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## **Multiple Representation Meltdown: Penn State Three Case Illustrates Entity Representation Pitfalls for Both Criminal Defense Counsel and Prosecutors - and the Need for Systemic State Law Reforms**

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# ARTICLES

## MULTIPLE REPRESENTATION MELTDOWN: “PENN STATE THREE” CASE ILLUSTRATES ENTITY REPRESENTATION PITFALLS FOR BOTH CRIMINAL DEFENSE COUNSEL AND PROSECUTORS—AND THE NEED FOR SYSTEMIC STATE LAW REFORMS

Lance Cole\*

### I. INTRODUCTION

The past two decades have been marked by dramatic changes in the way prosecutors investigate and charge business entities and equally dramatic changes in the way defense counsel defend entities and affiliated individuals.<sup>1</sup> Up until the late

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<sup>1</sup> See Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 60–77 (2005) [hereinafter Cole, *Reexamining the Collective Entity Doctrine*] (describing recent developments in the law of business entity criminal liability); Lance Cole, *The SEC’s Corporate Cooperation Policy: A Duty to Correct or Update?*, 41 SEC. REG. L.J. 127, 129–39 (2013) [hereinafter Cole, *Corporate Cooperation Policy*] (describing the evolution of the Justice Department’s corporate cooperation policies from 1999 to 2008); see also Lance Cole, *Revoking our Privileges: Federal Law Enforcement’s Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 534–42 (2003) [hereinafter Cole, *Revoking our Privileges*] (describing the cooperation provisions of the Federal Organizational Sentencing Guidelines); Lance Cole, *Corporate Criminal Liability in the 21st Century: A New Era?*, 45 S. TEX. L. REV. 147, 160–70 (2003) [hereinafter Cole,

1990s, the investigation and prosecution of business entities had evolved into a familiar pattern. When a company learned it was the subject of an investigation by a grand jury or other prosecutorial authority, the company would immediately retain defense counsel and begin to conduct its own internal investigation to “get ahead” of government investigators and prosecutors.<sup>2</sup> Defense counsel expected, consistent with *Upjohn Co. v. United States*,<sup>3</sup> that the findings of their internal investigation would be confidential and could not be obtained by prosecutors or plaintiffs’ lawyers in related civil lawsuits.<sup>4</sup> If evidence of wrongdoing by company personnel emerged, the company’s counsel would “assist” any potentially culpable individual officers and employees and find personal defense counsel, who in almost all instances would be paid by the company and could be expected to “work with” the company’s counsel as the investigation progressed.<sup>5</sup> The attorneys representing the company and the individuals would then “circle the wagons” (most likely including entering into a “joint defense agreement”<sup>6</sup> between counsel for the company and counsel for individuals) and try to keep all potentially culpable employees and officers “inside the tent” by asserting Fifth Amendment and other available privileges<sup>7</sup> and making

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*Corporate Criminal Liability*] (describing the impact of the Sarbanes-Oxley Act of 2002 “up the corporate ladder” reporting requirements).

<sup>2</sup> See, e.g., Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 863 (2003) (describing the use of internal investigations as a “hallmark of corporate legal practice”); see also Ralph C. Ferrara, Ann M. Ashton & Jonathan R. Tuttle, *Internal Corporate Investigations and the SEC’s Message to Directors in Cooper Co.*, 65 U. CIN. L. REV. 75, 77–95 (1996) (describing internal investigations as an important defensive tool providing a way to gather information through employee interviews, questionnaires, and document review).

<sup>3</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 397–402 (1981) (expressing importance of preserving confidential attorney-client communications).

<sup>4</sup> See Duggin, *supra* note 2, at 894–98 (discussing the Supreme Court’s and lower federal courts’ continued recognition that the results of internal investigations are protected by the attorney-client privilege and the attorney work-product doctrine).

<sup>5</sup> See Craig S. Lerner, *Conspirators’ Privilege and Innocents’ Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449, 1532–33 (2002) (noting the practice of corporations providing counsel for their employees if the employees agree to enter into a joint defense agreement).

<sup>6</sup> See generally Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 871–93 (1996) (discussing how joint defense arrangements work and the advantages they offer); see also Cole, *Revoking Our Privileges*, *supra* note 1, at 510–13 (describing the “common interest” or “joint defense” privilege and its limitations).

<sup>7</sup> See generally Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell—New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123 (2002)

prosecutors “fight for every inch of earth” in their efforts to obtain information that would support criminal charges against individuals or the company.<sup>8</sup>

Despite the ever-present risk that an employee could “break ranks” and approach the prosecutors to “cut a deal” to obtain reduced charges, or even immunity from prosecution in exchange for providing incriminating information about the company or its senior officials, these defense tactics worked quite well and thwarted prosecutors’ attempts to gain enough evidence to charge a company or individuals. In fact, this strategy worked so well that near the close of the Clinton administration, Department of Justice frustration with the success of corporate defense tactics, at least in part, prompted then-Deputy Attorney General Eric H. Holder to promulgate a memorandum setting forth a new Justice Department cooperation policy<sup>9</sup> that would in effect, penalize companies that employed the tactics described above.<sup>10</sup> The Holder Memorandum essentially warned corporations that to avoid harsh charging treatment by the Justice Department, they would be required to voluntarily disclose wrongdoing and cooperate with the Department’s investigation—“including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel.”<sup>11</sup>

Although the Holder Memorandum was widely criticized by the defense bar and academic commentators,<sup>12</sup> its policy position was reaffirmed and expanded by the George W. Bush administration Deputy Attorney General Larry D. Thompson in

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[hereinafter Cole, *New Protection*]; see also Akhil Reed Amar & Renec B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

<sup>8</sup> See *infra* notes 12 and 15 (collecting relevant authorities).

<sup>9</sup> For an in-depth scholarly analysis of Department of Justice guidelines and policy memoranda, see Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167 (2004).

<sup>10</sup> ERIC. H. HOLDER, DEPUTY ATTORNEY GENERAL, MEMORANDUM FROM THE U.S. DEP’T OF JUSTICE, TO ALL COMPONENT HEADS AND U.S. ATTORNEYS (1999) [hereinafter HOLDER MEMORANDUM]; see also Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 3–5 (2008) (attributing the Department of Justice’s success in obtaining white collar crime convictions and guilty pleas from 2002–2006 directly to the Holder Memorandum).

<sup>11</sup> HOLDER MEMORANDUM, *supra* note 10, at Section VI.B.

<sup>12</sup> *United States v. Stein*, 531 F.3d 130, 135 (2d Cir. 2008) (summarizing District Court findings).

2003.<sup>13</sup> The Thompson Memorandum was widely perceived as creating a “culture of waiver” and forcing the “deputization” of corporate defense counsel.<sup>14</sup> The influence of the Holder/Thompson waiver and deputization policies reached their zenith in 2006 in the now-infamous *United States v. Stein* case involving the federal investigation of the KPMG accounting firm’s tax shelter practice.<sup>15</sup> In that case, U.S. District Judge Lewis A. Kaplan held that KPMG’s defense lawyers, acting at the behest of federal prosecutors, had deprived KPMG partners and employees of their right to counsel under the Sixth Amendment by “causing KPMG to impose limitations on the advancement of legal fees” and had “deprived the defendants of their right to substantive due process of law under the Fifth Amendment.”<sup>16</sup> As a remedy, Judge Kaplan dismissed the indictments against thirteen of the defendants.<sup>17</sup> The U.S. Court of Appeals for the Second Circuit subsequently upheld Judge Kaplan’s rulings and recognized in its analysis of the case the link between the violations of constitutional rights by defense counsel and the Holder/Thompson policies that the Department of Justice prosecutors were following.<sup>18</sup>

On the same day that the Second Circuit affirmed Judge Kaplan’s decision in the *Stein* case, the Department of Justice announced that it was effectively abandoning the Holder/Thompson waiver and deputization policies.<sup>19</sup> On August 28,

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<sup>13</sup> See Cole, *Corporate Cooperation Policy*, *supra* note 1, at 131–33 (describing the Thompson Memorandum’s conversion of the Holder Memorandum from advisory guidance to mandatory Justice Department policy).

<sup>14</sup> *Id.* at 132 (collecting authorities criticizing the Thompson Memorandum for having created a “culture of waiver” and having “required corporate [defense] counsel to do the government’s work in hopes of avoiding corporate prosecution of their clients”); see also Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1240 (2006) (asserting that “the Department of Justice has embarked on a path in which it essentially deputizes corporations to help ‘catch the crooks’”).

<sup>15</sup> See *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

<sup>16</sup> *Id.* at 360–73.

<sup>17</sup> *Id.* at 380.

<sup>18</sup> See *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (discussing in the “Background” section at the beginning of the opinion the Thompson Memorandum and its predecessor the Holder Memorandum, and emphasizing language in the Thompson Memorandum explaining that a corporation’s advancing of legal fees to employees “may be considered by the prosecutor in weighing the extent and value of a corporation’s cooperation”).

<sup>19</sup> See Jonathan D. Glater & Michael M. Grynbaum, *U.S. Lifts a Policy in Corporate Crime Cases*, N.Y. TIMES, Aug. 28, 2008, at C6 (“The shift came on the same day that a federal appeals court upheld a decision throwing out the criminal charges in a case where the tactics had been used.”); see also Davis Polk & Wardwell, *White Collar Update*, at 1 (Sept. 5, 2008), [www.davispolk.com/files/09.05.08.Filp](http://www.davispolk.com/files/09.05.08.Filp)

2008, Deputy Attorney General Mark Filip announced new “guidelines” for corporate cooperation that changed prior policy by making clear that federal prosecutors “should not ask for [corporate privilege] waivers and are directed not to do so.”<sup>20</sup> Although many commentators,<sup>21</sup> including this author,<sup>22</sup> hailed the Filip Guidelines as a positive step toward fairer administration of criminal justice in the federal system, a 2015 Department of Justice policy statement again changed the rules of engagement and placed a new emphasis on prosecution of culpable individuals in corporate crime cases.

On September 15, 2015, then-Deputy Attorney General Sally Q. Yates released a new policy guidance memorandum calling for more “individual accountability for corporate wrongdoing” in Department of Justice prosecutions.<sup>23</sup> The Yates

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.Stein.Client.Memo.pdf (“For two separate but related reasons, August 28, 2008, was an especially significant day for the Department of Justice (“DOJ”), the white collar defense bar, and the corporate community.”); Katrice Bridges Copeland, *Preserving the Corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199, 1218–33 (2010) (discussing the *Stein* case and its aftermath and noting that the Filip Guidelines were “a direct reaction” to *Stein*); Brandon L. Garrett, *The Future of Self-Incrimination: Fifth Amendment, Confessions, & Guilty Pleas: Corporate Confessions*, 30 CARDOZO L. REV. 917, 917–28 (2008) (discussing the interplay between the coercive tactics employed by federal prosecutors to pressure corporations to pressure their employees to provide statements to prosecutors or risk cutting off payment of their legal fees, the *Stein* holding, the Filip Memo’s stance on a corporation’s advancing attorney’s fees to employees, and the rights of employees under the Fifth and Sixth Amendment).

<sup>20</sup> U.S. DEP’T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, [www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf](http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf); see also Cole, *Corporate Cooperation Policy*, *supra* note 1, at 137 (describing the August 28, 2008 “Filip Guidelines” in which Deputy Attorney General Mark Filip modified the Justice Department’s corporate cooperation policy to move from a waiver-based policy to a “new focus on obtaining facts, rather than privilege waivers”). The Filip Guidelines also abandoned the policy of treating a corporation’s advancing or reimbursing the attorneys’ fees of individual officers or employees as a lack of cooperation by a corporation. See U.S. ATTORNEYS’ MANUAL § 9-28.730 (2008), 2008 WL 5999741 (“In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys’ fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action.”).

<sup>21</sup> See, e.g., Copeland, *supra* note 19, at 1228–33 (describing the Filip Guidelines and noting that they are a step away from the “culture of waiver” that the DOJ’s cooperation policies had created in earlier years and a step toward preserving attorney-client privilege).

<sup>22</sup> See Cole, *Corporate Cooperation Policy*, *supra* note 1, at 137–39 (arguing that the Filip Guidelines were a positive step toward eliminating an unnecessary focus on privilege waivers in the Holder/Thompson memoranda and suggesting that the Securities and Exchange Commission should revise its cooperation policy to eliminate staff discretion to seek corporate privilege waivers so that its corporate cooperation policy would comport with the Department of Justice policy).

<sup>23</sup> SALLY Q. YATES, U.S. DEP’T JUSTICE, MEMORANDUM ON INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING (2015), <https://www.justice.gov/dag/file/769036/download> [hereinafter YATES MEMORANDUM]. The Yates Memorandum was later incorporated into the U.S. Attorney’s Manual.

Memorandum drew a range of responses from practitioners and academic commentators that ran the gamut from “not much new here”<sup>24</sup> to “major change in Justice Department policy.”<sup>25</sup>

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See U.S. ATTORNEYS’ MANUAL § 9-28.700 (2008), 2008 WL 5999738; see also generally Douglas Jones & Christopher J. Nicholson, *The Rules Have Changed: DOJ Issues New Guidance Targeting Individuals in Corporate Investigations*, 77 ALA. LAW. 264 (2016) [hereinafter Jones, *The Rules Have Changed*] (discussing the Yates Memorandum’s focus on individual accountability and its “six key steps,” including the abandonment of the prior “partial credit policy” in favor of a policy where a corporation does not receive any cooperation credit unless it identifies all individuals involved with wrongdoing, the focus on individuals from the very beginning of the investigation, and the open and now routine communication between DOJ criminal and civil attorneys); Michael P. Kelly & Ruth E. Mandlebaum, *Are the Yates Memorandum and the Federal Judiciary’s Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899 (2016) [hereinafter Kelly & Mandlebaum, *Concerns About Over-Criminalization*] (discussing the two conflicting trends that have resulted from the Yates Memorandum—increased prosecution of individuals and the federal courts’ growing distaste with prosecutorial overreach).

<sup>24</sup> See, e.g., Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. 51, 52–53 (2015) (asserting that the Yates Memorandum’s goal of holding individual corporate agents culpable is not a significant departure from earlier DOJ policies); Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & BUS. 407, 411–17 (2016) (explaining “Why the Yates Memo is No Game Changer” and observing that “[o]verall, though, the memo represents little more than a written restatement of how the game has always been played”); Debevoise & Plimpton Client Alert, *The “Yates Memorandum”: Has DOJ Really Changed Its Approach to White Collar Criminal Investigations and Individual Prosecutions?* 3 (Sept. 15, 2015), [http://www.debevoise.com/~media/files/insights/publications/2015/09/20150915\\_the\\_yates\\_memorandum\\_has\\_doj\\_really\\_changed\\_its\\_approach\\_to\\_white\\_collar\\_criminal\\_investigations\\_and\\_individual\\_prosecutions.pdf](http://www.debevoise.com/~media/files/insights/publications/2015/09/20150915_the_yates_memorandum_has_doj_really_changed_its_approach_to_white_collar_criminal_investigations_and_individual_prosecutions.pdf) (“At first glance, the Yates Memorandum is unlikely to lead to a sea change in the pattern seen recently in criminal prosecutions of individuals in white collar prosecutions.”); Ropes & Gray Alert, *The Yates Memo: Have the Rules Really Changed?* (Mar. 29, 2016), <https://www.ropesgray.com/newsroom/alerts/2016/March/The-Yates-Memo-Have-the-Rules-Really-Changed.aspx> (“The Yates Memo is not a sea change in DOJ policy but perhaps represents a bridge farther in a long line of efforts to deter corporate crime by prosecuting culpable individuals.”).

