a day. The Court found that Fina had violated Pennsylvania's Rule of Professional Conduct 3.10, which requires that a prosecutor obtain "prior judicial approval" before subpoenaing an attorney to appear before a grand jury to provide evidence concerning a client or former client of the attorney. Office of Disciplinary Counsel v. Fina, 225 A.2d 568 (Pa. 2020) (per curiam). Specifically, Fina's representation to Judge Feudale "that he would not question [Ms.] Baldwin in any way that would invade attorney-client privilege" when, in fact, he did, and presumably planned to do, just that, violated Rule 3.10. *Id.* at 571 (Wecht, J., concurring).

was to dismiss the charges or at least suppress the grand jury testimony given by each man.[29]

Almost immediately, the news media seized on the potential issues raised by Ms. Baldwin's curious and multilayered role, with numerous stories highlighting the potential significance of that role to the ultimate success or failure of the prosecution.[30] Then, in a somewhat bizarre turn of events, the prosecution filed a pleading that essentially conceded that Ms. Baldwin had represented Curley and Schultz before the grand jury, argued that such representation did not involve any conflict of interest, and argued that if there were any conflict of interest, it was the duty of the supervising judge and defense counsel – presumably Ms. Baldwin – to determine that, rather than a duty of the prosecution to raise it, and that the existence of any conflict was not relevant to the validity of the grand jury proceeding.[31] On the one hand, this was certainly one possible strategy for responding to the defendants' allegations that the entire

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[29]*See* Omnibus Pre-Trial Motion of Gary Charles Schultz, Commonwealth of Pennsylvania v. Gary Charles Schultz, No. CP-22-CR-5164-2011, Court of Common Pleas of Dauphin Co., Penn., Crim. Div., filed Nov. 1, 2012; Omnibus Pre-Trial Motion of Timothy Mark Curley, Commonwealth of Pennsylvania v. Timothy Mark Curley, No. CP-22-CR-5165-2011, Court of Common Pleas of Dauphin Co., Penn., Crim. Div., filed Nov. 1, 2012. The two motions differ in certain respects, but make fundamentally the same arguments with respect to Ms. Baldwin's involvement.

[30]*See, e.g.,* Jeremy Roebuck, *Ex-Pennsylvania State University counsel draws defense lawyers' scorn*, https://www.inquirer.com/news/ex-pennsylvania-state-university-counsel-draws-defense-lawyers-scorn-20121103.html (Nov. 3, 2012); Karen Langley, *Schultz, Curley attorneys dispute charges*, https://www.post-gazette.com/news/state/2012/11/03/Schultz-Curley-attorneys-dispute-charges/stories/201211030125 (Nov. 3, 2012); Nick Malawskey, *Ex-Penn State officials Tim Curley, Gary Schultz released following hearing; attorneys 'stunned' by testimony of Cynthia Baldwin*, www.pennlive.com/midstate/index.ssf/2012/11/ex-penn_state_officials_tim_cu.html (Nov. 2, 2012).

[31]Commonwealth's Answer to Defendants' Omnibus Pretrial Motions, Commonwealth of Pennsylvania v. Timothy M. Curley, No. CP-22-CR-5165-2011, Court of Common Pleas of Dauphin Co., Penn., Crim. Div., and Commonwealth of Pennsylvania v. Gary Charles Schultz, No. CP-22-CR-5164-2011, Court of Common Pleas of Dauphin Co., Penn., Crim. Div., filed Nov. 14, 2012, at 16—25. *See also, e.g.,* Jeremy Roebuck, *Role of ex-Penn State lawyer seemingly conceded by prosecutors*, https://www.inquirer.com/philly/news/local/20121128_Role_of_ex-Penn_State_lawyer_seemingly_conceded_by_prosecutors.html (Nov. 28, 2012).

grand jury process was tainted and that the charges should be dismissed. On the other hand, it did tend to reflect negatively on a star witness for the prosecution, since Ms. Baldwin had consistently maintained for several months that she was not and had never been an attorney for Curley or Schultz.[32]

Following on the prosecutors' filing, all three defendants filed motions to bar Ms. Baldwin from testifying at a scheduled preliminary hearing on the new charges.[33] Curley and Schultz argued, in essence that the criminal conspiracy charges filed against depended almost entirely upon the grand jury testimony of Ms. Baldwin, which the men said was in turn based on privileged communications they each had had with her when she was (as they asserted) serving as their counsel.[34] Spanier's motion was more concise, but

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[32]While it is clear why the prosecution argued that any conflict was irrelevant and that the prosecution had no duty to raise any potential conflict with defense counsel or the supervising judge, it is less clear why the prosecution felt it necessary to state as a fact that Ms. Baldwin had represented Curley and Spanier as their attorney, as opposed to simply arguing in the subjunctive ("Assuming arguendo that Ms. Baldwin were representing the defendants, such representation would not have constituted a conflict of interest . . ."). Presumably, the prosecution feared that, since Ms. Baldwin had implicitly identified herself to the supervising judge as counsel for Curley and Schultz and since each of them had expressed from the stand their respective beliefs that she was acting in such capacity, the proceedings might have been irremediably tainted if she had not in fact been doing so. That is, the defendants would have been able to argue that they had unknowingly been without representation at the proceeding. The prosecution likely feared that a court might be more inclined to throw out the indictments on that basis, as opposed to the basis that the defendants' counsel had simply committed a potential professional responsibility violation or otherwise failed to represent them in a competent and appropriate fashion.

[33]*See* Schultz-Curley Motion to Preclude; Spanier Motion to Preclude. The preliminary hearing was originally scheduled for December 13, 2012, but was postponed to address, among other things, the motions relating to Ms. Baldwin's testimony. *See, e.g.,* Peter Hall, *Hearing for Penn State administrators Spanier, Curley and Schultz postponed*, http://articles.mcall.com/2012-12-05/news/mc-penn-state-curley-schultz-spanier-hearing-postp-20121205_1_curley-and-schultz-tim-curley-gary-schultz (Dec. 5, 2012).

[34]Schultz-Curley Motion to Preclude at ¶¶ 3, 7 – 12. In June 2012, individual counsel retained by each of the men each sent Ms. Baldwin's counsel, Charles DeMonaco, letters asserting that Ms. Baldwin had represented to each of them that she was acting as their counsel before

likewise argued that Ms. Baldwin had represented him at the time of his initial interview by the Attorney General's office and his grand jury appearance and asserted that Ms. Baldwin's testimony was and would be based on privileged communications he had had with her.[35]

Throughout the ensuing months, Curley, Schultz and Spanier made various efforts to quash the indictments, exclude Ms. Baldwin's grand jury testimony, etc., based generally on the arguments that either her testimony was improper because it breached the attorney-client privilege that each of them alleged they had with regard to their communications with her or that, if she had not represented them individually at their grand jury appearances, despite their belief that she had, they had been denied counsel for those appearances. In January 2015, the trial court denied all the relevant motions, essentially finding that Ms. Baldwin had represented all the defendants solely as agents of Penn State and not individually, and that the defendants knew or should have known that at the time of their respective grand jury appearances.[36]

The Superior Court of Pennsylvania agreed to hear an interlocutory appeal of the trial court's rulings, and on January 22, 2016, reversed them and quashed the counts of perjury (except as to Curley), obstruction of justice and conspiracy leveled against the defendants.[37] Further, the court ruled that Ms. Baldwin could not testify regarding privileged communications in future proceedings against any of the

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the grand jury and directing that Ms. Baldwin assert the attorney-client and work product privileges in response to any requests from federal or state prosecutors or FSS. *Id.* at ¶ 13 and Exhibits F and G.

[35]*See* Spanier Motion to Preclude at ¶¶ 3 – 8.

[36]*See* Memorandum Opinion & Order, Commonwealth v. Timothy M. Curley, Gary Charles Schultz & Graham Basil Spanier, Nos. 3614 CR 2013, 5165 CR 2011, 3616 CR 2013, 5164 CR 2011 and 3615 CR 2013, Dauphin Co., Pa., Ct. of Comm. Pleas, Jan. 14, 2015 (consolidated opinion relating to all three defendants in their respective cases).

[37]*See* Schultz Superior Court Order, 133 A.3d at 299; Spanier Superior Court Order, 132 A.2d at 482; Curley Superior Court Order, 131 A.3d at 994—995 (the charge of perjury against Curley was not quashed because his challenge to that charge was not raised in the interlocutory appeal, for reasons not here relevant). Although the Superior Court entered separate opinions and orders in the three separate cases, the basis for each order was substantially the same. The order in the *Schultz* case most comprehen-

defendants absent a waiver by the affected defendant.[38] The court noted that "communications between a putative client and corporate counsel are generally privileged prior to counsel['s] informing the individual of the distinction between [agency representation and personal representation]."[39] The court found that Ms. Baldwin had not adequately explained that distinction to the defendants and that they reasonably believed that she was acting as their respective personal counsel in connection with their grand jury testimony; thus, the court found, communications in that context were privileged.[40]

In reaching its rulings, the Superior Court appeared to focus on three doctrinal considerations:

- The need for the attorney-client privilege to cover preliminary discussions between a lawyer and a potential client, even if the parties did not enter into an attorney-client relationship (or only entered into a limited one);
- The need to protect the reasonable expectations of a person who reasonably believes that an attorney-client relationship has been formed; and
- The need for a client's informed consent to any limitations on the scope of representation.[41]

Each of these will be discussed, to a greater or lesser extent, in the final portion of this essay.

It is admittedly unlikely that the typical healthcare lawyer – many of whom never appear before a grand jury at all, as lawyer or as witness – will have occasion to face quite as outré a set of professional responsibility issues as the Baldwin scenario presents. Stripped of the tragic underlying

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sively explains the court's reasoning both for allowing the appeal and for its decisions.

[38]*See* Schultz Superior Court Order, 133 A.3d at 326.

[39]*Id.* at 324.

[40]*Id.* at 324–325. The Superior Court also found that Schultz had been constructively denied his right to counsel before grand jury, because "he was not aware that Ms. Baldwin was not appearing with him in order to protect his interests and therefore unable to provide advi[c]e concerning whether he should answer potentially incriminating questions or invoke his right against self-incrimination." *Id.* at 326. The court found that Curley and Spanier had not effectively raised that argument on appeal, and so did not rule on it in those cases.

[41]*See id.* at 325.

facts, however, some of the issues faced by Ms. Baldwin – and by those individuals who may or may not have been her clients – are not as alien to healthcare lawyers as they may seem. Lawyers working in integrated health systems, academic medical centers and other complex organizations may well find themselves routinely dealing with physicians, administrators and others who view themselves as clients, even where those lawyers are in fact employed or engaged by the institution. Indeed, it is easy for a lawyer to become psychologically attuned to the notion that the chief executive officer, medical director, dean, department chair, vice president, etc., with whom that lawyer works regularly is the lawyer's client, or at least that such person's interests are necessarily identical with the interests of the institutional client. One can even get inanimate legal constructs involved in the exercise, as the lawyer provides services to system component organizations, corporate subsidiaries, joint venture entities, etc., but may or may not have a "true" attorney-client relationship with those entities. After a brief interlude for Wall Street, this essay will look at how some of the rules of professional responsibility might apply in the Baldwin case, and what that in turn may illustrate about their applicability in less dramatic settings.[42]

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[42]Although the primary purpose of the preceding section of this essay was simply to utilize the facts and allegations concerning Ms. Baldwin's role in the Curley/Schultz/Spanier cases as an illustration of a particular sort of problem – a real-life hypothetical, as noted above – it is, if nothing else, a courtesy to the reader to bring the story up to date. On November 21, 2017, the Pennsylvania Office of Disciplinary Counsel filed a Petition for Discipline against Ms. Baldwin, charging her with violations of several of the Pennsylvania Rules of Professional Conduct arising out of her alleged joint representation of the three individuals and Penn State. Thereafter, a hearing committee appointed by the Disciplinary Board of the Pennsylvania Supreme Court determined that the individuals had misled her about the facts and whether their interests were consistent with Penn State's and declined to find that she had violated the rules in question. *See* Matt Fair, *No Ethics Charges For Ex-Penn State Atty Over Sandusky Case*, *available at* https://www.law360.com/articles/1096323/no-ethics-charge-for-ex-penn-state-atty-over-sandusky-case (Oct. 26, 2018).

However, the Disciplinary Board rejected the hearing committee's findings, finding that Ms. Baldwin had in fact failed to meet the requirements of the rules, as a result of which the individual defendants had escaped prosecution on some of the charges initially brought against them and recommending that the Pennsylvania Supreme Court impose a public

censure. *See* Matt Fair, *Ex-Penn State GC To Face High Court Disciplinary Hearing*, *available at* https://www.law360.com/articles/1165976/ex-penn-state-gc-to-face-high-court-disciplinary-hearing (June 4, 2019). The Pennsylvania Supreme Court agreed with the Disciplinary Board's report, finding that Ms. Baldwin (a) had in fact represented Curley, Schultz and Spanier in their personal, individual capacities, (b) had not met her ethical obligation to provide them with competent representation (in part by failing to consult with or associate counsel experienced in representing clients in a grand jury investigation), (c) had violated the rule dealing with conflicts of interest in the concurrent representation of clients, (d) had violated the rule prohibiting disclosure of confidential client information without consent, and (d) had engaged in "conduct prejudicial to the administration of justice" (the rules in question are the Pennsylvania versions of Model Rules 1.1, 1.7, 1.6 and 8.4, respectively). However, noting that the fact that Ms. Baldwin had never been the subject of prior disciplinary proceedings was "offset by her lack of remorse for her actions", as evidenced by the arguments made in her briefs to the court, the court imposed a public reprimand on Ms. Baldwin, to be administered by the Disciplinary Board (as opposed to a public censure to be administered by the Supreme Court). *See* Off. of Disciplinary Counsel v. Baldwin, 225 A.3d 817 (Pa. 2020). The Board issued that public reprimand on July 22, 2020. *See* Public Reprimand, Off. of Disciplinary Counsel v. Cynthia A. Baldwin, No. 151 DB 2017 (July 22, 2020), *available at* http://www.pacourts.us/assets/opinions/DisciplinaryBoard/out/151DB2017-Baldwin2.pdf.

That was not the final chapter in what seems to be the longest-running professional responsibility show ever, though. Shortly after the public reprimand was posted, Ms. Baldwin released an affidavit signed in August 2019 by Judge Barry Feudale (who, recall, had been the supervising judge in the grand jury proceedings), in which Judge Feudale asserted that Justice (and by 2020, Chief Justice) Thomas G. Saylor of the Pennsylvania Supreme Court had approached him in July 2012 to tell him that there would be a disciplinary complaint forthcoming against Ms. Baldwin, that Justice Saylor "expected [Judge Feudale] to assist in every way with providing information in support of the disciplinary investigation", and that Ms. Baldwin had "caused us a lot of trouble when she was on the Supreme Court with her minority agenda". *See* Affidavit of Barry F. Feudale dated Aug. 26, 2019, available at https://images.law.com/contrib/content/uploads/documents/292/Affidavit-of-Barry-F.-Feudale-executed-C2.pdf; Rob Taylor, Jr., *Fighting Back: Cynthia Baldwin claims 'bias and vindictiveness' against Pa. Supreme Court Chief Justice over alleged comments*, Pittsburgh Courier Digital Daily, July 30, 2020, *available at* https://newpittsburghcourier.com/2020/07/30/fighting-back-cynthia-baldwin-claims-bias-and-vindictiveness-against-pa-supreme-court-chief-justice-over-alleged-comments/; *Former Penn State attorney Cynthia Baldwin levels bias accusation at state's chief justice*, Associated Press, July 25, 2020, *available at* https://www.pennlive.com/news/2020/07/attorney-cynthia-baldwin-levels-bias-accusation-at-states-chief-justice.html. Chief Justice Saylor (who, along with two other Pennsylvania Supreme Court justices, did not