<sup>25</sup> See, e.g., Kelly & Mandlebaum, *Concerns About Over-Criminalization*, *supra* note 23, at 899–920 (distinguishing three of the six Yates Memorandum directives which represent a significant change from DOJ policy and which have the potential to make prosecutors take a more aggressive approach to charging senior corporate executives); Alston & Bird Government & Internal Investigations Advisory, *The Yates Memo and the DOJ’s Focus on Individuals* 3 (Sept. 14, 2015), <https://www.alston.com/~media/files/insights/publications/2015/09/igovernment-internal-investigations-advisoryi-the/files/view-advisory-as-pdf/fileattachment/15148-the-yates-memo-and-the-dojs-focus-on-individ.pdf> (“The implications for this policy shift are fairly staggering for companies, not to mention executives.”); Gene Besen, *The Impact of the Yates Memo: Government Investigations Are Getting Personal* 1, <http://www.grayreed.com/portals/resource/Yates-Memo.pdf> (last visited Feb. 26, 2018) (“Memos to all federal prosecutors, issued from the Attorney General or Deputy Attorney General, signal significant policy changes. . . . [Private]

While there is support for both viewpoints, two provisions in the Yates Memorandum further complicate the already-difficult issue of multiple representation and potential conflicts of interest in corporate criminal investigations. Of the “six key steps” listed in the Yates Memorandum “that should be taken in any investigation of corporate misconduct,”<sup>26</sup> the first two are important changes from prior Justice Department policy. The first key step requires that “[t]o be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.”<sup>27</sup> This is an important change because, prior to the Yates Memorandum, a company could in some instances hope to obtain cooperation credit without “giving up” culpable individuals.<sup>28</sup> Further shifting the investigative focus toward culpability of individuals, the second key step set out in the Yates Memorandum requires that “[b]oth criminal and civil corporate investigations should focus on individuals from the inception of the investigation”—also a departure from past practice.<sup>29</sup>

Taken together, these two new requirements alone, if consistently implemented, will shift the focus of federal criminal investigations from entity liability to individual officers and employees and in so doing will add further risks to the ethical minefield that already confronts attorneys involved in investigations of entity misconduct.<sup>30</sup> Moreover, while the commentary on the Yates Memorandum

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counsel and their clients are advised to take stock of its impact and prepare accordingly for major shifts in prosecutorial strategy and priorities.”).

<sup>26</sup> YATES MEMORANDUM, *supra* note 23, at 2–3.

<sup>27</sup> *Id.*

<sup>28</sup> See Kelly & Mandlebaum, *Concerns About Over-Criminalization*, *supra* note 23, at 906–11 (describing the new “all or nothing” cooperation policy in step 1 of the Yates Memorandum as a significant change in DOJ policy); Amelia Toy Rudolph, *The Yates Memo and the Ethical and Strategic Challenges It Presents for White Collar Defense Attorneys*, 2015 WL 9183828 (Nov. 2015) (“What is different now, with the Yates Memo, is that the stakes are higher and the requirement [is] more stark. Before, the question was whether the corporation could receive ‘full’ credit for cooperation without offering up individuals. Now, the Yates Memo makes clear that a corporation will receive no credit for cooperation at all unless it discloses all information in its possession regarding culpable, or ‘involved,’ employees.”); see also Yockey, *supra* note 24, at 410 (describing the identifying culpable individuals mandate as at the core of the Yates Memorandum and quoting Deputy Attorney General Yates’s description of the mandate as a “substantial shift from prior practice”).

<sup>29</sup> YATES MEMORANDUM, *supra* note 23, at 4; see also Kelly & Mandlebaum, *Concerns About Over-Criminalization*, *supra* note 23, at 911–14 (asserting that the second step set out in the Yates Memorandum is a significant change from past DOJ practice and “could significantly change the dynamics of a typical government investigation”).

<sup>30</sup> See generally Jones, *The Rules Have Changed*, *supra* note 23, at 265–69 (discussing the focus that the Yates Memo places on individual accountability, even from the very beginning of the investigation); Kelly



has identified these heightened ethical risks, it has focused almost entirely on the risks for the defense side and has not examined the potential increased ethical risks facing prosecutors as a result of the new focus on individual culpability.<sup>31</sup> This Article seeks to provide a more holistic analysis of the range of ethical risks associated with criminal investigations of business entities by highlighting both defense counsel ethical risks and the heightened risk that prosecutorial misconduct issues will arise. The vehicle for this analysis will be the Penn State University/Jerry Sandusky child sexual abuse scandal and the “Penn State Three” prosecutions<sup>32</sup> of three senior university officials for allegedly covering up Sandusky’s crimes.

Although the Penn State Three case involves prosecutions under Pennsylvania state law, and not federal criminal prosecutions subject to the Yates Memorandum, the ethical issues presented in the case are the same issues that are likely to arise in any federal or state criminal investigation involving a business entity. Most importantly, it would be difficult to find a case that better illustrates a “worst-case scenario” for ethical miscalculations in the business entity multiple representation

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& Mandlebaum, *Concerns About Over-Criminalization*, *supra* note 23, at 899–916 (exploring the trend that has developed post Yates that involves the DOJ’s increased focus on individual accountability from the outset of the investigation); Rudolph, *supra* note 28, at 3 (“The risk that the Yates Memo moves to the front burner for counsel advising corporations in white collar investigations is the risk of conflicts between the corporation and individual employees and the need for one or more of the individuals to have separate, independent counsel.”). *But see* Yockey, *supra* note 24, at 413 (asserting that “there is arguably not much that *can* or *should* change in light of well-known practical and normative issues that affect the situation [in corporate internal investigations]”) (emphasis added).

<sup>31</sup> *See, e.g.*, Rudolph, *supra* note 28, at 3 (focusing on defense perspective); Jonathan W. Haray, Courtney Gilligan Saleski, Jeffrey D. Rotenberg & Mark A. Kasten, *DOJ Seeks to Revamp and Re-Energize Its Prosecution of Individuals: Key Takeaways*, DLA PIPER (Sept. 10, 2015), <http://pdf.dlapiper.com/pdfrederer.svc/v1/ABCpdf9/GetRenderedPdfByUrl//DOJ%20secks%20to%20revamp.pdf?url=https://www.dlapiper.com:443%2Fen%2Fus%2Finsights%2Fpublications%2F2015%2F09%2Fdoj-seeks-to-revamp%2F%3F%26pdf%3D1&attachment=false> (focusing on defense perspective); Latham & Watkins Client Alert, *DOJ Guidance Prioritizes Individuals in Criminal Corporate Enforcement Actions 1* (Sept. 15, 2015), <https://www.lw.com/thoughtLeadership/lw-yates-memo-enforcement-actions-prioritize-individuals> (focusing on defense perspective); *but see* Baker & McKenzie, *Recent U.S. Department of Justice Memorandum, “Individual Accountability for Corporate Wrongdoing,” Targeting Individuals May Result in Unintended Consequences* (Sept. 2015), [http://f.datasrvr.com/fr1/415/81176/bmgsmnt502Design\\_TeamCSB41996InputClient\\_Alert\\_-\\_DOJ\\_Memo\\_on\\_Corporate\\_Accountability\\_9-19\\_.pdf](http://f.datasrvr.com/fr1/415/81176/bmgsmnt502Design_TeamCSB41996InputClient_Alert_-_DOJ_Memo_on_Corporate_Accountability_9-19_.pdf) (focusing on prosecution considerations); Skadden, Arps, Slate, Meagher & Flom, *DOJ Issues Guidance to Prosecutors to Facilitate Individual Prosecution in Corporate Investigations 1* (Sept. 15, 2015), <https://www.skadden.com/insights/departments-of-justice-issues-guidance-to-prosecutors-to-facilitate-individual-prosecutions> (focusing on prosecutorial considerations).

<sup>32</sup> *See* Commonwealth v. Curley, 131 A.3d 994 (Pa. Super. Ct. 2016); Commonwealth v. Schultz, 133 A.3d 294 (Pa. Super. Ct. 2016); Commonwealth v. Spanier, 132 A.3d 481 (Pa. Super. Ct. 2016).

context. This was a “multiple representation meltdown” that raised a host of serious questions concerning the conduct, competence, and professional ethics of both the entity’s defense counsel and the state’s lead prosecutors, and that ultimately resulted in the dismissal of some of the most serious charges in the state’s criminal case.

## II. THE “PENN STATE THREE” CASE

### A. *Background and Initial Criminal Charges*

Although it is too early to know the impact of the Yates Memorandum, or to what extent the Trump administration will alter longstanding Justice Department policies on corporate prosecutions, it is clear that the policies set out in the Yates Memorandum increase the professional ethics risks arising out of multiple representations of business entities and individuals associated with those entities in criminal investigations.<sup>33</sup> While one might ask “How bad can it be?” if a mistake is made in the multiple representation context, the answer—if the Penn State Three case is any indicator—is “Very bad, indeed!” As a cautionary tale for both defense counsel and prosecutors, the Penn State Three case merits careful study. Moreover, as discussed in more detail below, the Penn State Three case presents a compelling argument for reform of both state grand jury practice rules and legal ethics requirements to minimize the risks of professional misconduct, whether inadvertent or calculated, by both defense counsel and prosecutors. Before examining the policy issues presented by the case, an analysis of its procedural history and the complex legal issues it presented is necessary.

In November 2011, a legal and public relations bombshell landed on Pennsylvania State University when press reports revealed that a special state

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<sup>33</sup> The Trump administration appears to be shifting Justice Department priorities from corporate crime to other kinds of prosecutions, such as violent crime and immigration offenses. See Peter J. Henning, *White Collar Watch: When Money Gets in the Way of Corporate Ethics*, N.Y. TIMES (Apr. 17, 2017), <https://www.nytimes.com/2017/04/17/business/dealbook/when-money-gets-in-the-way-of-corporate-ethics.html> (discussing changes in the Trump Justice Department prosecution priorities and referencing internal Justice Department memoranda by Attorney General Jeff Sessions directing federal prosecutors to focus more on combatting violent crime and immigration offenses). The Trump administration may also focus more on prosecuting responsible corporate officers and employees, rather than corporations, on the theory that fines and other monetary sanctions imposed on corporations punish innocent shareholders more than culpable corporate officials. *Id.* (discussing statements by Securities and Exchange Commission Chairman Jay Clayton questioning “whether companies should face large fines when shareholders ultimately pay the price for corporate penalties”). The latter would likely exacerbate the ethical issues that are the subject of this article, and while the former might marginally reduce the number of federal corporate criminal cases, the ethical issues that are the subject of this article will remain.

investigating grand jury<sup>34</sup> was recommending criminal charges against a respected former Penn State football coach, Jerry Sandusky.<sup>35</sup> Sandusky was indicted on November 4, 2011, and he was charged with multiple counts of involuntary deviate sexual intercourse, indecent assault, corruption of minors, unlawful contact with minors, endangering the welfare of minors, aggravated indecent assault, and attempt to commit indecent assault.<sup>36</sup> On the same day, two senior Penn State administrators, Athletic Director Timothy M. Curley and Senior Vice President Gary C. Schultz, were also charged with criminal offenses relating to the Sandusky investigation.<sup>37</sup> Curley and Schultz were initially charged with failing to report suspected child abuse

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<sup>34</sup> For a history of grand juries and an analysis of grand jury law and practice in Pennsylvania, see Brian Gallini, *Bringing Down a Legend: How an "Independent" Grand Jury Ended Joe Paterno's Career*, 80 TENN. L. REV. 705, 735–49 (2013); see also Schultz, 133 A.3d at 314–15 (describing “The Grand Jury in Pennsylvania and the Advent of the Statutory Right to Grand Jury Counsel”).

<sup>35</sup> See Sara Ganim, *Charges Against Former Penn State Coach Jerry Sandusky Removed from Court Website, But You Can Read Them Here*, PENN LIVE (Nov. 4, 2011), [http://www.pennlive.com/midstate/index.ssf/2011/11/charges\\_against\\_sandusky\\_remov.html](http://www.pennlive.com/midstate/index.ssf/2011/11/charges_against_sandusky_remov.html) (reporting that a state court website had posted a document describing the charges, then removed it); Sara Ganim, *Former Penn State Coach Jerry Sandusky Indicted on Felony Charges of Sex Crimes Against Minors*, PENN LIVE (Nov. 4, 2011), [http://www.pennlive.com/midstate/index.ssf/2011/11/former\\_penn\\_state\\_coach\\_jerry.html](http://www.pennlive.com/midstate/index.ssf/2011/11/former_penn_state_coach_jerry.html); see also Police Criminal Complaint, Exhibit A at 24, Commonwealth v. Sandusky (No. CR-636-11) (Centre County Nov. 4, 2011), <http://co.centre.pa.us/centreco/media/upload/SANDUSKY%20CRIMINAL%20COMPLAINT%202422%20OF%202011.pdf> [hereinafter Police Criminal Complaint Exhibit A]; Schultz, 133 A.3d at 300. Harrisburg Patriot-News reporter Sara Ganim had previously reported, in March 2011, that Sandusky was the subject of a grand jury investigation. See Sarah Ganim, *Jerry Sandusky, Former Penn State Football Staffer, Subject of Grand Jury Investigation*, PENN LIVE (Mar. 31, 2011), [http://www.pennlive.com/midstate/index.ssf/2011/03/jerry\\_sandusky\\_former\\_penn\\_sta.html](http://www.pennlive.com/midstate/index.ssf/2011/03/jerry_sandusky_former_penn_sta.html). Ganim was awarded the 2012 Pulitzer Prize for local reporting for her work on the Sandusky scandal. See Sara Ganim and Members of The Patriot-News Staff, *Harrisburg, PA*, PULITZER PRIZES, <http://www.pulitzer.org/winners/sara-ganim-and-members-patriot-news-staff>; Amy Chozick, *2 Pulitzers for Times; Huffington Post and Politico Win*, N.Y. TIMES (Apr. 16, 2012), <http://www.nytimes.com/2012/04/17/business/media/2012-pulitzer-prize-winners-announced.html>.

<sup>36</sup> Thirty-Third Statewide Investigating Grand Jury Presentment at 24, *In re Thirty-Third Statewide Investigating Grand Jury*, No. CP-22-CR-5164-2011 (Dauphin Cty. Ct. Com. Pl. Apr. 9, 2013), <http://co.centre.pa.us/centreco/media/upload/SANDUSKY%20CRIMINAL%20COMPLAINT%202422%20OF%202011.pdf> [hereinafter Presentment]; Police Criminal Complaint Exhibit A, *supra* note 35, at 24; 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), <https://assets.documentcloud.org/documents/396512/report-final-071212.pdf> [hereinafter Freeh Report].