B. Sullivan & Cromwell and Lehman Brothers: Who You Gonna Call (And Who Else Is Gonna Call 'Em, Too)?

The alleged conflict-of-interest issues (among other potential professional responsibility issues) in the Penn State/Cynthia Baldwin matter have been widely discussed in the regional press and the legal trade press. By contrast, the likewise-interesting potential issues relating to the representation of Lehman Brothers by the high-profile law firm Sullivan & Cromwell and its superstar financial services industry lawyer H. Rodgin Cohen[43] have been discussed primarily, if not exclusively, in a single law review article: Professor Milan Markovic's *The Sophisticates: Conflicted*

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participate in the court's decision on the Disciplinary Board case; Ms. Baldwin has indicated that her lawyers asked for his recusal) thereafter confirmed that he had been notified of an informal disciplinary inquiry by the Pennsylvania Judicial Conduct Board concerning him as a result of the allegations in the affidavit. *See* Max Mitchell, *Pa.'s Chief Justice Subject of Disciplinary Investigation as Speculation Over Affidavit Persists*, LEGAL INTELLIGENCER (Aug. 26, 2020), *available at* https://www.law.com/thelegalintelligencer/2020/08/26/pa-s-chief-justice-subject-of-disciplinary-investigation-as-speculation-over-affidavit-persists/. The four justices who did participate in ruling on the Baldwin case issued a statement denying any bias in that ruling, noting that "Attorney Baldwin's failure to take responsibility for her errors now continues after she received her sanction." *See* Paula Reed Ward, *Pa. Supreme Court criticizes former justice who received reprimand over Jerry Sandusky case*, https://triblive.com/local/pa-supreme-court-criticizes-former-justice-who-received-reprimand-over-jerry-sandusky-case/ (Sept. 8, 2020). As Wolcott Gibbs famously said about something else entirely, "Where it all will end, knows God!" *See* Wolcott Gibbs, *Time. . .Fortune. . .Life. . .Luce*, THE NEW YORKER, Nov. 28, 1936, *available at* https://www.newyorker.com/magazine/1936/11/28/time-fortune-life-luce.

[43] *See, e.g.,* Alan Feuer, *Trauma Surgeon of Wall Street*, www.nytimes.com/2009/11/15/nyregion/15cohen.html?pagewanted=all&_r=0 (Nov. 13, 2009) (Cohen is "the dean of Wall Street lawyers"); ANDREW ROSS SORKIN, TOO BIG TO FAIL 195 (2009; Penguin ed. 2011) ("[Cohen] had the ear of virtually all the banking CEOs and regulators in the country, having been involved in nearly every major banking transaction of the last three decades. [Timothy] Geithner[, then-president of the Federal Reserve Bank of New York,] often relied on him to understand the Federal Reserve's own powers."); firm biography of H. Rodgin Cohen, https://www.sullcrom.com/lawyers/HRodgin-Cohen (including numerous quotes from *Chambers USA*, *Legal 500*, *BTI Consulting Group's All-Stars*, etc., attesting to Cohen's preeminent status in banking regulatory and transactional work).

Representation and the Lehman Bankruptcy.[44] Nonetheless, some of the issues identified by Professor Markovic may have particular relevance for lawyers in the healthcare industry.

Professor Markovic's admittedly somewhat tendentious article focuses on the applicability of Model Rule 1.7's prohibition on representations that involve concurrent conflicts of interest[45] to Sullivan & Cromwell's representation of Lehman Brothers in the weeks leading up to its bankruptcy. Specifically, the article discusses three purported conflicts of interests and considers the efficacy of Lehman's presumed advance waiver of such conflicts[46] under the letter and spirit of Model Rule 1.7. Although it is impracticable to outline all the facts underlying the article without essentially reproduc-

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[44]2012 UTAH L. REV. 903 (2012).

[45]*See* Model Rules R. 1.7, to be discussed further below.

[46]Although Professor Markovic presumably did not have access to actual engagement letters signed by Lehman Brothers, the article assumes, probably correctly, that Sullivan & Cromwell had obtained a broad advance waiver of conflicts. *See* Marcovic at 916 – 919. Such advance waivers are commonly sought by large law firms representing "sophisticated" corporate clients, particularly where the law firm represents many clients in the same industry or practice area. *See generally, e.g.,* Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22. GEO. J. L. ETHICS 97 (2009).

In that regard, exactly what clients are "sophisticated" and whether sophisticated clients ought to have a greater ability to grant consent to otherwise "non-consentable" conflicts is a topic of ongoing debate. *See, e.g.,* Law Firm General Counsel Roundtable, *Proposals of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients* (Mar. 2011), *available at* www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/lawfirmgeneralcounsel_issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf (proposal to Am. Bar Ass'n Ethics 20/20 Comm'n submitted by 33 major law firm general counsel recommending, inter alia, greater flexibility for sophisticated clients and law firms to contract around certain conflict-of-interest requirements in the Model Rules); Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567 (2012) (sharply criticizing proposal); James W. Jones & Anthony E. Davis, *In Defense of a Reasoned Dialogue About Law Firms and Their Sophisticated Clients*, 121 YALE L.J. ONLINE 589 (2012) (responding to Fox).

ing it here, it is useful to briefly outline the specific potential conflicts that Professor Markovic identified.[47]

The Two Dogs – One Bone Problem. Following the near-collapse of Bear Stearns & Co. in early 2008, Lehman engaged Sullivan & Cromwell, and specifically Rodgin Cohen, to help the investment bank either find a strategic partner to invest new capital or find a buyer. By mid-2008, Lehman was primarily focused on engineering a merger with Bank of America; when Bank of America abandoned discussions with Lehman to focus instead on acquiring Merrill Lynch, Lehman then tried to stave off bankruptcy by pursuing a sale to Barclays PLC. In addition to Lehman, Merrill Lynch and Barclays were also clients of Sullivan & Cromwell, albeit the firm did not represent Merrill Lynch or Barclays in connection with the Lehman situation before Lehman filed for bankruptcy.[48]

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[47]It should be noted that, even assuming that Professor Markovic correctly characterized the situations he described as conflicts of interest within the meaning of that term under Model Rule 1.7, the existence of a conflict of interest does not in and of itself imply an ethical violation, since the conflict may have been consented to or otherwise waived. Professor Markovic expressly disclaimed any intent to suggest that Sullivan & Cromwell or Rodgin Cohen individually had violated any ethics rules. *Cf.* Kevin C. McMunigal, *Lawyer Conflicts of Interest and Sophisticated Clients*, 1 UTAH ONLAW: THE UTAH L. REV. ONLINE SUPP. 213 (2013) (arguing, *inter alia*, that Professor Marcovic may have been too kind).