<sup>37</sup> See Schultz, 133 A.3d at 300–01; Commonwealth v. Curley, 131 A.3d 994, 994–96 (Pa. Super. Ct. 2016); Police Criminal Complaint Exhibit A, *supra* note 35, at 24. See also Sara Ganim, *Penn State Officials Conspired to Protect Themselves and Jerry Sandusky*, *AG Says*, PENN LIVE (Nov. 1, 2012), [http://www.pennlive.com/midstate/index.ssf/2012/11/ag\\_sandusky\\_coverup\\_was\\_not\\_a.html](http://www.pennlive.com/midstate/index.ssf/2012/11/ag_sandusky_coverup_was_not_a.html).

and committing perjury in their grand jury testimony during the Sandusky investigation.<sup>38</sup>

The decision by the Pennsylvania Attorney General's Office to bring criminal charges against two of Penn State University's most senior officials was remarkable, but the response of then-University President Graham B. Spanier to the charges against Curley and Schultz was perhaps even more remarkable, and it foreshadowed the far-greater turmoil that was yet to come for the University.<sup>39</sup> In a move that an

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<sup>38</sup> See *Information, Commonwealth v. Curley* (Jan. 19, 2012) (No. CP-22-CR-5165-2011), <http://www.dauphincounty.org/government/Court-Departments/CurleySchultz/Curley-AG-Information-Jan-19-2012.pdf>; *Information, Commonwealth v. Schultz* (Jan. 19, 2012) (No. CP-22-CR-5164-2011), <http://www.dauphincounty.org/government/Court-Departments/CurleySchultz/Schultz-AG-Information-Jan-19-2012.pdf>. Subsequently, as discussed below, they and former Penn State University President Graham Spanier were charged with conspiracy and obstruction of justice, in addition to the initial perjury and failure to report charges. See *infra* Section II.B.

<sup>39</sup> At the time of this writing, the most detailed and comprehensive report on the Sandusky/Penn State scandal is the 267-page (with exhibits) July 12, 2012, "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" authored by former Federal Bureau of Investigation Director Louis J. Freeh and the law firm Freeh, Sporkin & Sullivan. Freeh Report, *supra* note 36, at 1. It should be noted, however, that the Freeh Report has been very controversial and has been vigorously challenged by Penn State supporters for having unfairly blamed both Penn State University and former Penn State football coach Joe Paterno for Sandusky's misconduct. See, e.g., Ken Belson, *Paterno Family Challenges Accusation of Cover-Up*, N.Y. TIMES (Feb. 10, 2013), <http://www.nytimes.com/2013/02/11/sports/naafootball/paterno-family-challenges-accusation-of-cover-up.html>; Cindy Boren, *Nike's Phil Knight Reverses Stance on Joe Paterno After Family's Report is Released*, WASH. POST (Feb. 11, 2013), [https://www.washingtonpost.com/news/early-lead/wp/2013/02/11/nikes-phil-knight-reverses-stance-on-joe-paterno-after-familys-report-is-released/?utm\\_term=.ce323e5bac3e](https://www.washingtonpost.com/news/early-lead/wp/2013/02/11/nikes-phil-knight-reverses-stance-on-joe-paterno-after-familys-report-is-released/?utm_term=.ce323e5bac3e); Mike Dawson, *State Sen. John Yudichak Questions Freeh Report, Urges Penn State to Challenge Sanctions*, CENTRE DAILY TIMES (Mar. 5, 2013) (reporting "the growing chorus of university and elected officials speaking out in defense of Penn State and against the Freeh report"); Sara Ganim, *Penn State Alumni Group Releases Analysis Critical of Freeh Report*, PENN LIVE (Sept. 13, 2012), [http://www.pennlive.com/midstate/index.ssf/2012/09/penn\\_state\\_alumni\\_group\\_releas.html](http://www.pennlive.com/midstate/index.ssf/2012/09/penn_state_alumni_group_releas.html); Sara Ganim, *Analysis: FBI Director Louis Freeh, State's Results Differ Greatly. Why?*, PENN LIVE (Jan. 17, 2013), [http://www.pennlive.com/midstate/index.ssf/2012/07/analysis\\_fbi\\_director\\_louis\\_fr.html](http://www.pennlive.com/midstate/index.ssf/2012/07/analysis_fbi_director_louis_fr.html); Don Van Natta Jr., *Measured, But No Less Damning*, ESPN (Feb. 10, 2013), [http://www.espn.com/espn/otl/story/\\_id/8932633/report-family-former-penn-state-coach-joe-paterno-strong-freeh-report](http://www.espn.com/espn/otl/story/_id/8932633/report-family-former-penn-state-coach-joe-paterno-strong-freeh-report). In 2015, current Penn State President Eric Barron told the Associated Press that he believed the Freeh Report was "not useful to make decisions" and he was "not a fan of the report" because it took a prosecutorial approach and created an "absurd" and "unwarranted" picture of students, faculty, and others associated with the University. Mark Scolforo, *Penn State President: Freeh Acted Like a Prosecutor*, U.S. NEWS & WORLD REP. (Jan. 28, 2015), <http://www.usnews.com/news/sports/articles/2015/01/28/penn-state-president-criticizes-freeh-report-naa-penalties>. In March 2017, after a jury convicted Spanier of child endangerment, Freeh issued a press statement asserting that the trial evidence confirmed all of the Freeh Report's investigative findings and that Barron should resign. See Charles Thompson, *Louis Freeh, a voice long silent, erupts after former Penn State President Graham Spanier's conviction*, PENN LIVE (Mar. 24, 2017), [http://www.pennlive.com/news/2017/03/louis\\_freeh\\_a\\_voice\\_long\\_silen.html](http://www.pennlive.com/news/2017/03/louis_freeh_a_voice_long_silen.html). Although this article cites the Freeh Report for

experienced criminal defense lawyer almost certainly would have emphatically vetoed, Spanier issued a public statement expressing “unconditional support” for Curley and Schultz, as well as “complete confidence” that they had acted appropriately.<sup>40</sup> Spanier went on to state that he was “confident the record will show these charges are groundless and that they conducted themselves professionally and appropriately.”<sup>41</sup>

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objectively verifiable information, such as the contents of documents and email communications, it takes no position on the analysis and conclusions contained in the report.

<sup>40</sup> The text of Spanier’s initial November 5, 2011 statement was:

The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance. With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee. Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately

Graham Spanier, Penn State, *Statement from President Spanier*, PENN STATE NEWS (Nov. 5, 2011), <http://news.psu.edu/story/153819/2011/11/05/statement-president-spanier> [hereinafter *Statement from President Spanier*].

<sup>41</sup> *Statement from President Spanier*, *supra* note 40, at 1. Spanier’s statement in support of Schultz and Curley has had significant negative financial repercussions for the University. In October 2016, a jury awarded former Penn State assistant football coach Mike McQueary \$7.3 million in damages in a defamation case based in part on Spanier’s public statement of support for Schultz and Curley. See Marc Tracy, *Mike McQueary Is Awarded \$7.3 Million in Penn State Defamation Case*, N.Y. TIMES (Oct. 27, 2016), [http://www.nytimes.com/2016/10/28/sports/ncaaf/mike-mcqueary-penn-state-verdict.html?\\_r=0](http://www.nytimes.com/2016/10/28/sports/ncaaf/mike-mcqueary-penn-state-verdict.html?_r=0); see also Verdict Slip, *McQueary vs. Pa. State Univ.* (2016) (No. 2012-1804) (awarding \$1,150,000 compensatory damages for defamation, \$1,150,000 for compensatory damages misrepresentation, and \$5,000,000 punitive damages for misrepresentation), <http://co.centre.pa.us/centrecoco/media/upload/MCQUEARY%20VERDICT%20SLIP.pdf>. McQueary alleged that he was terminated after he told investigators from the Pennsylvania Attorney General’s Office that in 2001 he had reported an incident of child abuse by Sandusky to then-head football coach Joe Paterno, who then reported the matter to Curley and Schultz. See Complaint at 4–8, 13, *McQueary vs. Pa. State Univ.* (Oct. 1, 2012) (No. 2012-1804), <http://co.centre.pa.us/centrecoco/media/upload/MCQUEARY%20VS%20THE%20PENNSYLVANIA%20STATE%20UNIVERSITY%20COMPLAINT.pdf>. In the same case, the trial judge subsequently awarded McQueary an additional (approximately) \$5 million on his state law whistleblower claim against Penn State. See Order, *McQueary vs. Pa. State Univ.* (Nov. 30, 2016) (No. 2012-1804) (awarding \$3,974,048 for past/future economic loss and \$1,000,000 for past/future non-economic loss), <http://co.centre.pa.us/centrecoco/media/upload/MCQUEARY%20ORDER%20FILED%20NOVEMBER%2030%202016.pdf>.

The Penn State Board of Trustees met on Sunday evening, November 6, 2011.<sup>42</sup> After the meeting, Spanier issued a press release stating that Curley and Schultz had asked to be placed on administrative leave so that they could defend themselves against the criminal charges.<sup>43</sup> According to an investigative report prepared by former Federal Bureau of Investigation Director Louis Freeh for the Penn State Board of Trustees, “several Trustees described the second press release as a ‘turning point’ for Spanier” because the Board itself had decided that Curley and Schultz should be suspended, and the Board was displeased with the wording of Spanier’s press release.<sup>44</sup> The Board of Trustees met again by conference call on November 8<sup>45</sup>

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<sup>42</sup> Sara Ganim & Jan Murphy, *Inside Penn State Board of Trustees, Battle Brews Over Sex Scandal*, PENN LIVE (Nov. 9, 2011), [http://www.pennlive.com/midstate/index.ssf/2011/11/jerry\\_sandusky\\_penn\\_state\\_trus.html](http://www.pennlive.com/midstate/index.ssf/2011/11/jerry_sandusky_penn_state_trus.html). The only official record of a November 2011 meeting is the November 11, 2011 meeting. See Board of Trustees, *Minutes of Meeting*, vol. 259, at 1, Penn State Office of the Board of Trustees (Nov. 11, 2011), <https://trustees.psu.edu/pdf/november2011minutesbot.pdf>. The Board of Trustees did not allow public access to the minutes of other meetings in November 2011. See Editorial Board, *Opinion, Transparency to Public Vital for Board of Trustees*, DAILY COLLEGIAN (Oct. 31, 2016), [http://www.collegian.psu.edu/opinion/editorials/article\\_117d2262-9efc-11e6-9c62-47129c2178d2.html](http://www.collegian.psu.edu/opinion/editorials/article_117d2262-9efc-11e6-9c62-47129c2178d2.html).

<sup>43</sup> See Penn State, *Trustees Announce 2 Officials to Step Down While Case is Investigated*, PENN STATE NEWS (Nov. 7, 2011), <http://news.psu.edu/story/153816/2011/11/07/trustees-announce-2-officials-step-down-while-case-investigated>.

<sup>44</sup> See Freeh Report, *supra* note 36, at 93. The Freeh Report is discussed in more detail in *supra* note 39 and *infra* Section II.B.1. For information about the report and the considerable controversy it has generated, see *infra* note 52.

<sup>45</sup> Freeh Report, *supra* note 36, at 93–94. During the conference call meeting then-Chair of the Board of Trustees Steve Garban, who had previously worked for Spanier as Penn State’s treasurer and senior vice president for finance and operations, stepped down as Chair and was replaced by Vice Chair John Surma. See Freeh Report, *supra* note 36, at 94. Garban subsequently resigned from the Penn State Board of Trustees on July 19, 2012, after the Freeh Report stated that Garban had been told by Spanier in April 2011 about the grand jury investigation of Sandusky but failed to share that information with all the other members of the board. See Letter From Steve Garban to Karen Pectz (July 19, 2012), <https://trustees.psu.edu/pdf/garbancommunication.pdf>; Letter from Karen Pectz to Steve Garban (July 19, 2012), <https://trustees.psu.edu/pdf/garbancommunication.pdf>. See also The Associated Press, *Under Fire, Trustee Resigns at Penn State*, N.Y. TIMES (July 19, 2012), <https://mobile.nytimes.com/2012/07/20/sports/ncaafotball/penn-state-trustee-steve-garban-resigns.html>.

and in person on the evening of November 9.<sup>46</sup> At the November 9 meeting, the Board decided to terminate Spanier without cause.<sup>47</sup>

At the same meeting, the Board decided to terminate Penn State head football coach Joe Paterno.<sup>48</sup> The Board named Executive Vice President and Provost Rodney Erickson as Interim President of the University.<sup>49</sup>

## B. *The Freeh Report Leads to Additional Criminal Charges*

### 1. Background and Initial Criminal Charges

On November 21, 2011, the University Board of Trustees retained former Federal Bureau of Investigation Director Louis Freeh to investigate the University's handling of the Sandusky matter.<sup>50</sup> Freeh's report was released on July 12, 2012.<sup>51</sup>

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<sup>46</sup> Freeh Report, *supra* note 36, at 94. See also Sarah Ganim & Jeff Frantz, *President Graham Spanier Ousted by Penn State Trustees*, PENN LIVE (Nov. 10, 2011), [http://www.pennlive.com/midstate/index.ssf/2011/11/president\\_graham\\_spanier\\_also.html](http://www.pennlive.com/midstate/index.ssf/2011/11/president_graham_spanier_also.html); Penn State, *Report of the Board of Trustees concerning Nov. 9 decisions*, PENN STATE NEWS (Mar. 12, 2012), <http://news.psu.edu/story/150954/2012/03/12/report-board-trustees-concerning-nov-9-decisions> [hereinafter *Report of the Board of Education*].

<sup>47</sup> *Report of the Board of Trustees*, *supra* note 46, at 1; Minutes of Meeting, *supra* note 42, at 6. See also Ganim & Frantz, *supra* note 46, at 1.

<sup>48</sup> *Report of the Board of Trustees concerning Nov. 9 decisions*, PENN ST. NEWS (Mar. 12, 2012), <http://news.psu.edu/story/150954/2012/03/12/report-board-trustees-concerning-nov-9-decisions>. See Dave Sheinin, *Joe Paterno Fired as Football Coach at Penn State*, WASH. POST (Nov. 9, 2011), [https://www.washingtonpost.com/sports/colleges/joe-paterno-will-retain-at-end-of-penn-state-football-season/2011/11/09/g1QAQbkb6M\\_story.html?utm\\_term=.494cc9ffc8b7](https://www.washingtonpost.com/sports/colleges/joe-paterno-will-retain-at-end-of-penn-state-football-season/2011/11/09/g1QAQbkb6M_story.html?utm_term=.494cc9ffc8b7). Paterno's termination remains a subject of controversy and contention among Penn State supporters and detractors. See, e.g., Wallace McKelvey, *Five years after Joe Paterno's firing, Penn State trustee continues to rail against decision*, PENN LIVE (Nov. 4, 2016), [http://www.pennlive.com/news/2016/11/five\\_years\\_after\\_joe\\_pateros.html](http://www.pennlive.com/news/2016/11/five_years_after_joe_pateros.html); see also Rodney Erickson, *A message from Rodney Erickson*, PENN ST. NEWS (Nov. 10, 2011), <http://news.psu.edu/story/153734/2011/11/10/message-rodney-erickson>; Patriot-News, *Penn State interim president Rodney Erickson: 'This is a terrible tragedy for everyone involved'*, PENN LIVE (Nov. 10, 2011), [http://www.pennlive.com/midstate/index.ssf/2011/11/penn\\_state\\_interim\\_president\\_r.html](http://www.pennlive.com/midstate/index.ssf/2011/11/penn_state_interim_president_r.html); Freeh Report, *supra* note 36, at 8; David Jones, *Penn State's Firing of Graham Spanier, Joe Paterno the First Step Toward Cleansing*, PENN LIVE (Nov. 11, 2011), [http://blog.pennlive.com/davidjones/2011/11/penn\\_state\\_board\\_of\\_trustees\\_d.html](http://blog.pennlive.com/davidjones/2011/11/penn_state_board_of_trustees_d.html). The Board's decision to terminate Paterno has proved to be one of the most controversial actions in the entire Sandusky debacle, in part because of the manner in which Paterno was terminated—by a telephone call with no advance notice. See generally Will Hobson, *Six Years Later, Penn State Remains Torn Over the Sandusky Scandal*, WASH. POST, Dec. 28, 2017 (describing ongoing controversy over Paterno's termination).