[48]*See* Marcovic at 907 – 910. *See also* Stony Olsen, *The Life and Career of H. Rodgin Cohen: A Most Respected Attorney*, https://www.lawcrossing.com/article/4574/The-Man-at-the-Eye-of-the-Financial-Hurricane-H-Rodgin-Cohen/ (undated, but apparently written in late 2008 or early 2009):

> According to the *Wall Street Journal*, since the beginning of September 2008, Cohen's calendar has looked like this:
>
> - On Sept. 5, Fannie Mae needed Cohen in Washington for emergency meetings about its future with government officials, which ended with Cohen helping to broker a deal that put Fannie and Freddie into conservatorship.
> - In mid-September, Cohen represented Wachovia in its preliminary merger talks with Morgan Stanley.
> - Several days later, after those talks faltered, he advised Japanese bank Mitsubishi UFJ Financial Group as it negotiated a 21% stake in Morgan Stanley.
> - Cohen was counseling Lehman until it sought bankruptcy protection on Sept. 15, and then pivoted to represent Barclays, which ended up buying Lehman's US operations.
> - Late last month, as banks and private-equity firms rushed to examine

During the period when Sullivan & Cromwell was actively trying to help Lehman sell itself to Bank of America, Cohen received a call from the president and chief operating officer of Merrill Lynch, Gregory Fleming. Fleming sought information about the status of negotiations between Lehman and Bank of America, advising Cohen that Merrill Lynch itself needed to find a buyer if it was to survive. Cohen discerned that Merrill Lynch was pursuing a sale to Bank of America and declined to provide information to Fleming concerning Lehman's discussions. Likewise, however, Cohen did not disclose to Lehman that Merrill Lynch was in discussions with Bank of America, even though Lehman believed that it alone was the sole object of Bank of America's potential affections. In Professor Markovic's view, this nondisclosure by Cohen was "unquestionably" contrary to Lehman's best interests, because if Lehman had known about the competition for a deal with Bank of America Lehman might have lowered its demands or more assiduously sought out other potential acquirors. Thus, Professor Markovic concludes, "[s]ince Cohen possessed material information that he felt he could not disclose out of concern for another client, Sullivan had a conflict of interest that materially limited [its] representation of Lehman."[49]

The Overfamiliarity Problem. When the prospect of a deal with Bank of America collapsed, Barclays became Lehman's last real hope for a buyer. Sullivan & Cromwell, and Cohen in particular with respect to some matters, had represented Barclays on multiple occasions. However, the firm was not

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Washington Mutual's books, Cohen had to choose between four clients that wanted to hire him before settling on J.P. Morgan.

- In early October, after advising Wachovia in an agreement to sell part of itself to Citigroup, Cohen advised the Wachovia board that its duty to shareholders required it to accept a competing bid from Wells Fargo, even if doing so violated an exclusivity agreement with Citi. That deal [resulted] in litigation.

[49] *See* Marcovic at 919 – 920. Professor Markovic points out that it is not clear under the Model Rules that Cohen owed any duty of confidentiality to Merrill as a result of Fleming's disclosures, since such disclosures did not "relat[e] to the representation" (in the language of Model Rule 1.6) of Merrill by Sullivan, but notes that such confidentiality rules are historically construed broadly. *Id.* at 920 – 921.

representing Barclays in connection with its discussions with Lehman prior to Lehman's bankruptcy.[50]

After acknowledging that Model Rule 1.7 does not necessarily prohibit a law firm from representing one client in a business transaction with another client (that is not being represented by the firm in that transaction), assuming informed consent,[51] Professor Markovic nonetheless identified two perceived conflicts that, in his view, may have impeded the efficacy of Sullivan's representation of Lehman in a potential deal with Barclays. The first of those was Sullivan's presumed awareness of the fact that Barclays' best interests might have been served if Lehman went bankrupt, thereby enabling Barclays to acquire the particular assets it wanted at a distressed price without the burden of taking on the entirety of Lehman (which was in fact what happened). Thus, argues Professor Marcovic, it may not have been accurate to assume that Lehman and Barclays shared a common transactional objective – the consummation of a sale of Lehman to Barclays, obviating the need for a bankruptcy.[52]

The second issue identified by Professor Marcovic was what he characterized as Sullivan's possible failure to conduct appropriate due diligence on Barclays' ability to consummate a purchase of Lehman within the timeframe needed – in particular, Sullivan's failure to discover (and advise Lehman) that Barclays had not taken appropriate steps to ensure that its British financial services regulator would allow the transaction to go forward, a fact of which Lehman (and Sullivan) did not become aware until the clock had run out on Lehman's ability to survive. Although acknowledging that the extreme time pressures undoubtedly limited Sullivan's ability to perform due diligence, Professor Markovic suggested that Sullivan's (and Cohen's) prior client relationship with Barclays may have given it a "blind spot" vis-à-vis Barclays, causing the firm to accept as credible both the sincerity of Barclays' commitment to the deal

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[50] *Id.* at 923 – 924. When Lehman filed for bankruptcy, "Sullivan ceased to represent Lehman and began to represent Barclays in its efforts to acquire Lehman's North American investment banking and brokerage business", apparently with the consent of Lehman management. *Id.* at 928.

[51] *Id.* at 923 – 924.

[52] *Id.* at 924 – 925.

and the extent of its ability actually to close it. In his view, Lehman might have been better served had it engaged counsel more inclined to be skeptical of Barclays than Sullivan might have been.[53]

The Same-Time-Tomorrow? Problem. From a philosophical standpoint, perhaps the most disturbing "conflict" identified by Professor Markovic involves what is perhaps the most troubling aspect of Model Rule 1.7: a conflict that arises because "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer".[54] In this case, the "personal interest" identified by Professor Markovic was the relationship of Sullivan & Cromwell, and Cohen especially, with the regulators responsible for overseeing the firm's financial service clients.

In analyzing this issue, Professor Markovic focused on Sullivan's and Cohen's reputations as the law firm and lawyer of choice for an extremely large number of major financial industry players, as well as on the reputation that Cohen had built as a trusted advisor to financial industry regulators, summarized in a *New York Times* article as follows:

> Mr. Cohen is perhaps unique among lawyers of his stature in having what a New York investment banker, Gary W. Parr, called "trusted relationships with people in government." Those relationships are, in fact, so strong that the former Treasury official in charge of financial institutions during the bailout often called Mr. Cohen to ask, "So O.K., Rodge, how do we make this work?"
>
> "He was one of my kitchen cabinet of advisers," said the former official, David G. Nason. Sometimes that meant getting advice on loan guarantees or on investing private equity in banks, though whatever the subject, Mr. Nason said, "he was always available as a sounding board."
>
> Mr. Cohen's role as a sounding board could not, of course, be divorced from his representation of the very banks that stood to gain from the federal programs he advised on; Mr. Nason

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[53] *Id.* at 924 – 928. Whether or not a different lawyer or law firm might have been less inclined to be sanguine about the ability of Barclays to close the deal, Cohen does appear to have been completely blindsided by the U.K. government's unwillingness to allow it to proceed. *See* Sorkin, *Too Big*, at 350 – 352.

[54] Model Rules R. 1.7(a)(2).

said that these conflicts of interest were managed with both openness and trust.

"When you're dealing with a Rodge Cohen, you begin by saying, 'This is sensitive information, and you're not going to use it for your own personal benefit,' " Mr. Nason explained. "If they do use it for personal or client gain, they're not going to be part of the discussion anymore — and they like being part of the mix."[55]

This excerpt summarizes the very characteristics that concern Professor Markovic: essentially, that "repeat players" who practice daily before the same regulators and have developed relationships of trust with them may be "unwilling to fully press their clients' interests because they cannot risk alienating" those regulators.[56] From a legal ethics perspective, the issue is whether a lawyer's personal interest in maintaining his or her reputation and credibility with regulators may impair that lawyer's willingness or practical ability to assert aggressive positions on behalf of a client, or to take unconventional steps – e.g., going around the regulatory chain of command to appeal to higher authority – that might best serve a client's interest in a specific situation. Professor Markovic contrasts Sullivan's position with that of Lehman's bankruptcy lawyers at Weil Gotshal, who were purportedly less constrained to consider the sensibilities of Treasury and Federal Reserve officials.[57]

Although doing full justice to Professor Marcovic's arguments requires more analysis of the specific facts than is necessary or appropriate here, it is worth noting that this issue presents something of a difficult analysis in any circumstance where a lawyer or a law firm is trafficking in the area of "inside baseball" that is frequently critical in complex regulatory environments. On the one hand, lawyers and law firms work hard to develop both substantive expertise and personal credibility before regulatory authorities, and that expertise and credibility is often of great benefit to clients. In an industry like healthcare, it is simply no longer realistically possible to effectively represent clients by simply "reading the law" and advising them. Knowing how the law is being interpreted in practice, and having the cred-

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[55]Feuer, *Trauma Surgeon*.

[56]*See* Marcovic at 932.

[57]*See id.* at 932 – 937.

ibility to have an effective dialogue with regulators, is simply critical – and sometimes indispensable – in many situations. On the other hand, it cannot reasonably be denied that a lawyer is less likely to recommend or pursue a scorched-earth policy in dealing with regulators – even unreasonable or arbitrary ones – if that lawyer knows that he or she will be coming back to the same regulators again and again (and not always from a position of strength).

Certainly, credibility with regulators serves legitimate interests of clients, and knowledge gained from cooperative interaction with regulators can help a lawyer more effectively advise a client. At the same time, however, it is not unreasonable to consider whether such cooperative relationships may inhibit effective representation in some circumstances, especially in those cases where the client at hand may be concerned that it will itself have no tomorrow if its lawyers worry overmuch about seeing the same regulator tomorrow.

Professor Markovic's point is not that Sullivan & Cromwell or Rodgin Cohen engaged in unethical or unprofessional behavior.[58] Instead, his point is that existing rules of professional responsibility may not serve to adequately protect the interests even of sophisticated consumers of legal services, such as Lehman Brothers, and to some extent that the evolved practice of advance waivers may obscure important questions about the perceived weaknesses in existing conflicts rules. Although the illustrations he uses are perhaps more dramatic than most because of the backdrop of the financial crisis of 2008, the issues that he raises have continuing implications for the representation of organizations in all manner of regulated industries, including healthcare.

III. PRACTICAL AND IMPRACTICAL REALITIES: LESSONS FOR HEALTHCARE LAWYERS FROM PENN STATE AND LEHMAN BROTHERS

The situations described above are admittedly extreme examples of ethical dilemmas, framed in terms of highly

[58] In fact, he expressly disclaimed that intention. *See id*. at 905

charged situations. In order to derive broad practical applications therefrom, it is useful first to look at some of the ethics rules that are implicated by those situations and to consider how those rules might apply in somewhat more mundane settings.

A. Who's the Client?

As any lawyer who has spent any time in private practice knows, it is very important to know who one's client is. In the first place, it is normally the client who pays the fee, and it's good to make sure that one is sending the bill to the right place. Beyond that, of course, it is typically the client to which the lawyer owes many of his or her duties: the duty of competent representation, the duty of diligence, the duty of confidentiality, the duty to avoid conflicts of interest, and so on.

Somewhat unfortunately, most of these duties are expressed in rules of professional conduct that were largely written around the model of a single, individual lawyer hired by a single, individual client to undertake a single, discretely defined task. Even those rules that expressly contemplate different models still assume, at least to some extent, a well-defined relationship with a single client decisionmaker.

Of course, this is often not the case. Lawyers representing "entity" clients frequently deal with a multiplicity of overlapping client authority figures, some of whom may themselves also be functioning as lawyers for the client. Further, a lawyer's representation of such a client may be defined or limited in such a way as to raise questions about how broad the lawyer's responsibilities are and what role the lawyer has vis-à-vis other lawyers representing the same client, or affiliates of the same client. In such circumstances, the text of professional responsibility rules may well provide only limited guidance in dealing with real-world situations. The following subsections will discuss some of the applicable rules and the conundra that may be posed by their interplay.

1. Model Rule 1.13: The Organization as Client

Model Rule 1.13 provides the most basic – and yet most difficult – rule of entity representation: "A lawyer employed or retained by an organization represents the organization

acting through its duly authorized constituents."[59] Those constituents, in turn, are the officers, directors, employees and shareholders of a corporation, or those who hold analogous positions with entities that are not corporations.[60] Where the interests of a client organization and its constituents diverge, the lawyer who is engaged by the organization owes his or her duties to the organization, and generally may not represent a constituent if the constituent's interests are adverse to those of the organization.[61]

Simple enough, it would seem. However, an organization is but a legal construct, and it may act only through real people. Some of those people may have multiple motives, some of which are more clearly consistent with the organization's interests than others. Further, those people may not perceive either the organization's interests – or their own – in the same way as the lawyer does.

Beyond that, organizations are frequently not monolithic in nature. Instead, they may have subsidiaries, sister organizations, divisions, joint ventures and so on and so forth. Even a single, centralized parent organization may have subsidiaries in which others hold minority interests, or wholly owned subsidiaries that for various reasons are independently managed, with management teams and boards wholly or partially distinct from those of the parent.

Take your average health system, for example. You've got some sort of a parent company governing board and management team, then a few hospitals with their own boards and management teams, and maybe some sort of regional middle-management above them, and, oh yes, each with a medical staff that in most states is not a distinct legal entity but that definitely has a mind of its own. Then there are probably some joint ventures with third parties, maybe a GPO or an offshore captive insurer, probably a few good subsidiaries providing post-acute or ancillary care services. Go to the system headquarters, head down into the basement, and find the door that says "Office of General Counsel" on it. There are reasons the people inside look somewhat haggard.

The ABA Standing Committee on Ethics and Professional

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[59] Model Rules R. 1.13(a).

[60] Model Rules R. 1.13(a), cmt. [1].

[61] *See* Model Rules R. 1.13(f) and cmt. [10].

Responsibility struggled with "corporate family" issues for some years, choosing finally to address them through Model Rule 1.7, the basic conflict-of-interest rule (about which more in a bit), rather than through Model Rule 1.13. In Formal Opinion No. 95-390,[62] the Committee considered "whether a lawyer who represents a corporate client may undertake a representation that is adverse to a corporate affiliate of the client in an unrelated matter, without obtaining the client's consent."[63] The Committee essentially concluded that the answer was "yes", unless circumstances indicated that it was "no", or perhaps "it depends".[64] Without belaboring the point, however, it is fair to say that although there may be a technical defense to an ethics complaint brought by one corporate affiliate where its counsel acted adversely to another corporate affiliate without the consent of the first affiliate, in the real world a lawyer who proceeds without such consent faces practical, if not technical, peril.

2. Officers, Directors and Suchlike

A fundamental principle of Model Rule 1.13 is that, by representing an organization, a lawyer does not necessarily represent its individual officers, directors, stockholders (or other owners) or employees. However, Model Rule 1.13(g) al-

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[62]Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Opinion 95-390, "Conflicts of Interest in the Corporate Family Context" (Jan. 25, 1995).

[63]*Id*. at 1.

[64]In fact, the Committee's majority conclusion was summarized thus:

> A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter. However, a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client's corporate affiliates; or if the lawyer's obligations to either the corporate client or the new, adverse client, will materially limit the lawyer's representation of the other client.

Id. at 1. However, the Committee noted that "a lawyer ordinarily would be well advised as a matter of prudence and good practice to discuss the matter with his existing client before undertaking a representation adverse to an affiliate of the client, even though consent may not be ethically required". *Id.* at 13. Several dissents to the opinion were sharply critical of the majority's failure to impose an ethical obligation requiring such a consultation.

lows a lawyer to undertake such dual representation subject to the conflict provisions of Model Rule 1.7. In the event that the lawyer becomes aware of a conflict between the interests of the organization and some or all of the jointly represented constituents, the lawyer must advise the potentially adverse constituents that he or she represents the organization and that the affected constituent understands that the lawyer can no longer give him or her legal advice and that communications between them may not be privileged.[65]

A lawyer undertaking such joint representation should be cognizant of Model Rule 1.7(a), which prohibits a lawyer (subject to consent by both affected clients under some permitted circumstances) from representing 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.[66]

3. Application of Model Rule 1.7 to Corporate Representation

Model Rule 1.7 is applicable both to the joint representation of an organization and individual constituents and to the joint representation of organization clients. Thus, for example, the representation of an organization and individual officers, directors or employees of the organization, of a parent and a subsidiary, of sister organizations, or (if one has found a way to do it) divisions or other unincorporated components of a single unitary entity would all remain subject to Model Rule 1.7. If a conflict between the two clients were to develop, or if the lawyer's ability to represent one were compromised by responsibilities to the other, then the lawyer would not be able to continue the joint representation.