<sup>49</sup> Erickson, *supra* note 48; see also Patriot-News, *supra* note 48.

<sup>50</sup> See Freeh Report, *supra* note 36, at 8.

<sup>51</sup> See Freeh Report, *supra* note 36, at i.

The report was unsparingly critical of the conduct of Spanier, Schultz, and Curley, and evidence discovered in the Freeh investigation led to criminal charges against Spanier and additional criminal charges against Schultz and Curley.<sup>52</sup> Recounting or even summarizing the entirety of the 267-page (with exhibits) Freeh Report is not feasible in an article of this length, so the focus of this discussion of the Freeh Report will be the matters that are most relevant to the multiple representation issues that are the subject of this Article.

For purposes of this Article, the most important findings of the Freeh investigation were emails and documentary evidence that provided additional information about the roles of Spanier, Schultz, and Curley in the Sandusky scandal.<sup>53</sup> Freeh's investigative team recovered documents and emails, previously undisclosed and not produced to the Sandusky investigating grand jury during its investigation, that the Freeh Report concluded were evidence of a cover-up of Sandusky's criminal actions.<sup>54</sup> Of particular importance was an email exchange among Spanier, Schultz, and Curley that took place in early 2001 after then Penn State athletic graduate assistant, Mike McQueary, witnessed Sandusky sexually assaulting a boy in the shower room of Penn State's Lasch Building athletic facility on the evening of Friday February 9, 2001.<sup>55</sup>

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<sup>52</sup> The Freeh Report also discussed the conduct of Penn State's long-serving head football coach Joe Paterno. Paterno was not charged with any criminal offenses, and he died of lung cancer on January 22, 2012, before the completion of the Freeh Report. *See generally* Will Hobson, *Six Years Later, Penn State Remains Torn Over the Sandusky Scandal*, WASH. POST, Dec. 28, 2017 (noting that Paterno was not charged and "Freeh did not interview Paterno, who had died that January [2012]"). Paterno's role in the Sandusky case remains a controversial and divisive issue, within the Penn State community and in general. *See generally* DICK THORNBURGH, REVIEW OF THE FREEH REPORT CONCERNING JOSEPH PATERNO (2013), [http://paterno.com/Resources/Docs/THORNBURGH\\_FINAL\\_REPORT\\_2-7-2013.pdf](http://paterno.com/Resources/Docs/THORNBURGH_FINAL_REPORT_2-7-2013.pdf) (criticizing the Freeh Report treatment of Paterno). In light of the fact that Paterno is deceased and was not charged with any crimes, this Article does not analyze Paterno's involvement in the events surrounding the Sandusky case.

<sup>53</sup> *See* Freeh Report, *supra* note 36, at 16, 50–76.

<sup>54</sup> *Id.* at 75.

<sup>55</sup> The 2011 Sandusky grand jury Presentment report states that McQueary told the grand jury that he saw a naked boy, whose age he estimated to be ten years old, being subjected to anal intercourse by a naked Sandusky. Presentment of Statewide Grand Jury at 6–7, *Commonwealth v. Sandusky* (Nov. 4, 2011) (No. 49-2-01), <http://co.centre.pa.us/centreco/media/upload/SANDUSKY%20CRIMINAL%20COMPLAINT%202422%20OF%202011.pdf> [hereinafter Presentment 2011]; *see also* Freeh Report, *supra* note 36, at 66–68; *Commonwealth v. Spanier*, 132 A.3d 481, 483 (Pa. Super. Ct. 2016); *Commonwealth v. Schultz*, 133 A.3d at 300–01 (Pa. Super. Ct. 2016); *Commonwealth v. Curley*, 131 A.3d 994, 996 (Pa. Super Ct. 2016). On June 22, 2012, Sandusky was convicted of indecent assault, unlawful contact with minors, corruption of minors, and endangering the welfare of children in connection with this incident; he was acquitted of one count of involuntary deviate sexual intercourse in connection with this incident. Verdict



After talking later that night with his father and a family friend who was also a medical doctor in addition to his father's supervisor, McQueary reported the incident to Paterno the next morning, a Saturday.<sup>56</sup> Paterno called Curley, who was Penn State's Athletic Director, the following day, a Sunday, and Curley and Schultz met that day with Paterno at Paterno's home, where the three discussed the incident.<sup>57</sup> Curley and Schultz then met with McQueary about a week and a half later.<sup>58</sup> McQueary testified that he told Curley and Schultz that the contact he had observed between Sandusky and the boy in the showers was "extremely sexual" and he "thought some kind of intercourse was going on."<sup>59</sup>

In their grand jury testimony Curley and Schultz described the meeting differently. Curley testified to the grand jury that he recalled that McQueary reported people "horsing around" in the shower, and that there was "inappropriate conduct"

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Slip, *Commonwealth v. Sandusky*, No. CP-14-CR-2421-2011 (Centre Cnty. Ct. Com. Pl. June 22, 2012), <http://co.centre.pa.us/centreco/media/upload/SANDUSKY%20VERDICT%20SLIP%20FOR%202421%20of%202011.pdf>; Verdict Slip, *Commonwealth v. Sandusky*, No. CP-14-CR-2422-2011 (Centre Cnty. Ct. Com. Pl. June 22, 2012), <http://co.centre.pa.us/centreco/media/upload/SANDUSKY%20VERDICT%20SLIP%20FOR%202422%20of%202011.pdf>; see also Patriot-News, *Jerry Sandusky Verdict: Complete Breakdown of Charges*, PENN LIVE (June 22, 2011), [http://www.pennlive.com/midstate/index.ssf/2012/06/jerry\\_sandusky\\_verdict\\_complet.html](http://www.pennlive.com/midstate/index.ssf/2012/06/jerry_sandusky_verdict_complet.html).

<sup>56</sup> See Frech Report, *supra* note 36, at 67; *Schultz*, 133 A.3d at 301; *Curley*, 131 A.3d at 996; *Spanier*, 132 A.3d at 483; Transcript of Proceedings Preliminary Hearing, Witness Joseph Paterno at 175–76, *Commonwealth v. Curley*, *Commonwealth v. Schultz*, No. CP-22-MD-1374-2011, No. CP-MD-1375-2011 (Dauphin Cnty. Ct. Com. Pl. Dec. 16, 2011), [http://media.pennlive.com/midstate\\_impact/other/Curley-Schultz-Hearing-Transcript.pdf](http://media.pennlive.com/midstate_impact/other/Curley-Schultz-Hearing-Transcript.pdf) [hereinafter Paterno Preliminary Hearing Testimony December 2011] ("Well, I don't know what you would call it. Obviously, he was doing something with the youngster. It was a sexual nature. I'm not sure exactly what it was. I didn't push Mike to describe exactly what it was because he was very upset. Obviously, I was in a little bit of a dilemma since Mr. Sandusky was not working for me anymore. So I told—I didn't go any further than that except I knew Mike was upset and I knew some kind of inappropriate action was being taken by Jerry Sandusky with a youngster.").

<sup>57</sup> Presentment 2011, *supra* note 55, at 7.

<sup>58</sup> Transcript of Proceedings Preliminary Hearing, Witness Michael McQueary at 30–31, *Commonwealth v. Curley*, *Commonwealth v. Schultz*, No. CP-22-MD-1374-2011, No. CP-MD-1375-2011 (Dauphin Cnty. Ct. Com. Pl. Dec. 16, 2011), [http://media.pennlive.com/midstate\\_impact/other/Curley-Schultz-Hearing-Transcript.pdf](http://media.pennlive.com/midstate_impact/other/Curley-Schultz-Hearing-Transcript.pdf) [hereinafter McQueary Preliminary Hearing Testimony December 2011]; Presentment 2011, *supra* note 55, at 7 (testifying that the meeting occurred "nine or ten days" after he reported to Paterno and that the meeting took place at the Bryce Jordan Center on Penn State's campus); see also Frech Report, *supra* note 36, at 72.

<sup>59</sup> McQueary Preliminary Hearing Testimony December 2011, *supra* note 58, at 34 ("[B]ut I would have described that it was extremely sexual and that I thought that some kind of intercourse was going on."); Frech Report, *supra* note 36, at 72.

that made McQueary “uncomfortable.”<sup>60</sup> According to the grand jury Presentment report, “When asked whether [McQueary] had reported ‘sexual conduct’ ‘of any kind’ by Sandusky, Curley answered, ‘No’ twice.”<sup>61</sup>

Schultz testified that he was “very unsure about” what McQueary told him and Curley about the shower incident.<sup>62</sup> Schultz testified that “he had the impression that Sandusky might have inappropriately grabbed the boy’s genitals while wrestling and agreed that such was inappropriate sexual conduct between a man and a boy.”<sup>63</sup> While Schultz conceded that McQueary had reported inappropriate sexual conduct, he testified that the allegations “were not that serious” and that he and Curley “had no indication that a crime had occurred.”<sup>64</sup>

In its November 2011 Presentment report, the investigating grand jury stated that it found McQueary’s grand jury testimony to be “extremely credible.”<sup>65</sup> After recounting the testimony of Curley and Schultz, the Presentment report states that the grand jury found that “portions of the testimony of Tim Curley and Gary Schultz are not credible.”<sup>66</sup> As noted above, on November 4, 2011, the Pennsylvania Office of the Attorney General charged Curley and Schultz with perjury and failing to report suspected child abuse.<sup>67</sup>

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<sup>60</sup> Presentment 2011, *supra* note 55, at 8. *See also* Freeh Report, *supra* note 36, at 72.

<sup>61</sup> Presentment 2011, *supra* note 55, at 8.

<sup>62</sup> Presentment 2011, *supra* note 55, at 9. *See also* Freeh Report, *supra* note 36, at 72.

<sup>63</sup> Presentment 2011, *supra* note 55, at 9.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 11.

<sup>67</sup> *See id.* at 12. On March 13, 2017, Curley and Schultz each pleaded guilty to one count of Endangering Welfare of Children, a misdemeanor of the first degree. *See* Guilty Plea Agreement, Commonwealth v. Schultz, No. CP-22-CR-0003616-2013 (Dauphin Cnty. Ct. Com. Pl. Mar. 13, 2017), <http://www.dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Documents/3-13-17%20Amended%20Criminal%20Information%20and%20Guilty%20Plea%20-%20Schultz.pdf>; Guilty Plea Agreement, Commonwealth v. Curley, No. CP-22-CR-0003614-2013 (Dauphin Cnty. Ct. Com. Pl. Mar. 13, 2017), <http://www.dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Documents/3-13-17%20Amended%20Criminal%20Information%20and%20Guilty%20Plea%20-%20Curley.pdf>. The perjury charge, as well as subsequently brought conspiracy and obstruction of justice charges discussed below were dismissed on January 22, 2016 after the Pennsylvania Superior Court ruled that Curley and Schultz’s right to counsel in their grand jury testimony had been violated when Baldwin represented them in her capacity as Penn State’s in-house General Counsel. *See Schultz*, 133 A.3d at 328; *Curley*, 131 A.3d at 1007.

## 2. The Freeh Investigation Yields Additional Evidence

The Freeh investigation yielded two important caches of contemporaneous evidence concerning Spanier, Schultz, and Curley. In May of 2012, Freeh's investigators obtained a file of Schultz's handwritten notes marked "confidential" that his assistant had removed from his office after he was charged with perjury and failure to report suspected child abuse in November 2011.<sup>68</sup> The file contained notes indicating that Schultz and Curley met on February 12, 2001, prior to their meeting with McQueary and after their Sunday meeting with Paterno, to discuss the Sandusky matter.<sup>69</sup> Spanier told Freeh's investigators that he met with Schultz and Curley on February 12, 2001, and they gave him a "heads up" about a "unique" situation that had arisen concerning Sandusky showering with a child in a Penn State athletic facility.<sup>70</sup> Spanier said there was no mention of anything abusive or sexual about the situation, and that he understood that Sandusky and the child were "horsing around" or "engaged in horseplay" in the shower.<sup>71</sup>

Freeh's investigators also retrieved Penn State email correspondence among Spanier, Schultz, and Curley that had not previously been disclosed or produced to

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<sup>68</sup> Freeh Report, *supra* note 36, at 69–70.

<sup>69</sup> *Id.* at 70.

<sup>70</sup> *Id.* Freeh Report also discusses evidence showing that by February 12, 2001, after their Sunday, February 11, 2001, meeting with Paterno but before they had met with McQueary, Schultz and Curley had given Spanier a "heads up" about the Sandusky matter and taken several other steps, including: reviewing a prior 1998 incident involving Sandusky showering with a child that was investigated by law enforcement authorities, discussed at 39–47 of the Freeh Report; contacting the chief of Penn State's University Police Department to ask whether a police file of the 1998 matter still existed (he emailed Schultz at 9:56 p.m. on February 12 responding that the file was in the department's archives); contacted Penn State's outside legal counsel, Wendell Courtney, Esq., to discuss "reporting of suspected child abuse;" discussed approaching Sandusky to see if he "confesses to having a problem;" and discussed reporting Sandusky to the board of the Second Mile charity for at risk children that Sandusky had founded. *See id.* at 71.

<sup>71</sup> *Id.* at 70. Paterno testified to the Grand Jury on December 16, 2011 that he told Curley via telephone about the Saturday discussion with McQueary. *See* Paterno Preliminary Hearing Testimony December 2011, *supra* note 55, at 177–78 ("I ordinarily would have called people right away, but it was a Saturday morning and I didn't want to interfere with their weekends. So I don't know whether I did it Saturday or did it early the next week. I'm not sure when, but I did it within the week . . . I talked to my immediate boss . . . Tim Curley . . . I believe I did it by phone. As I recall, I called him and I said, hey, we got a problem, and I explained the problem to him."). Curley testified that Paterno had Schultz and Curley over to his house on Sunday, February 11, 2001 to discuss the incident. *See* Freeh Report, *supra* note 36, at 68. Schultz testified that this meeting to discuss the shower incident occurred either at Schultz's office or Paterno's house. *See id.*

the Sandusky grand jury in response to its subpoenas to Penn State.<sup>72</sup> One of those emails was a Thursday, February 22, 2001 email that Schultz sent to Spanier and Curley stating that the three would meet “at 2:00 p.m. on Sunday in Tim’s office.”<sup>73</sup> Schultz’s confidential file of handwritten notes contained notes of a meeting on February 25, 2001.<sup>74</sup> Schultz’s notes are dated but do not indicate who attended the meeting.<sup>75</sup> Spanier’s hardcopy calendar indicates a 2:00 p.m. meeting on February 25, 2001 in “TMC office”<sup>76</sup> (presumably TMC refers to Timothy M. Curley). Schultz’s notes of the February 25 meeting state “(3) tell Chair of Board of Second Mile” (with a note asking “who’s the chair??”), “Report to Dept. of Welfare,” and “Tell J.S. to avoid bringing children alone into Lasch Building”<sup>77</sup> (presumably J.S. is Jerry Sandusky).