In fact, depending on the nature of the conflict, the lawyer

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[65] *See* Model Rules R. 1.13(f) and cmt. [10].

[66] Model Rules R. 1.7(a). The "consent" exceptions are in Model Rules R. 1.7(b).

might not be able to continue representation of either client in the particular matter at hand. Model Rule 1.9, governing duties to former clients, may require the lawyer to withdraw from representation of a client if the duties owed to a former client (in this case, the client the lawyer actually wants to withdraw from representing) limit the lawyer's ability to adequately represent the remaining client (for example, where such representation would be limited by the lawyer's obligation to protect the confidential information of the former client, or where the two clients have developed directly adverse interests).[67]

4. What About People Who Think They're Clients?

Thus, when a lawyer has formally undertaken to represent an organization and one or more of its constituents but subsequently determines that the interests of the organization and the constituent have diverged, the lawyer has a duty to so inform the constituent and, in all likelihood, withdraw from representation of the constituent (and perhaps from representation of the organization as well). On the other hand, it is entirely possible that a constituent may form the impression that he, she or it is the lawyer's client without the lawyer's having actually undertaken such a relationship. In-house counsel are particularly vulnerable to such developments, because of their necessarily close and frequent interaction with client personnel in circumstances that are frequently less formal than interactions between such personnel and outside counsel.

This is certainly true in the corporation/officer setting, particular as one moves higher up the officer chain and senior officers become more convinced that their interests and those of the organization are indistinguishable. It may perhaps be even more likely in complex healthcare organizations, where strong and independent personalities, overlapping roles, and complex organizational structures make life a good bit more confusing. For example, it is not unnatural for a physician/administrative officer in a hospital, health system or academic medical center, who has been advised by a lawyer with regard to his or her administrative role, to assume that he or she has an attorney-client relationship with

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[67] *See* Model Rules R. 1.9 and cmts. [4], [5] and [33] to R. 1.7.

that lawyer with regard to such physician's private medical practice or even with regard to his or her contractual arrangements with the institutional client. That is to say, it is not unnatural, but is still probably wrong. Similarly, it is not unnatural for a healthcare executive who routinely turns to his or her organization's (internal or external) counsel for advice in connection with the executive's business function, or who may have been jointly represented in litigation by the same counsel as the organization, to believe that such counsel is "his lawyer" or "her lawyer".[68]

In such a case, the lawyer must be sensitive to yet another Model Rule, Model Rule 4.3 (as well as to Model Rule 1.13(f), discussed above). Model Rule 4.3 requires that in dealing on behalf of a client with an unrepresented person, the lawyer must not profess to be disinterested and must try to correct any misunderstanding the unrepresented person has regarding the lawyer's role. Further, "[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[69]

Beyond that, there is the issue that may be characterized as the "client by estoppel". Under the Restatement of the Law Governing Lawyers,

> [a] relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that

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[68] *See, e.g.,* United States v. Nicholas, 606 F. Supp.2d 1109 (C.D. Cal.), *rev'd sub nom.* United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009) (corporate executive argued that his statements to law firm conducting internal investigation were the subject of personal attorney-client privilege because same law firm was representing corporation and executive (along with other executives) in defending securities litigation).

[69] Model Rules R. 4.3.

> the person reasonably relies on the lawyer to provide the services . . . .[70]

In other words, even where the lawyer has not expressly agreed to an attorney-client relationship, the lawyer may under some circumstances be deemed to have entered into one by "fail[ing] to negate consent [to the relationship] where the [prospective client] has reasonably assumed that the relationship is underway".[71] Such relationship may be construed to prevent the lawyer from representing another client that is adverse to the client-by-estoppel, and at a minimum may limit such representation to the extent that the lawyer has a duty to protect confidential information of the client-by-estoppel.

Thus, for example, in the Penn State case, the Pennsylvania Supreme Court and its Disciplinary Board ultimately concluded that Ms. Baldwin (a) had taken on Messrs. Curley, Schultz and Spanier as her clients in their individual capacities, not simply in their institutional roles, whether she had wanted to or not,[72] and (b) having done so, had then failed to satisfy the duties created by that individual attorney-client relationship. At a minimum, it appears that at whatever point Ms. Baldwin became aware that any of the men seemed to believe that she was representing them individually, she should have promptly and clearly advised them that her client was Penn State, that she was not their personal lawyer except to the extent that they were acting in their institutional capacities and that their interests were aligned with those of Penn State, that communications they had with her were not privileged as between them and each other or Penn State, and that any privilege belonged to and could be waived

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[70]RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

[71]GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING (4th ed. 2017) § 2.05.

[72]Even if she had not expressly agreed to represent them as clients, under the Restatement position it appears likely that they would have fallen into the client-by-estoppel category; their behaviors – and statements in open court in response to direct questions from the supervising judge – manifested their understanding that she was their lawyer, and it does not appear that she took the steps necessary to negate that understanding.

by Penn State.[73] If, as is not entirely unreasonable, she initially undertook to represent all of them under the belief that (a) their interests were in fact consistent with those of each other and with the interests of Penn State and (b) that the grand jury's attentions were directly solely at the potential for charges against Sandusky and not against them and/or Penn State, she would then have had a duty to advise them when she determined that their interests had diverged from the interests of Penn State and/or each other and to withdraw from representing some or all of her clients, or at least to have obtained their informed consent to a limitation on her representation to the extent necessary to eliminate any potential conflict.[74]

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[73]Of course, Ms. Baldwin's position seems to be that she did more-or-less exactly that, although she did not persuade the Disciplinary Board or the Supreme Court that any credible explanation for why, if she were not representing Curley, Schultz and Spanier at the time of their grand jury appearances, she apparently allowed the grand jury supervising judge to believe that she was doing so or for why she let the men's statements from the witness stand to that effect to go uncorrected. In the *Schultz* case, the Superior Court noted that "[s]imply stating that she could reveal communications to the Penn State Board of Trustees and was general counsel to the University was decidedly inadequate . . . . [and] consistent with the joint attorney-client privilege concept". Schultz Superior Court Order, 133 A.3d at 324. *Accord* Spanier Superior Court Order, 132 A.3d at 496 ("Consistent with our decision in *Schultz*, we find that Ms. Baldwin did not adequately explain to Spanier that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests. Although Spanier knew Ms. Baldwin was general counsel for Penn State, this knowledge does not *ipso facto* result in Spanier understanding that she represented him solely in an agency capacity before the grand jury."); Curley Superior Court Order, 131 A.3d at 1007 ("Moreover, Ms. Baldwin did not adequately explain to Curley that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests. Although Curley was certainly aware that Ms. Baldwin was general counsel for Penn State, this awareness did not result in Curley knowing that she represented him solely in an agency capacity. Indeed, it is illogical to conclude that Curley was aware of this critical distinction when there is 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 of Curley as being so limited.").