According to the Freeh Report, Spanier told Freeh’s investigators that the February 25 meeting was only with Curley and that Schultz was not present.<sup>78</sup> Spanier also denied that there was any mention of the Department of Welfare and said there was no suggestion of anything about abuse or sexual contact.<sup>79</sup>

Freeh’s investigators also retrieved an email exchange among Spanier, Schultz, and Curley on February 27–28, 2001.<sup>80</sup> Those emails are perhaps the most controversial evidence in the entire Freeh Report, so they are quoted in full below. At 8:10 p.m. on February 27, Curley sent Spanier and Schultz the following email message:

I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday—

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<sup>72</sup> See *id.* at 73–76.

<sup>73</sup> *Id.* at 72.

<sup>74</sup> *Id.* at 72–73.

<sup>75</sup> *Id.* at Exhibit 5E.

<sup>76</sup> *Id.* at 73.

<sup>77</sup> *Id.* at 72–73, Exhibit 5E. The next day, February 26, 2001, Schultz sent Curley an email to Curley confirming that “you’ve got the ball” on the three items listed in his notes and noting that he would be out of the office for the next two weeks. *Id.* at 73, Exhibit 5F.

<sup>78</sup> The Freeh Report does not indicate whether or not Spanier was shown Schultz’s notes of the February 25 meeting. *Id.* at 73.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 74–75.

I am uncomfortable with what we agreed were the next steps. I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received. I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help. Also, we feel a responsibility at some point soon to inform his organization and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities. I need some help on this one. What do you think about this approach?<sup>81</sup>

Spanier responded to Curley's email later that evening, at 10:18 p.m., as follows:

Tim: This approach is acceptable to me. It requires you to go a step further and means that your conversation will be all the more difficult, but I admire your willingness to do that and I am supportive. The only downside for us is if the message isn't "heard" and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.<sup>82</sup>

Schultz replied to the email exchange between Curley and Spanier on Wednesday, February 28, at 7:12 p.m., with the following message:

Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.<sup>83</sup>

The Freeh Report concludes that these emails, and in particular Spanier's statement concerning becoming "vulnerable for not having reported it," are evidence that Spanier, Schultz, and Curley decided not to report the shower incident to a law enforcement or child protection authority because they had already decided to report

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<sup>81</sup> *Id.* at 74, Exhibit 5G.

<sup>82</sup> *Id.* at 75, Exhibit 5G.

<sup>83</sup> *Id.* at 76, Exhibit 5G.

it to the Second Mile.<sup>84</sup> Spanier told Freeh's investigators that "the comment related specifically and only to [Curley's] concern about the possibility that [Sandusky] would not accept our directive and repeat the practice."<sup>85</sup> He continued, saying, "Were that the outcome of his discussion I would have worried that we did not enlist more help in effacing such a directive."<sup>86</sup> Spanier also told the Freeh investigators that his use of the word "humane" in his email response to Curley refers "specifically and only to my thought that it was humane of [Curley] to wish to inform Sandusky first and allow him to accompany [Curley] to the meeting with the president of the Second Mile." He continued, "Moreover, it would be humane to offer counseling to Sandusky if he didn't understand why this was inappropriate and unacceptable to us."<sup>87</sup>

### 3. Penn State General Counsel Cynthia Baldwin Testifies

The Freeh Report states that Schultz's confidential notes about Sandusky and the emails relating to the February 2001 Lasch Building shower room incident were promptly provided by Freeh's investigators to the Pennsylvania Attorney General's Office.<sup>88</sup> In October 2012, Penn State University waived its attorney-client privilege, with respect to General Counsel Cynthia Baldwin's representation of the University in the Sandusky matter and, in particular, the University's compliance with investigative efforts in the Sandusky grand jury investigation.<sup>89</sup>

This waiver of attorney-client privilege by the University allowed Baldwin, who had served as the University's in-house counsel during the grand jury investigation of Sandusky, to provide grand jury testimony about Penn State's efforts to comply with grand jury subpoenas for documents and records relating to Sandusky.<sup>90</sup> Baldwin's grand jury testimony pursuant to the University's waiver of privilege was subject to "a caveat," however, that she would not testify about, "any

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<sup>84</sup> *Id.* at 75.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 75–76.

<sup>88</sup> *Id.* at 66. That evidence helped determine that the incident, which previously was thought to have occurred in March 2002, took place in February 2001. *Id.*

<sup>89</sup> See Transcript of Proceedings of Grand Jury at 3–4, Commonwealth, Thirty-Third Statewide Investigation Grand Jury, No. 1 (Oct. 22, 2012), <https://www.scribd.com/document/192201108/Cynthia-Baldwin-grand-jury-proceedings-October-22-2012> [hereinafter Oct. 22, 2012 Grand Jury Transcript].

<sup>90</sup> See *id.* at 1–4.

of the issues relating to the testimony of Mr. Schultz and Mr. Curley and conversations she had with them about that testimony.”<sup>91</sup> The reason for this limitation on Baldwin’s grand jury testimony was that Schultz and Curley, through counsel, had asserted attorney-client privilege “for any conversations or information that passed between [Schultz and Curley] and Miss Baldwin in preparation for their grand jury appearance or anything relating to their grand jury appearance.”<sup>92</sup> Counsel for the Attorney General’s Office, Penn State University, and Baldwin proposed to the supervising judge that Baldwin’s grand jury testimony go forward but without any questioning of Baldwin about Schultz and Curley’s grand jury testimony or preparation for that testimony.<sup>93</sup> The supervising judge agreed that Baldwin could provide grand jury testimony on that basis.<sup>94</sup>

Four days later, on October 26, 2012, then-former<sup>95</sup> Penn State General Counsel Baldwin provided grand jury testimony, represented by her personal counsel and questioned by the same Attorney General’s Office prosecutor who had assured the supervising judge of the grand jury that Baldwin would not be questioned about the grand jury testimony of Schultz and Curley.<sup>96</sup> Baldwin testified that she was Penn State’s first in-house general counsel, that the University had never had an in-house legal counsel before she assumed that role, and that she served as Penn State’s

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<sup>91</sup> *Id.* at 4–6.

<sup>92</sup> *Id.* at 4 (stating to the court by counsel for the Pennsylvania Attorney General’s Office describing the claims of attorney-client privilege by Schultz and Curley).

<sup>93</sup> *See id.* at 10.

<sup>94</sup> *See id.* at 11–14. In proposing that course of action to the supervising judge, counsel for the Pennsylvania Attorney General’s Office stated that the Commonwealth “is going to take a very clear position as does Miss Baldwin that she was University Counsel and she was not individually representing those two gentlemen.” *Id.* at 11. In his closing remark to the court, counsel for the Attorney General’s Office said “I have no doubt that they will try and run the football in the middle with it but I don’t think they should get anywhere with it.” *Id.* at 14. The prosecutor’s comment proved to be extraordinarily prescient, as is discussed in detail in Section II.D below, although his confidence in the Commonwealth’s legal position ultimately proved less so. *See infra* Section II.D.

<sup>95</sup> Baldwin ceased serving as Penn State’s general counsel on June 30, 2012. *See* Oct. 22, 2012 Grand Jury Transcript at 2–3 (discussing statements by counsel to Penn State University and Baldwin’s counsel). *See also* Transcript of Proceedings of Grand Jury at 6, *Commonwealth of Pennsylvania, Thirty-Third Statewide Investigation Grand Jury, In re* Notice No. 1 (Oct. 26, 2012), <https://www.scribd.com/document/192201126/Cynthia-Baldwin-grand-jury-transcript-from-October-26-2012> [hereinafter Oct. 26, 2012 Grand Jury Transcript] (stating testimony by Baldwin that she “left on June 30”).

<sup>96</sup> *See* Oct. 26, 2012 Grand Jury Transcript at 5–6. As indicated in note 97, *infra*, other grand jury testimony states that Baldwin ceased serving as Penn State’s general counsel in June 2012, not in January 2012.

general counsel from February 2010 until June 2012.<sup>97</sup> Baldwin also testified that she had previously served as an Allegheny County Judge in the Civil Division, the Adult Family Division, and the Juvenile Division for 18 years,<sup>98</sup> as a Justice of the Pennsylvania Supreme Court for two years,<sup>99</sup> and as a member of the Penn State University Board of Trustees from 1995 until January 2010.<sup>100</sup>

Baldwin testified that she first became aware of the Sandusky investigation in late December 2010, when she was contacted by the Pennsylvania Attorney General's Office about four grand jury subpoenas.<sup>101</sup> One subpoena was for University documents "requesting basically any information about Jerry Sandusky and allegations of misconduct."<sup>102</sup> The other three subpoenas were "for people to testify. Those three persons were Tim Curley, Gary Schultz, and Joe Paterno."<sup>103</sup> She testified that after she received the telephone call about the subpoenas,

I got up out of my seat and ran up the stairs to the second floor—the President's office is 208, mine was 108—to tell the President that we were receiving three subpoenas for Tim Curley, Gary Schultz, and Joe Paterno and that there—that they would—we would have to contact them to tell them about the subpoenas and that I would make contact with them.<sup>104</sup>

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<sup>97</sup> In what appears to be a mistake as to the date she ceased to serve as Penn State's general counsel, on October 26, 2012, Baldwin initially testified that she served as Penn State's general counsel "until January 30 of this year, 2012," Oct. 26, 2012 Grand Jury Transcript at 1–3, but subsequently in her testimony she stated that she "left on June 30." *Id.* at 71. The June 30, 2012 date is consistent with information provided to the grand jury by Baldwin's counsel and Penn State University's counsel. *See* Oct. 22, 2012 Grand Jury Transcript at 2–3 (statements by counsel to Penn State University and by Baldwin's counsel).

<sup>98</sup> *See* Oct. 26, 2012 Grand Jury Transcript at 5.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 6.

<sup>101</sup> *Id.* at 11–12.

<sup>102</sup> *Id.* at 12.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 12–13.



Baldwin then consulted with Spanier, and she testified that “Graham said to me, well, you can go in with Tim and Gary and that was the conversation we had then.”<sup>105</sup> Baldwin also emphasized in her grand jury testimony that “there was no doubt that I was representing the Pennsylvania State University because they were agents of the University, I mean, very high officials . . . .”<sup>106</sup>

This initial decision by Spanier and Baldwin that Baldwin would accompany Schultz and Curley to their grand jury testimony subsequently proved to be extraordinarily important; that decision, and the legal ramifications that flowed from it, is the central focus of this Article. The judicial decisions that analyzed the very complex legal issues arising out of that decision are discussed in Sections II.C and II.D below.

Baldwin testified at length about her interactions with Spanier in connection with the Sandusky investigation and Spanier’s grand jury testimony.<sup>107</sup> Of particular relevance to this Article, Baldwin testified that during the time she was representing Penn State University in connection with the Sandusky grand jury investigation, and when she accompanied Spanier, Schultz, and Curley to their grand jury appearances, she had no knowledge of the email communications and Schultz notes that are described above.<sup>108</sup> In particular, she testified that she was “operating under the presumption that they have told me the truth. They don’t know anything else. They have told me the truth.”<sup>109</sup> She then was asked by counsel from the Attorney General’s Office “what can you tell us about Spanier’s representations to you through this lengthy period of the investigation?”<sup>110</sup> Baldwin responded, “That he is—that he is not a person of integrity. He lied to me.”<sup>111</sup> She was then asked, “Why did he tell you the lies? Why did he say the things that he said to you?”<sup>112</sup> Baldwin’s response was, “I can’t get inside his mind, but the fact is that there is no doubt he

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<sup>105</sup> *Id.* at 14. Baldwin also testified that “later, there was another conversation with Graham; and he said, well, you’ll go in [to the grand jury] with me.” *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See generally* Oct. 26, 2012 Grand Jury Transcript at 49–70.

<sup>108</sup> *See id.* at 69.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 69–70.

<sup>111</sup> *Id.* at 70.

<sup>112</sup> *Id.*

lied to me. I can't think of any other reason for lying than trying to hide it from me."<sup>113</sup>

#### 4. The Pennsylvania Attorney General's Office Files New Criminal Charges

On November 1, 2012, the Pennsylvania Attorney General's Office charged Spanier with eight counts of endangering the welfare of children, failure to report child abuse, perjury, obstruction of justice, and conspiracy to obstruct justice, commit perjury, and endanger the welfare of children.<sup>114</sup> Three of the charges—perjury, conspiracy, and one of the endangering the welfare of children charges—were felonies.<sup>115</sup> The Attorney General's Office also filed new charges against Curley<sup>116</sup> and Schultz,<sup>117</sup> in addition to the initial perjury and failure to report suspected child abuse charges discussed above,<sup>118</sup> charging them with endangering the welfare of children, obstruction of justice, and conspiracy to obstruct justice, commit perjury, and endanger the welfare of children.<sup>119</sup> As with the charges against Spanier, the charges of conspiracy and endangering the welfare of children were felonies.<sup>120</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> Criminal Docket, Commonwealth v. Graham B. Spanier, Docket No. MJ-12303-CR-0000419-2012 (Dauphin Cnty. Magis. Dist. Ct. Nov. 1, 2012), <https://www.scribd.com/document/111792451/Graham-Spanier-charged-in-Jerry-Sandusky-case>.

<sup>115</sup> *See id.*; *Spanier*, 132 A.3d at 482 n.3 (“The Commonwealth filed a single conspiracy count, which included all of the conspiracy crimes mentioned above.”); *see also* Sara Ganim, *Ex-PSU President Spanier Charged with Obstruction, Endangerment, and Perjury; More Charges Filed Against Other Administrators*, PENN LIVE (Nov. 1, 2012), [http://www.pennlive.com/midstate/index.ssf/2012/11/spanier\\_charged\\_with\\_obstructi.html](http://www.pennlive.com/midstate/index.ssf/2012/11/spanier_charged_with_obstructi.html).

<sup>116</sup> *See Curley*, 131 A.3d at 995.

<sup>117</sup> *See Schultz*, 133 A.3d at 300.

<sup>118</sup> *See supra* Section II.B.4.

<sup>119</sup> *See Curley*, 131 A.3d at 995 n.3 (“The Commonwealth filed a single conspiracy count, which included conspiracy to commit perjury, obstruction of justice, and endangering the welfare of a child.”); *Schultz*, 133 A.3d at 300 n.3 (“The Commonwealth filed a single conspiracy count, which included conspiracy to commit perjury, obstruction of justice, and endangering the welfare of a child.”).

<sup>120</sup> *See* Criminal Docket, Commonwealth v. Timothy Mark Curley, Docket No. MJ-12303-CR-0000421-2012 (Dauphin Cnty. Magis. Dist. Ct. Nov. 1, 2012), <https://www.scribd.com/document/111794212/Curley-Charges>; Criminal Docket, Commonwealth of Pennsylvania v. Gary Schultz, Docket No. MJ-12303-CR-0000422-2012 (Dauphin Cnty. Magis. Dist. Ct. Nov. 1, 2012), <https://www.scribd.com/document/111795193/Schultz-Charges>.

Then-Acting Attorney General Linda Kelly held a press conference to announce the charges against Spanier, Schultz, and Curley.<sup>121</sup> Kelly asserted that the three had participated in a “conspiracy of silence” to cover up Sandusky’s crimes: “This was not a mistake by these men. It was not an oversight. It was not misjudgment on their part. This was a conspiracy of silence by top officials working to actively conceal the truth, with total disregard for the children who were Sandusky’s victims in this case.”<sup>122</sup> Spanier, Schultz, and Curley, through their counsel, vigorously denied the charges. Spanier’s counsel asserted that Kelly and then-Pennsylvania Governor Tom Corbett were targeting him for political reasons, asserting that “[Corbett] is now manipulating public officials and resources to settle a personal score.”<sup>123</sup>

The new charges began what ultimately would be almost five years of legal warfare between the Pennsylvania Attorney General’s Office and the three defendants. That battle lasted until March 2017 when Curley and Schultz each pleaded guilty to a single misdemeanor charge of Endangering the Welfare of Children and agreed to cooperate with the Attorney General in Spanier’s criminal

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<sup>121</sup> Steve Eder, *Former Penn State President Is Charged in Sandusky Case*, N.Y. TIMES (Nov. 1, 2012), <http://www.nytimes.com/2012/11/02/sports/ncaafootball/graham-b-spanier-former-penn-state-president-charged-in-sandusky-casc.html>; Sarah Ganim, *Penn State Officials Conspired to Protect Themselves and Jerry Sandusky, AG Says*, PENN LIVE (Nov. 1, 2012), [http://www.pennlive.com/midstate/index.ssf/2012/11/ag\\_sandusky\\_coverup\\_was\\_not\\_a.html](http://www.pennlive.com/midstate/index.ssf/2012/11/ag_sandusky_coverup_was_not_a.html); *University Officials Issue Statement on Attorney General’s Actions*, PENN ST. NEWS (Nov. 1, 2012), <http://news.psu.edu/story/145000/2012/11/01/university-officials-issue-statement-attorney-generals-actions>.

<sup>122</sup> See CNN Wire Staff, *Ex-Penn State Officials Accused of “Conspiracy of Silence,”* CNN (Nov. 1, 2012), <http://www.cnn.com/2012/11/01/justice/penn-state-scandal/index.html> (quoting Kelly).

<sup>123</sup> See *Graham Spanier’s Attorneys Release Statement*, CBS PITT. (Nov. 1, 2012), <http://pittsburgh.cbslocal.com/2012/11/01/graham-spaniers-attorneys-release-statement/>; see also Sara Ganim, *Graham Spanier, other Penn State officials showed ‘total disregard to the suffering of children,’ AG says*, PENN LIVE (Nov. 1, 2012), [http://www.pennlive.com/midstate/index.ssf/2012/11/graham-spanier\\_other\\_penn\\_stat.html](http://www.pennlive.com/midstate/index.ssf/2012/11/graham-spanier_other_penn_stat.html).

trial,<sup>124</sup> which ended on March 24, 2017, when a jury found Spanier guilty of one misdemeanor charge of Endangering the Welfare of Children.<sup>125</sup>

The most important field of battle in the years-long legal war between the defendants and the Attorney General's office was the dispute over Baldwin's appearance with Curley, Schultz, and Spanier at their grand jury appearances and whether her subsequent grand jury testimony violated their attorney-client privilege. That issue was the subject of lengthy judicial opinions, first by the trial judge in the case holding that no privilege existed between Baldwin and the three defendants in their personal capacities, and a second set of opinions by the Pennsylvania Superior Court reversing the trial judge and dismissing the conspiracy, perjury, and obstruction of justice charges against Spanier, Schultz, and Curley. Those opinions are discussed in more detail below.

### C. *The Trial Court Opinion in the Penn State Three Case*

On January 14, 2015, Judge Todd A. Hoover, then the trial judge in the criminal case against Spanier, Schultz, and Curley, issued a 53-page Memorandum Opinion and Order concluding the Baldwin had properly represented Spanier, Schultz, and Curley in their capacity as agents of the University at their grand jury appearances.<sup>126</sup> The Trial Court Opinion denied the defendants' motions to preclude Baldwin's grand

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<sup>124</sup> See Amended Criminal Information, Commonwealth v. Timothy Mark Curley, No. CP-22-CR-0003614-2013 (Dauphin Cty. Ct. Com. Pl. Mar. 13, 2017), <http://www.dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Documents/3-13-17%20Amended%20Criminal%20Information%20and%20Guilty%20Plea%20-%20Curley.pdf>; Amended Criminal Information, Commonwealth v. Gary Charles Schultz, No. CP-22-CR-0003616-2013 (Dauphin Cty. Ct. Com. Pl. Mar. 13, 2017), <http://www.dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Documents/3-13-17%20Amended%20Criminal%20Information%20and%20Guilty%20Plea%20-%20Schultz.pdf>.

<sup>125</sup> See Will Hobson, *Former Penn State President Graham Spanier Convicted of Child Endangerment*, WASH. POST (Mar. 24, 2011), [https://www.washingtonpost.com/sports/colleges/former-penn-state-president-graham-spanier-convicted-of-child-endangerment/2017/03/24/d1936c34-109a-11e7-9b0d-d27c98455440\\_story.html?utm\\_term=.c359070b00e5](https://www.washingtonpost.com/sports/colleges/former-penn-state-president-graham-spanier-convicted-of-child-endangerment/2017/03/24/d1936c34-109a-11e7-9b0d-d27c98455440_story.html?utm_term=.c359070b00e5). Spanier was acquitted of a felony charge of endangering the welfare of children and a felony charge of conspiring to endanger the welfare of children. See *id.* At the time this article was written, Spanier was appealing his conviction.

<sup>126</sup> See Memorandum Opinion and Order, Commonwealth v. Timothy M. Curley, Gary Charles Schultz, Graham Basil Spanier, No. 3614 CR 2013, No. 5165 CR 2011, No. 3616 CR 2013, No. 5164 CR 2011, No. 3615 CR 2013 (Dauphin Cty. Ct. Com. Pl. Jan. 14, 2015), [https://www.scribd.com/document/252653399/Order-on-Curley-Schultz-and-Spanier#fullscreen&from\\_embed](https://www.scribd.com/document/252653399/Order-on-Curley-Schultz-and-Spanier#fullscreen&from_embed) [hereinafter Trial Court Opinion].

jury testimony and to quash the 2012 conspiracy, perjury, and obstruction charges as defective for relying on privileged attorney-client communications.<sup>127</sup>

The bulk of the trial court's analysis revolved around "the scope of the attorney-client privilege asserted by each Defendant."<sup>128</sup> More narrowly, the court found it necessary to determine "whether the record demonstrate[d] the existence of an individual attorney-client privilege between each Defendant personally and Ms. Baldwin."<sup>129</sup> The court concluded that it did not.<sup>130</sup> While the court recognized that the attorney-client privilege is "the most revered of our common law privileges,"<sup>131</sup> it also recognized that the privilege is not without cost. Specifically, the court recognized the tension between the interests of justice that the privilege is intended to serve and the truth-seeking function of the judicial system.<sup>132</sup>

The trial court began its analysis with the test set out by the Pennsylvania Superior Court in *Commonwealth v. Mrozek*.<sup>133</sup> The *Mrozek* test states that, before the attorney-client privilege can be asserted, the following requirements generally must be met:

- 1) The asserted holder of the privilege is or sought to become a client.
- 2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
- 3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- 4) The privilege has been claimed and is not waived by the client.<sup>134</sup>

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<sup>127</sup> See generally Trial Court Opinion, *supra* note 126, at 50–52.

<sup>128</sup> *Id.* at 27.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 28–29.

<sup>131</sup> *Id.* at 28 (quoting *Commonwealth v. Maguigan*, 511 A.2d 1327, 1333 (Pa. 1986)).

<sup>132</sup> *Id.* at 29 (citing *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 217 (Pa. 2014)).

<sup>133</sup> *Commonwealth v. Mrozek*, 657 A.2d 997, 998 (Pa. Super. Ct. 1995).

<sup>134</sup> *Id.*

In applying the *Mrozek* test, however, the court recognized the difficulty in adapting that test to the corporate/organizational entity context.<sup>135</sup> The court recognized that there is a difference between representing a constituent of an organization in his or her official capacity, as an *agent* of a corporation, and in his or her capacity as an individual outside of the organizational context.<sup>136</sup> The court also noted that in the corporate context, as is always the case in all contexts, those claiming to assert the privilege—here Spanier, Schultz, and Curley asserting that a personal attorney-client privilege existed with Baldwin—bear the burden of proving the privilege’s applicability.<sup>137</sup>

In light of the special complexities presented by the attorney-client privilege in the corporate context, the court recognized the need for a test that is better suited to deal with the intricacies of representation in the corporate context and that does not ignore the dual nature of a constituent’s personality.<sup>138</sup> In fact, as the court recognized, “Pennsylvania cases, and federal cases relying on Pennsylvania law, *have* addressed the standard applicable to determination of the scope of corporate counsel’s representation.”<sup>139</sup> The court continued, “Whether there is a valid claim of privilege exists [sic] is decided on a case-by-case basis, and applicability of the privilege based upon the attorney-client relationship is a factual question, the scope of which is a question of law.”<sup>140</sup> Ultimately, in recognition of the challenges presented in the business-entity context, the court framed its analysis by the five-part test for the existence of the privilege between corporate officers and corporate counsel set forth by the United States Court of Appeals for the Third Circuit in *In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*<sup>141</sup>

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<sup>135</sup> *Id.* at 29 (citing *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124 (3d Cir. 1986)).

<sup>136</sup> *Id.* at 30.

<sup>137</sup> *Id.* at 30–31.

<sup>138</sup> *Id.* at 31.

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> *Id.* (citing *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986)).

<sup>141</sup> *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124 (3d Cir. 1986) (“[U]nder existing law, any privilege that exists as to a corporate officer’s role and functions within a corporation belongs to the corporation, not the officer.”).

In *Bevill* the district court had used a five-part test for determining the scope of the attorney-client privilege with regard to corporate officers in the business-entity context:

First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.<sup>142</sup>

The district court in *Bevill* held that the privilege belonged to the corporate entity for all communications that occurred after the corporation retained counsel, and did not belong to the individual corporate officers except for any conversations with counsel that were not related to the business and assets of the corporation.<sup>143</sup> The individuals appealed the district court's decision and the Third Circuit affirmed.<sup>144</sup>

In affirming the district court's holding and endorsing its newly created test, the Third Circuit, like the trial court in the Penn State Three case,<sup>145</sup> recognized the special circumstances involved in corporate representation and appreciated the need for a specialized framework that takes these circumstances into account.<sup>146</sup> Much like the issue facing the trial court in the Penn State Three case, the key issue addressed by the Third Circuit in *Bevill* was "whether the individuals' assertion of an attorney-client privilege can prevent the disclosure of corporate communications with corporate counsel when the corporation's privilege has been waived."<sup>147</sup>

In the Trial Court Opinion, Judge Hoover noted that the Pennsylvania Commonwealth Court had adopted the *Bevill* test in *Maleski by Chronsiter v.*

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<sup>142</sup> Trial Court Opinion, *supra* note 126, at 31–32.

<sup>143</sup> *Id.* at 32.

<sup>144</sup> *Id.* at 33.

<sup>145</sup> *See id.* at 31.

<sup>146</sup> *See Bevill*, 805 F.2d at 124.

<sup>147</sup> *Id.*

*Corporate Life Insurance Co.*<sup>148</sup> There, the Pennsylvania Commonwealth Court stated, “This test recognizes the distinction between the corporation’s privilege, and that of the officer or director seeking individual representation separate and apart from corporate matters. Further, we believe that this test insures protection of communications in which the officer or director holds a privilege . . . .”<sup>149</sup> Ultimately, Judge Hoover understood *Bevill* to mean, at a fundamental level, that the attorney-client privilege *as to communications related to a constituent’s role in the corporation* belongs to the corporation and can only be waived by it.<sup>150</sup>

Judge Hoover applied the standards set forth in *Bevill* and found that “the evidence fails to establish that Ms. Baldwin represented Defendants in their individual capacities, but instead, demonstrated that Ms. Baldwin represented each Defendant in his role as an official of the University conducting University business.”<sup>151</sup> In other words, Baldwin represented Spanier, Schultz, and Curley, but did so only in their capacity as agents of the university. Her client was not the individual officers in their personal capacities, but rather was Penn State University.

Having reached that conclusion, Judge Hoover made relatively quick work of the application of the *Bevill* test. He easily concluded that Spanier, Schultz, and Curley all had approached Baldwin for legal advice.<sup>152</sup> On the more difficult issue of whether the officers had made it clear that they were approaching Baldwin for representation in their individual capacities, Judge Hoover held that subjective belief that Baldwin would so represent them was not sufficient.<sup>153</sup> In addition, they had proceeded with her as counsel knowing that she represented the university.<sup>154</sup> Judge Hoover also noted that head football coach Joe Paterno had already retained separate

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<sup>148</sup> Trial Court Opinion, *supra* note 126, at 31.

<sup>149</sup> *Maleski v. Corp. Life Ins. Co.*, 641 A.2d 1, 5 (Pa. Commw. Ct. 1994).

<sup>150</sup> Trial Court Opinion, *supra* note 126, at 32. One commentator has gone so far as to say that, “[u]nder *Bevill*, if [an] individual has [a personal legal] conversation with an attorney whom the individual knows represents the individual’s entity employer, the individual has no privilege, *regardless* of the reasonableness of the individual’s belief about the relationship the individual has with the lawyer.” Grace M. Giesel, Upjohn Warnings, *the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109, 150 (2010) (emphasis added).

<sup>151</sup> Trial Court Opinion, *supra* note 126, at 33.

<sup>152</sup> *See id.* at 33–34.

<sup>153</sup> *Id.* at 34.

<sup>154</sup> *Id.*



counsel to represent him personally.<sup>155</sup> These factors support the court's conclusion that Spanier, Schultz, and Curley could not have reasonably believed that Baldwin would be representing them individually in their personal capacities.<sup>156</sup> Also, unlike the defendants in *Bevill*, at the time of their grand jury appearances, neither Curley nor Schultz nor Spanier expressed any need for individual legal advice. All three knew that Baldwin represented Penn State University, and none of them indicated to her that they were seeking legal assistance beyond the scope of that representation.