[74]Model Rules R. 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Thus, for example, it would have been notionally possible for Ms. Baldwin to have entered into an

5. Practical Aspects of "Representation Confusion"

These issues may present themselves in more routine settings than the Baldwin/Penn State situation. Perhaps the most obvious area in which they arise is in the context of internal or government investigations, where an organization's personnel, accustomed to relying on the advice of the organization's regular internal or external counsel, seek guidance from such counsel as to personal concerns relating to the investigation (e.g., "Do I need a lawyer?" "What happens if I don't agree to be interviewed?" "Can I tell you something off the record?") or, worse yet, simply disclose incriminating information to such counsel without preamble. In such cases, it is clear – if painful – that the organization's counsel must ordinarily be firm in clarifying that he or she does not and cannot represent or advise the individual.[75]

Such issues may present themselves less obviously within complex healthcare organizations. For example, constituents within an academic medical center, such as department heads or executives of subsidiary entities, may look to lawyers within the university counsel's office to represent their interests, even though such interests may not be fully aligned with the interests of university administration. Similarly, the parties to a joint venture may look at counsel to the joint venture sponsor as their lawyer, even though the sponsor's interests may diverge from the interest of other participants in the venture. Situations such as these do not have the dramatic resonance of the Penn State case, but they may present dilemmas and pitfalls just as significant for the lawyer who is insufficiently sensitive to the rules of professional responsibility. It is not enough for the lawyer to

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express agreement with any or all of Curley, Schultz and/or Spanier that she would represent them jointly (along with her representation of Penn State) unless and until a conflict developed among them, or between any of them and the university. In real life, however, implementing such a limitation in the specific circumstances present would likely not have had the desired result, because the knowledge Ms. Baldwin obtained from the three individuals would likely have tainted her representation of Penn State, so that she would have had to withdraw from representing any of her "clients". In general, grand jury investigations are not circumstances under which one wants to push the joint representation envelope too far.

[75] Although, as has been pointed out, that may present its own set of problems by making it less likely that an internal investigation will actually yield informative results.

avoid representing clients whose interests may be in conflict in the context of a grand jury investigation or regulatory enforcement action. The lawyer who is perceived by all parties to a joint venture to be representing them, or who is perceived by both the corporate executive negotiating an employment contract and the corporation with whom that contract will be made, is exposing himself or herself to significant risk from a professional responsibility standpoint.

B. Who Has to Know What the Lawyer Knows?

Closely related to these issues is the question of the lawyer's obligations when a constituent of the organization client is engaging, or proposing to engage, in activities that constitute a violation of law or a violation of a legal duty to the organization. Here again, the relevant starting point is Model Rule 1.13:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances[,] to the highest authority that can act on behalf of the organization as determined by applicable law.[76]

This is written in the context in which "the organization" is the client. Thus, its application is dependent upon the resolution of some of the issues outlined in the preceding section. If the lawyer has concluded that he or she may jointly represent an organization and individual constituents, this subsection of the rule presents some real issues if the lawyer determines that such individual constituents have violated their duties to the organization or have exposed the organization itself to potential culpability for violations of

[76]The author has written at some length about the mechanics and implications of this aspect of Model Rule 1.13 in William W. Horton, *Representing the Healthcare Organization in a Post-Sarbanes-Oxley World: New Rules, New Paradigms, New Perils*, 37 J. HEALTH L. 335 (2004).

the law. Under Model Rule 1.13, the lawyer has an obligation to report such matters up the ladder within the organization. On the other hand, Model Rule 1.6 (discussed below) may prevent the lawyer from making such disclosures without the consent of the individual client(s). Thus, if the lawyer undertakes to represent both an organization and individual constituents thereof, the lawyer would be well advised to have a written agreement permitting the lawyer to withdraw from the individual representation and, if possible, to disclose information in compliance with Model Rule 1.13 notwithstanding any rights the individual client(s) may otherwise have to assert the confidentiality of such information.[77].

C. Who *Gets* to Know What the Lawyer Knows?

Which raises, of course, the whole issue of how and when a lawyer can and must disclose confidential information to someone who is not the lawyer's client. The basic rule of confidentiality is set forth in Model Rule 1.6(a): "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [Model Rule 1.6(b)]."[78] Note the breadth of the language: the rule does not simply protect information provided by the client, or information subject to the attorney-client privilege. It protects "information relating to the representation" of the client – "not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source".[79]

Model Rule 1.6(b) provides limited exceptions to this duty

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[77]As a practical matter, however, such waiver of confidentiality may be unenforceable unless the individual client received independent advice of counsel before entering into it.

[78]Model Rules R. 1.6(a).

[79]Model Rules R. 1.6 cmt. [3]. In contrast to this ethical duty, the attorney-client privilege protects only communications between the lawyer and the client in the course of seeking or providing legal services, and as a technical matter is applicable only where disclosure of such communications is sought before a tribunal. *See generally* William W. Horton, *A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for* Upjohn, 61 BUS. LAW. 95, 101 – 103 (2005).

of confidentiality. For present purposes, the relevant language is this:

> A lawyer may reveal information relating to the representation of a client [without the client's informed consent] to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . . .[80]

Where the client is an organization, Model Rule 1.13(c) provides even broader permissive authority for nonconsensual disclosure:

> Except as provided in [Model Rule 1.13(d), relating to a lawyer's engagement to represent a client in an internal investigation or in the defense of a claim relating to an alleged violation of law], if
>
> (1) despite the lawyer's efforts in accordance with [Model Rule 1.13(b), discussed above] the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
>
> then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Both of these rules are permissive, not mandatory, in nature.[81] Thus, as a matter of professional responsibility, neither of the rules requires a lawyer to do anything. In the healthcare arena, where the same underlying conduct may

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[80]Model Rules R. 1.6(b).

[81]The reader should be aware that there is considerable variation among the states in the degree to which these permissive exceptions contained in Model Rules R. 1.6(b) and 1.13 (c) have been adopted and in the specific language used by states that have adopted them in some form.

be characterized under different circumstances as a criminal violation, a civil violation or an administrative matter, with wildly different potential consequences, it may well be hard to discern when these rules come into play or what the appropriate analysis is. However, in the post-Enron world, it is clear that a lawyer who believes that his or her client has committed a material violation of law must at least consider the applicability of these rules and whether "reporting out" is a necessary and appropriate course of action.[82]

Returning to Penn State, these duties raise some obvious issues. If Ms. Baldwin in fact represented Curley, Schultz and/or Spanier, it appears that Model Rule 1.6 would have limited her ability to disclose to the grand jury or otherwise matters that she learned about those men in the course of her representation. At least once Sandusky himself had been indicted, such disclosure would not have been necessary to prevent reasonably certain death or bodily harm, as required under Model Rule 1.6(b)(1). The other exceptions set forth in Model Rule 1.6 would likewise appear to be inapposite, especially because there is no indication that any of the men were using the services of Ms. Baldwin in furtherance of any alleged commission of a crime or fraud by them. Hypothetically, Model Rule 1.13(c) might have permitted "reporting out" by Ms. Baldwin, but (a) it is not clear that she satisfied the condition precedent to that provision by referring the matter up to the highest authority that could act on behalf of Penn State (indeed, the statements on behalf of the Board of Trustees suggest that they were not informed of any violations allegedly committed by Curley, Schultz or Spanier), and (b) Model Rule 1.13(c) only addresses a lawyer's reporting-out rights when the client is an organization. If in fact Curley, Schultz and/or Spanier were also Ms. Baldwin's clients in an individual, and not solely an agency, capacity, Model Rule 1.13(c) does nothing to permit her to make disclosures of confidential communications without their re-

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A lawyers should not assume the Model Rules language is in effect in a particular state without actually looking it up.

[82]Lawyers for public companies must also consider the permissive and required actions under 17 C.F.R. Part 205, the Securities and Exchange Commission's "attorney conduct rules" promulgated under the Sarbanes-Oxley Act. *See generally* Horton, *Post-Sarbanes-Oxley World*, *supra* n. 11.

spective consent; only Model Rule 1.6 would govern. Essentially, it appears that disclosures by Ms. Baldwin would only have been permitted if (a) none of the individuals, as individuals and not simply as agents of Penn State, were actual clients (or clients-by-estoppel) of hers and (b) Penn State consented to the disclosures (since any information she obtained relating to her representation of Penn State would perforce be confidential to Penn State).