Third, Judge Hoover held that Baldwin could not have reasonably known that a conflict of interest would develop in her representation of Curley and Schultz as agents of the university.<sup>157</sup> In collecting documents in fulfillment of the subpoena *duces tecum* (which was directed to her client, the university), she was told by Curley and Schultz that no relevant documents existed in their possession.<sup>158</sup> Judge Hoover stated:

If Defendants possessed personal knowledge which created either personal criminal exposure or a conflict of interest, we have no evidence upon which we could conclude that Ms. Baldwin was or should have been aware of such information and communicated with them in their individual capacities in spite of such knowledge.<sup>159</sup>

Further, as noted above, the court had already found that Baldwin understood that she was representing the university, and was representing the three university officials only in their roles as agents of the university.<sup>160</sup>

On the last two prongs of the *Bevill* test, the trial court held that Baldwin had maintained the confidences of the defendants in their roles as agents of the university, and noted that the defendants had not alleged that their communications with Baldwin had involved personal matters outside the business and affairs of Penn State

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<sup>155</sup> *Id.* at 10.

<sup>156</sup> See Giesel, *supra* note 150, at 150 (noting that, under *Bevill*, there is a "requirement that the individual honestly and reasonably believe that he is seeking legal advice or assistance from a person who may become or is the individual's lawyer").

<sup>157</sup> Trial Court Opinion, *supra* note 126, at 34–35.

<sup>158</sup> *Id.* at 34.

<sup>159</sup> *Id.* at 34–35.

<sup>160</sup> *Id.* at 10.

University.<sup>161</sup> Judge Hoover also held, based on this agency theory of representation, that neither Curley nor Schultz was denied his statutory right to counsel.<sup>162</sup> Baldwin represented them in their agency capacity, and she was present with them before the Grand Jury if they had wanted to consult with her.<sup>163</sup> She had made it clear that she represented the university,<sup>164</sup> and supervising grand jury Judge Feudale's colloquy complied with all applicable law.<sup>165</sup> Spanier, Schultz, and Curley appealed to the Pennsylvania Superior Court.<sup>166</sup>

*D. The Pennsylvania Superior Court Decision in the Penn State Three Case*

The defendants' principal arguments on appeal to the Pennsylvania Superior Court centered on the assertion that the attorney-client privilege protected their communications with Baldwin because she represented them individually.<sup>167</sup> They also claimed that any limitation on the scope of Baldwin's representation constructively denied them their statutory right to counsel before the grand jury.<sup>168</sup>

The Superior Court began its analysis by stating that the scope of the attorney-client privilege is a question of law to be reviewed *de novo*.<sup>169</sup> The court then framed three issues on appeal: (1) whether the proper standard for evaluating the existence of an attorney-client relationship in the grand-jury context was reasonable belief of the client; (2) whether the trial court's agency theory was sufficient to protect the defendants' statutory right to counsel in the grand-jury context; and (3) whether Baldwin's grand jury testimony violated the attorney-client privilege.<sup>170</sup>

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<sup>161</sup> *Id.* at 35.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 36.

<sup>164</sup> *Id.* at 35.

<sup>165</sup> *See id.* at 36.

<sup>166</sup> *See* Commonwealth v. Schultz, 133 A.2d 294, 299 (Pa. Super. Ct. 2016); Commonwealth v. Curley, 131 A.3d 994, 994 (Pa. Super. Ct. 2016); Commonwealth v. Spanier, 132 A.3d 481, 482 (Pa. Super. Ct. 2016).

<sup>167</sup> *Schultz*, 133 A.2d at 299.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 312 (citing *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215 (Pa. 2014)).

<sup>170</sup> *Id.* at 307–08.

As is suggested by the manner in which the court framed the issues, the Superior Court's analysis differed from that of the trial court in that the Superior Court's focus was less on the attorney-client privilege in the organizational entity context, and more on the privilege in the grand jury representation context. Consistent with this different analytical approach, the Superior Court rejected the trial court's application of the *Bevill* test, holding instead that the traditional *Mrozek* test was sufficient to determine whether Baldwin represented the defendants in an individual capacity.<sup>171</sup> The court concluded that it was not bound by its sister court's opinion to apply *Bevill* in *Maleski*, especially because it was a single-judge decision.<sup>172</sup> As such, the Superior Court held that the Commonwealth Court's decision in *Maleski* was only persuasive, and described the *Bevill* test as "inapt."<sup>173</sup>

In general, the Superior Court embraced a strict and arguably somewhat simplistic view of the attorney-client privilege, largely disregarding any potential need to tailor it to specific circumstances, including to the complexities of multiple representation in the business entity context.<sup>174</sup> Specifically, the court quoted, with emphasis, the Pennsylvania Supreme Court in *Maguigan*:

The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. **To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made**

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<sup>171</sup> See *id.* at 322.

<sup>172</sup> *Id.* at 321 (quoting 210 Pa. Code § 69.414 (2015)) (stating that a "single-judge opinion of this court, even if reported, shall be cited only for its persuasive value and not as a binding precedent").

<sup>173</sup> *Id.* at 322. Other courts, however, have applied the *Bevill* Test in the grand jury context. See *In re Grand Jury Subpoena*, 274 F.3d 563, 567 (1st Cir. 2001) (denying the privilege and holding that "an individual privilege may exist in these circumstances only to the extent that communications made in a corporate officer's personal capacity are separable from those made in his corporate capacity"); see also *In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000) (citing *Bevill* as support for the proposition that "employees or officers of the corporation generally may not prevent a corporation from waiving the attorney-client privilege arising from communications between the corporation's counsel and officers of the corporation").

<sup>174</sup> See *Schultz*, 133 A.2d at 313 (citing *Commonwealth v. Maguigan*, 511 A.2d 1327, 1333–34 (Pa. 1986)).

**by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged . . . .”<sup>175</sup>**

The emphasis the Superior Court placed on this passage is indicative of its support for a “one size fits all” interpretation and application of the privilege. In adopting such an approach, however, the court arguably failed to sufficiently recognize the tension between the interests of justice that the privilege serves and the truth-seeking function of the judicial system,<sup>176</sup> an interest that had recently been emphasized by the Pennsylvania Supreme Court in *In re Thirty-Third Statewide Investigating Grand Jury*.<sup>177</sup>

The cost that the privilege imposes on the judicial truth-seeking function is not the only issue that the Superior Court failed to address. Although the court cited *In re Condemnation by Philadelphia*<sup>178</sup> for the proposition that the attorney-client privilege applies to corporations with regard to communications made by agents who act on the corporation’s behalf, the court failed to recognize that in that context the privilege belongs to the corporation and not to its agents.<sup>179</sup> Instead, the focus of the Superior Court’s analysis revolved around the fact that this specific issue of privilege had arisen in the context of an Investigating Grand Jury. It began its analysis with a discussion of the history of the grand jury in the Commonwealth of Pennsylvania.<sup>180</sup> The court noted that until relatively recently in Pennsylvania there was no right to counsel before the grand jury.<sup>181</sup> This changed with the passage of the Pennsylvania

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<sup>175</sup> *Id.* (citing *Maguigan*, 511 A.2d at 1333–34).

<sup>176</sup> See Trial Court Opinion, *supra* note 126, at 29 (citing *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 217 (Pa. 2014)).

<sup>177</sup> See *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d at 217 (In denying the petitioner’s request for a protective order protecting communications with counsel, the court recognized the tension between “encouragement of trust and candid communication between lawyers and their clients . . . and the accessibility of material evidence to further the truth-determining process.”).

<sup>178</sup> *In re Condemnation by Phila.*, 981 A.2d 391 (Pa. Commw. Ct. 2009).

<sup>179</sup> *Schultz*, 133 A.3d at 313. It is also interesting to note that the *Condemnation* case was heard by the Commonwealth Court, the “sister court” whose single-judge opinions the Superior Court dismissed as only persuasive, but not binding, when rejecting the trial court’s reliance on the *Maleski* Commonwealth Court opinion. See *id.* at 321.

<sup>180</sup> *Id.* at 314–16.

<sup>181</sup> *Id.* at 315.

Grand Jury Act of 1980.<sup>182</sup> The court referenced the following language, much of it again in bold print for emphasis:

**A witness subpoenaed to appear and testify before an investigating grand jury or to produce documents, records or other evidence before an investigating grand jury shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in the presence of the investigating grand jury . . . . Such counsel may be retained by the witness or shall be appointed in the case of any person unable to procure sufficient funds to obtain legal representation. Such counsel shall be allowed to be present in the grand jury room during the questioning of the witness and shall be allowed to advise the witness . . . . An attorney, or attorneys who are associated in practice, shall not continue multiple representation of clients in a grand jury proceeding if the exercise of the independent professional judgment of an attorney on behalf of one of the clients will or is likely to be adversely affected by his representation of another client. If the supervising judge determines that the interest of an individual will or is likely to be adversely affected, he may order separate representation of witnesses, giving appropriate weight to the right of an individual to counsel of his own choosing.**<sup>183</sup>

The court also emphasized that “[t]he supervising judge is charged with deciding whether the witness’s interest will be adversely affected by an attorney representing multiple clients.”<sup>184</sup>

Spanier, Shultz, and Curley argued on appeal that the statutory right to counsel provided by the Grand Jury Act includes a right to *effective assistance* of counsel.<sup>185</sup> Specifically, they argued that the trial court’s agency theory of representation “relieves the attorney of the duty to exercise loyalty and independent judgment, to provide competent and diligent representation to each client, to obtain each client’s informed consent, preferably in writing, before proceeding with the representation,

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<sup>182</sup> 42 PA. CONS. STAT. § 4549 (2017) (effective Dec. 4, 1980).

<sup>183</sup> *Schultz*, 133 A.3d at 315–16 (citing § 4549).

<sup>184</sup> *Id.* at 316.

<sup>185</sup> *Id.*

and to maintain the client's communications as confidential."<sup>186</sup> While it did not directly address that specific issue, the Superior Court seemed to agree.<sup>187</sup>

Ultimately, the court concluded that Baldwin had not adequately explained to Spanier, Schultz, and Curley the distinction between representing them as agents of the University and representing them individually.<sup>188</sup> In reaching this conclusion, the court rejected the *Bevill* test relied upon by the trial court and instead applied the *Mrozek* test, finding that it was "unequivocally satisfied,"<sup>189</sup> and therefore that Baldwin had breached the attorney-client privilege during her testimony to the grand jury.<sup>190</sup>

To support this conclusion, the Superior Court noted that "Upjohn warnings" have evolved to inform an individual that corporate counsel represents the corporate entity and not the individual personally.<sup>191</sup> The Superior Court cited a 2009 American Bar Association White Collar Crime Committee task force report entitled "Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees."<sup>192</sup> The Superior Court, however, failed to recognize that the 2009 ABA Report was by its own terms specifically intended to apply to situations in which counsel for a corporation is conducting an internal investigation, acting as an investigator seeking evidence of misconduct and interviewing company officials as witnesses and potential wrongdoers.<sup>193</sup> That role is, of course, very different from

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<sup>186</sup> *Id.* at 317.

<sup>187</sup> *See id.* at 325.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 323.

<sup>190</sup> *Id.* at 325.

<sup>191</sup> *See id.* at 314.

<sup>192</sup> *Id.* at 314 (citing White Collar Crime Committee, American Bar Association, *Upjohn Warnings: Recommended Best Practices when Corporate Counsel Interacts with Corporate Individuals*, 2009 A.B.A. SEC. CRIM. JUST. 3, 32 [hereinafter 2009 ABA Report]).

<sup>193</sup> *See* 2009 ABA Report, *supra* note 192, at 1. The same is true of the only other authority the Superior Court cited on the use of *Upjohn* warnings, a 2010 law review article that also by its terms was specifically addressing the conduct of internal investigations. *See* *Commonwealth v. Schultz*, 133 A.3d 294, 314 (Pa. Super. Ct. 2016) (citing Giesel, *supra* note 150, at 110–11). That article begins by noting that, "An entity, such as a corporation, occasionally asks its lawyer to investigate a particular matter. Often the investigation requires the lawyer to interview employees, officers, directors, or other individuals related to the entity." *Id.* at 110. Thus, this source too is addressing situations where corporate lawyers are conducting internal investigations—not situations, like that of Baldwin, where lawyers for the corporation

the role Baldwin was playing when she acted as Penn State University's in-house counsel in responding to external requests for information and testimony in the form of grand jury subpoenas.<sup>194</sup> This distinction is discussed further in Part III below.

Before turning to the important policy issues raised by the Pennsylvania Superior Court's decision in the Penn State Three case, there are two additional points in the opinion that are important and merit emphasis for purposes of this Article. Both pertain to the conduct of the prosecutors in the case. And both highlight the point that multiple representation situations in criminal cases do not just present ethical risks for defense counsel—prosecutors too can find themselves accused of serious professional ethics missteps.

First, as discussed in Section II.B.3 above, a condition of the waiver of privilege by Penn State University was that Baldwin would not be questioned in the grand jury about Schultz and Curley's grand jury testimony or preparation for that testimony.<sup>195</sup> The Superior Court discussed the privilege waiver by Penn State University and recounted the representations made to the grand jury's supervising judge by the prosecution concerning the limitations on questioning Baldwin during her grand jury appearance.<sup>196</sup> The court then noted that “[d]espite the foregoing representations by [the prosecutor], a number of the Commonwealth's questions to Ms. Baldwin before the grand jury precisely implicated potential confidential communications.” In a footnote that followed this statement, the court stated that in light of the prosecutor's prior representations to the supervising judge, “we find his subsequent questioning of Ms. Baldwin, absent prior judicial approval on the privilege question, to be highly improper.”<sup>197</sup>

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are assisting an entity client and its officials respond to outside investigations. For further discussion of the importance of this distinction, see *infra* Part III.

<sup>194</sup> The court also did not note that the 2009 ABA Report recognized that some counsel believe oral “*Upjohn* warnings” are preferable to written warnings, which some counsel believe are too formal and create the risk that “Constituents may be able to claim that they received inadequate warnings whenever the formalized warning is not followed precisely.” ABA Report, *supra* note 192, at 33. The latter point is somewhat ironic, as this is essentially the result reached by the Superior Court, notwithstanding its admonition that Baldwin had failed to follow “best practices” as described in the ABA Report.

<sup>195</sup> See *supra* note 91 and accompanying text.

<sup>196</sup> See *Schultz*, 133 A.3d at 305–06.

<sup>197</sup> See *id.* at 306 n.14. The Court also made reference to Pennsylvania Rule of Professional Conduct 3.10, which provides: “A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the

Obviously, a finding by a state appellate court that a state prosecutor engaged in “highly improper” conduct is a serious matter. Whether the court is right or wrong in its analysis and conclusion, such a public judicial finding is an outcome that any prosecutor would undoubtedly wish to avoid. Part III of this Article discusses the policy issues surrounding this finding by the Superior Court and recommends changes to Pennsylvania grand jury practice and attorney professional conduct rules that are intended to ensure that such incidents are avoided in the future.

The final point from the Superior Court’s decision that merits emphasis in this Article also involved a finding by the court concerning the conduct of the prosecutors. Prior to the grand jury testimony of Curley and Schultz, but after they had been interviewed by the prosecutors (with Baldwin present) in preparation for their grand jury testimony, Baldwin asked one of the senior prosecutors if Schultz and Curley were targets of the criminal investigation.<sup>198</sup> The prosecutor responded that they were not targets at that time.<sup>199</sup> In a footnote to its opinion, the Superior Court pointed out that at the time that statement was made,

the OAG was already aware that McQueary had told investigators that he reported a sodomy to Schultz and Curley, and it knew that there had been no follow up police investigation. Thus, at that time, the OAG ostensibly had a basis upon which to charge Curley and Schultz with failure to report suspected child abuse. Hence, this claim was misleading.<sup>200</sup>

Again, for a state appellate court to find that a prosecutor in the Office of the Attorney General made a “misleading” statement to an attorney representing clients at a grand jury appearance is a serious matter. If the prosecutors were seeking to gain a tactical advantage by setting a “perjury trap” for Schultz and Curley,<sup>201</sup> then the

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attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.” *Id.*

<sup>198</sup> See *Schultz*, 133 A.3d at 301–02.