A broader consideration relating to obligations under Model Rule 1.6 is suggested by the Lehman Brothers scenario. Lawyers and law firms who are active in a particular industry or sector may, of course, obtain information about a variety of clients' plans, strategies, financial condition, etc., etc., that would be useful to other clients. Such information does not necessarily have to be of the "directly adverse" sort that usually raises concerns under professional responsibility rules. Instead, it may be what might be called "environmental information".

For example, suppose the law firm of Upright & Sikorsky is frequently engaged as transaction counsel by both Megalithic Healthcare, Inc. and Sorrowful Sisters of St. Zephyrinus Health Systems, both hospital chains with active acquisition programs who sometimes compete with each other for deals. Suppose further that SSSZ had confided to the firm that it planned to quietly suspend acquisition activity for the next 12 months because it was addressing debt covenant issues in its credit facility. That information might be highly useful to Megalithic, since it would limit the ability of potential acquisition targets to use the possibility of a sale to SSSZ as leverage to get a higher offer from Megalithic; in fact, Upright was currently representing Megalithic in two deals where just such a tactic was being employed by the targets. Depending on how the firm came by this information, it might or might not technically be confidential information subject to Model Rule 1.6, but in any event it would obviously harm the relationship between SSSZ and the Upright firm if the Upright firm disclosed SSSZ's financial constraints to Megalithic. On the other hand, it would be in Megalithic's best interest to have that information, which would be to its direct advantage in two current Upright/Megalithic engagements. Does Upright's practical reluctance to disclose that information to Megalithic constitute a material limitation on its ability to represent Mega-

lithic, as contemplated by Model Rule 1.7?[83] Probably not, but these sorts of issues dance around the margins of the Model Rules.

D. Who Loves Ya, Baby?

Perhaps the most difficult issue raised by Professor Markovic is the last one: Is there a point where the very expertise and agency relationships that may cause a client to seek out a lawyer or law firm cross the line to create a conflict of interest? Is there a point where a law firm's ability to effectively represent a client is materially compromised by that firm's interest in maintaining good relationships with a regulator before whom the firm represents other clients, whose needs may not require the sort of aggressive action that the client of the moment might most benefit from? Certainly, this can be a very realistic question in the healthcare law game. The healthcare industry is regulated in complex and arcane ways, and understanding those ways often requires not only a detailed knowledge of current laws and regulations, but also a knowledge of what those laws and regulations replaced and how they evolved over time.[84] Such knowledge, coupled with access to senior regulators, is a product in high demand by healthcare clients, and the more esoteric the area of expertise, the more likely it is that the lawyer who has such expertise will be sought out by clients who are competitors with each other.

As noted in Professor Markovic's article, Model Rule 1.7(a)(2) provides that a conflict of interest may result from

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[83] *Cf.* Model Rules R. 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.").

[84] In 2019, the author engaged in protracted and vigorous email debate with various persons at CMS that, among other things, involved the author's effort to argue that the fact that preamble commentary on a Medicare proposed rule in 1982 had never been modified, rescinded or even called into question by CMS, in either the 1982 final rule or the numerous subsequent revisions thereto, compelled the conclusion that the author's interpretation of current language in the State Operations Manual was correct and that the CMS staff's interpretation was incorrect. Sadly for purposes of the anecdote (and, it might be suggested, for purposes of regulatory clarity), the author's effort proved unpersuasive, or at least unavailing.

a "personal interest of the lawyer". The commentary to that Model Rule makes it clear that the drafters were thinking primarily of situations where either (a) the lawyer had a specific business or economic interest that potentially conflicted with the client's interest, such as the pursuit of employment with an opposing party or law firm, or (b) the "probity of a lawyer's own conduct in a transaction" were in "serious question".[85] On the other hand, it cannot be denied that

> [a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.[86]

And if the lawyer's zeal in advocacy on behalf of one client is tempered by reluctance to burn bridges with regulators because other clients might still need to traverse those bridges, might that rise to the level of a disqualifying personal interest under Model Rule 1.7(a)(2)?

Certainly, on the whole it is likely to be beneficial to a client to have a lawyer or law firm with a record for diligence, competence, credibility and professionalism that is recognized by the regulatory authorities with jurisdiction over the client. Further, such a record is generally developed by being, objectively speaking, pretty good, and clients are generally better served by having lawyers that are pretty good than by having the other kind. While preserving good regulatory relationships may militate against a lawyer's going medieval[87] on agency representatives, the commentary to the Model Rules does note that there are limits to a lawyer's duty of zealous representation:

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may

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[85] *See* Model Rules R. 1.7, cmt. [10].

[86] Model Rules R. 1.3, cmt. [1].

[87] *See* PULP FICTION (Miramax Films 1994) (mob boss Marsellus Wallace threatens to "get medieval" on a portion of the anatomy of certain persons who have done harm to him, which the viewer is given to understand means that Mr. Wallace intends to treat such persons with extreme violence).

> have authority to exercise professional discretion in determining the means by which a matter should be pursued. See [Model] Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.[88]

Presumably, one sort of expertise that experienced lawyers may bring to bear is knowledge of what approaches are likely to play best with the regulators before whom they regularly appear. Certainly, there may be cases where the lawyer misjudges that, or where the lawyer is reluctant to take a particularly aggressive position on behalf of a particular client if the lawyer is concerned that such an approach will impair his or her credibility with the agency in general. Intuitively, however, it seems that even if that concern is characterized as a personal interest of the lawyer (as opposed to simply a characteristic of the particular lawyer's approach to practice, or even an inherent dynamic of this particular practice niche generally), it will be a fairly rare occurrence for such a personal interest to rise to the level of "materially limiting" the representation of the current client, as contemplated by Model Rule 1.7. Nonetheless, this is a risk the lawyer should be attentive to, and it may be appropriate for the lawyer to advise a client that a particular argument or approach might be more successfully advanced by other counsel, to whom the lawyer might refer the matter.

IV. A PARTING POSTSCRIPT

It is, perhaps, easy for us as lawyers to read the rather lurid details of the Penn State/Cynthia Baldwin matter and think, "Wow. But at least that couldn't ever happen to me." For most of us, it is probably less easy to imagine ourselves as the Rodge Cohen of the healthcare industry, a lawyer of such rarefied reputation and abilities that an entire industry sector is anxious to hire us and entrust us with their most proprietary secrets.

However, these sensationalistic situations are, at least from a professional responsibility perspective, not so remarkably distant from things that many healthcare lawyers will face. Healthcare organizations are complex enterprises, and

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[88] Model Rules R. 1.3, cmt. [1].

they (and those who work within them) are certainly vulnerable to investigations, enforcement actions and even criminal prosecution. It is, unfortunately, not uncommon for a healthcare lawyer to find that one or more of the client officers or directors to whom he or she has often provided advice and counsel is suddenly the subject or target of an investigation, with interests that may not align with those of the organization. Likewise, because the healthcare industry is very large and the healthcare bar relatively compact, it is not only the $1,500-an-hour gurus who find themselves engaged by clients who are competitors with each other; it may well be the lawyer in a small city who represents the local hospital but also represents half the local physicians, or the go-to healthcare lawyer in a sparsely lawyered state, who gets called every time an out-of-state player wants to come into the market because he or she is the lawyer with all the connections.

Thus, the moral of the story, such as it is, is that the structure and dynamics of the healthcare industry (and, to some extent, the personalities of those who populate it) are such that healthcare lawyers must always be sensitive to the possibility of conflicts of interest in their attorney-client relationships. They can sneak up in unexpected ways and from unexpected places, and cultivating a heightened sensitivity to those sorts of issues makes it both less likely that the client's expectations of the attorney-client relationships are frustrated and less likely that the lawyer will have an unplanned opportunity to get to know his or her local bar disciplinary investigators.