<sup>199</sup> *Id.* at 302.

<sup>200</sup> *Id.* at 302 n.8.

<sup>201</sup> Experienced criminal defense lawyers who are preparing clients for “on the record” testimony in legal proceedings, such as grand jury appearances, are very wary of allowing their clients to fall victim to a “perjury trap.” A perjury trap “is created when the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to later prosecute him for perjury.” *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991) (citing *United States v. Simone*, 627 F. Supp. 1264 (D.N.J. 1986)). See also Bennett L. Gershman, *The Perjury Trap*, 129 U. PA. L. REV. 624 (1981).



tactic backfired on them in the worst possible way. Part III of this Article discusses the policy issues raised by the Superior Court's characterization of the prosecutor's response as "misleading" and recommends changes to Pennsylvania grand jury rules to prevent the recurrence of such incidents.

### III. RECOMMENDED LAW AND POLICY CHANGES BASED UPON THE "PENN STATE THREE" CASE

#### A. "Upjohn Warnings" Should Be Made Mandatory in Pennsylvania

The fact that there was confusion surrounding Baldwin's interaction with Spanier, Schultz, and Curley about her role in connection with their grand jury appearances is not surprising. Neither the Model Rules of Professional Conduct nor the Pennsylvania Rules of Professional Conduct define precisely how and when an attorney-client relationship is formed.<sup>202</sup> In seeking to clarify who is a client, Pennsylvania courts have recognized the attorney-client relationship when the lawyer is expressly engaged or retained to represent the client (an express attorney-client relationship), or when the client reasonably believes that she is being represented (an implied attorney-client relationship).<sup>203</sup>

The line between express and implied attorney-client relationship blurs when a lawyer represents an entity, as Baldwin did in her representation of Penn State University. Because the entity can only act through human beings, the organizational lawyer necessarily renders legal advice to the human beings who are the organizational constituents, including directors, officers, employees, and shareholders acting in their organizational capacities.<sup>204</sup> In the course of entity

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<sup>202</sup> See *Kirchner v. K&L Gates, LLP*, 46 A.3d 737 (Pa. Super. Ct. 2012); *Cost v. Cost*, 677 A.2d 1250 (Pa. Super. Ct. 1996); *Minnich v. Yost*, 817 A.2d 538 (Pa. Super. Ct. 2003) (recognizing the express and implied attorney-client relationship and defining both).

<sup>203</sup> See *Comm. On Prof'l Ethics v. Johnson*, 447 F.2d 169, 174 (3d Cir. 1971) (considering the totality of circumstances to determine whether a lawyer and a client entered into an implied attorney-client relationship). See also *Atkinson v. Haug*, 622 A.2d 983 (Pa. Super. Ct. 1993) (considering prior relationship between the attorney and the putative client to determine whether an implied attorney-client relationship existed).

<sup>204</sup> *In re Thirty-Third Statewide Investigating Grand Jury*, No. CP-22-CR-5164-2011 (Dauphin Cty. Ct. Com. Pl. Apr. 9, 2013), <http://www.dauphincounty.org/Courts/CurleySchultzSpanier/April%209,%202013%20Opinion%20of%20Grand%20Jury%20Judge%20-%20Judge%20Feudale.pdf> [hereinafter *Feudale's Order*]. The order stated, "General Counsel hired by a corporation as an employee officer is responsible for how the corporation's legal matters are handled. Whether a private or public corporation,

representation, the entity's constituents can develop a mistaken belief that the organization's lawyer also represents them in their personal capacities.<sup>205</sup> The strikingly differing analyses and rulings of the trial court and the Pennsylvania Superior Court<sup>206</sup> regarding Baldwin's representation of Curley, Schultz, and Spanier illustrate the complexity and difficulty of this issue.

The Superior Court concluded that Baldwin erred in not providing Curley, Schultz, and Spanier with "*Upjohn* warnings" making clear that she represented the University only and did not represent them in their personal, individual capacities.<sup>207</sup> As discussed above, the courts seems to have taken the position that Baldwin should

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the general counsel usually offers legal advice to the Board of Directors, CEO/President of the corporation and other senior executives." *Id.*

<sup>205</sup> See Paula Reed Ward, *Penn State's General Counsel Cited for Missteps*, PITTSBURGH POST GAZETTE (July 15, 2012), <http://www.post-gazette.com/state/2012/07/15/Penn-State-s-general-counsel-cited-for-missteps/stories/201207150174>. Ward asks who should and could have been considered Baldwin's client throughout the Sandusky investigations. *Id.*

<sup>206</sup> A third court, the court that supervised the initial Sandusky jury investigation, also addressed this issue. Supervising Judge Barry Feudale noted that Spanier, Schultz, and Curley were "highly educated men who had positions of considerable influence at PSU as well as inferentially, knowledge about important events that impact the reputation of the university; and it therefore strain[ed] credulity to infer that they were somehow deluded or misrepresented by attorney Baldwin." Feudale's Order, *supra* note 204, at 12. Judge Feudale ultimately ruled that, as a grand jury supervising judge, he lacked jurisdiction to decide whether Baldwin's testimony to the grand jury should be excluded. However, the judge issued a sixteen-page opinion supporting admission of Baldwin's testimony and stating that "the assertions and motions of counsel for the defendants lack merit." *Id.* at 7. The judge explained that "[w]hen attorney Baldwin appeared before this court with witness Curley and Schultz, the court was aware attorney Baldwin was General Counsel, Chief Legal Officer and Vice President of PSU," and, as such, represented the defendants in their professional capacity. *Id.* at 8-9. The judge noted that he assumed Baldwin could represent the defendants in their professional capacity because no conflict of interest between PSU and the defendants was initially apparent. *Id.* at 9. To the contrary, the judge was under the impression that the defendants voluntarily agreed to testify as friendly witnesses. *Id.* The judge reasoned that Baldwin's presence did not create a conflict of interest because the Office of Attorney General, Baldwin and the defendants did not raise any objections. *Id.* at 10. The judge admitted, however, that he did not ask any additional questions when Baldwin introduced herself as General Counsel for Penn State University and that he was only concerned whether Baldwin could jointly represent Curley and Schultz. *Id.* at 10-11. The judge stressed that a careful review of Baldwin's grand jury testimony transcript "reflect[ed] that Baldwin did not violate the attorney-client or work product privilege" and that, in light of the subsequently issued Frech Report, she had been misled by Curley, Schultz, and Spanier. *Id.* at 12.

<sup>207</sup> See *Commonwealth v. Schultz*, 133 A.3d 294, 323 (Pa. Super. Ct. 2016) ("Ms. Baldwin did not adequately explain to Schultz that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests."). See also *id.* at 325 ("Ms. Baldwin neglected to adequately explain the distinction between personal representation and agency representation, and give appropriate warnings to Schultz.").

have followed the “best practices” that are recommended in the ABA Report<sup>208</sup> on the use of *Upjohn* warnings in internal investigations. The court also cited a 2010 law review article on the use of *Upjohn* warnings,<sup>209</sup> although the court again failed to recognize that both the ABA Task Force report and law review article, including the specific pages cited by the court, were focused only on the conduct of internal investigations and not on an entity’s inside counsel assisting entity officials respond to subpoenas from an outside criminal investigating body.<sup>210</sup>

It is important to note that attorneys who are conducting an internal investigation for a corporation interview corporate officials and employees to determine whether those officials and employees have engaged in any wrongful conduct. Therefore, lawyers conducting internal investigations have a special obligation to warn the persons they interview that they do not represent them as individuals.<sup>211</sup> Nonetheless, the fact remains that the decision of the Superior Court is now the law in Pennsylvania. As a practical matter, the Superior Court decision means that providing *Upjohn* warnings now is not just a “best practice” in Pennsylvania, to use the language of the ABA task force report, when lawyers conduct corporate internal investigations. Instead, providing *Upjohn* warnings is now a mandatory requirement for any Pennsylvania attorney who represents a business entity in connection with a criminal investigation and advises the officers and employees of the entity about the investigation.<sup>212</sup>

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<sup>208</sup> See *id.* at 315.

<sup>209</sup> See *id.* (citing Giesel, *supra* note 150, at 110–11).

<sup>210</sup> See Giesel, *supra* note 150, at 110–11.

<sup>211</sup> The fact that both the ABA task force report and the law review article cited by the Superior Court expressly and only address the conduct of corporate attorneys who are conducting internal investigations supports this assertion.

<sup>212</sup> This is true even when the attorney provides advice about a criminal investigation of a third party, because here Baldwin understood that Sandusky was the target of the investigation and she had been told nothing by Spanier, Schultz, or Curley to suggest that they might have personal criminal exposure in the matter—in fact everything they had told her suggested otherwise. Cf. *Schultz*, 133 A.3d at 323 (“The issues communicated and addressed were not general business matters relative to the operation of the University, but pertained to the criminal investigation into Jerry Sandusky.”). Moreover, Baldwin even specifically asked the prosecutor, immediately before their grand jury testimony, if Schultz and Curley were targets of the investigation, and the prosecutor told Baldwin they were not targets at that time. See *id.* at 301–02. As noted above, the Superior Court stated that the prosecutor’s representation to Baldwin “was misleading.” See *id.* at 302 n.8.

Although the Superior Court focused heavily on the fact that Baldwin was accompanying Curley and Schultz, and later Spanier, to their grand jury testimony,<sup>213</sup> much of the court's analysis suggests that the requirement to provide individuals with an *Upjohn* warning that the attorney represents only the entity is not limited to situations where individual officers or employees are testifying before a grand jury. To the contrary, the overall tone and thrust of the Superior Court's analysis suggests that an attorney representing an entity must always make clear to individuals that the attorney represents only the entity and not the individuals in their personal capacities.<sup>214</sup>

The Superior Court stated that “communications between a putative client and corporate counsel are generally privileged prior to counsel informing the individual of the distinction between representing the individual as an agent of the corporation and representing the person in his personal capacity.”<sup>215</sup> The court concluded that all of Baldwin's communications with Schultz were privileged,<sup>216</sup> and therefore Baldwin was precluded “from testifying in future proceedings regarding privileged communications between her and Schultz, absent a waiver by Schultz.”<sup>217</sup>

This holding leaves lawyers who represent entities, whether as in-house counsel or outside counsel, in a position of great peril whenever their representation involves an actual or potential criminal investigation or prosecution. To avoid the fate that befell Baldwin in her role as in-house counsel at Penn State—being viewed by a court as having fallen short in meeting her professional responsibilities despite evidence that the entity officials with whom she was dealing withheld relevant

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<sup>213</sup> See, e.g., *Schultz*, 133 A.3d at 314 (“Underlying Schultz's claims is the extent and scope of Ms. Baldwin's representation to him prior and during his testimony before a criminal investigating grand jury.”); see also *id.* at 317 n.20 (“We do note that the Commonwealth has failed to cite a single case where a witness testified before a grand jury in an organizational or representative capacity and the testimony offered was used to prosecute the individual in a personal capacity.”).

<sup>214</sup> See, e.g., *Schultz*, 133 A.3d at 323 (“Although Schultz was certainly aware that Ms. Baldwin was general counsel for Penn State, it is unreasonable to conclude that this awareness by a lay person *ipso facto* results in Schultz knowing that she represented him solely in an agency capacity.”).

<sup>215</sup> *Schultz*, 133 A.3d at 324 (citing PA. R. PROF'L CONDUCT 1.2(c), 1.0(e), 1.6(a), 1.18(b)).

<sup>216</sup> *Schultz*, 133 A.3d at 325 (“Schultz consulted with Ms. Baldwin for purposes of preparing for his grand jury testimony relative to a criminal investigation into Jerry Sandusky, and reasonably believed she represented him . . . we conclude that all the communications between Schultz and Ms. Baldwin were protected by the attorney-client privilege.”).

<sup>217</sup> *Id.* at 326.

information from her<sup>218</sup>—corporate lawyers should always err on the side of caution and provide *Upjohn*-like warnings to all individuals they advise in their capacity as counsel for the entity. No prudent lawyer who is aware of the Superior Court’s holding in the *Schultz* case will fail to provide an *Upjohn*-type warning that explicitly informs individuals that the lawyer represents the entity and does not represent the entity officials in their individual capacities. Moreover, no prudent lawyer should fail to document that warning, either in a contemporaneous memorandum to the file or, if the lawyer wants to ensure that their professional conduct cannot later be second-guessed, by having the individual official sign a document verifying that she received and understands a warning that the lawyer represents only the entity and not her personally.

But what of lawyers in Pennsylvania who represent entities but do not routinely practice criminal law and are unaware of the Superior Court’s decision in *Schultz*? For them the decision of the Superior Court in the *Schultz* case represents a classic “trap for the unwary” that may snare them in the same way it did Cynthia Baldwin.<sup>219</sup> This is an untenable result, both in terms of the regulation of practicing lawyers and, most importantly, ensuring that clients receive adequate representation in Pennsylvania. Whether a lawyer-client relationship in Pennsylvania is defined in the proper manner and the attorney-client privilege applies in accordance with Pennsylvania law should not turn on whether the lawyer involved happens to be familiar with a particular case decided by the Pennsylvania Superior Court—even a case as notorious as the Penn State Three case. Therefore, the appropriate response to the Superior Court’s decision is an amendment to the Pennsylvania Rules of Professional Conduct making clear that a lawyer representing an organization must warn the organization’s individual constituents any time the lawyer provides those

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<sup>218</sup> In this case, Schultz withheld his file of confidential notes on the Sandusky matter. *See supra* Section II.A.2. Baldwin testified that she believed Spanier had lied to her during her interactions with him about the Sandusky matter. *See supra* Section II.A.3.

<sup>219</sup> Baldwin was an experienced judge and a former Pennsylvania Supreme Court Justice with decades of experience on the bench in private practice, at a large law firm, and as Penn State’s in-house general counsel. Despite this wealth of experience, the Superior Court did not hesitate to find fault with Baldwin’s conduct. *See, e.g., Schultz*, 133 A.3d at 324 (“While Ms. Baldwin could have limited the scope of her representation during Schultz’s grand jury testimony or prior thereto, there is no support in the record that such a limited representation was adequately explained to Schultz or that he provided informed consent to such a representation.”). *See also id.* at 325 (“We add that Ms. Baldwin did not provide anything akin to *Upjohn* warnings.”).

constituents advice about, or communicates with constituents about, a criminal investigation or prosecution.<sup>220</sup>

The current rule on lawyers representing an organization as the client is deficient in two respects, in light of the Superior Court's holding in the Penn State Three case. First, the rule contains only a general admonition that, "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client *when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.*"<sup>221</sup> This rule, while perhaps adequate to address situations such as a known existing or potential conflict of interest between an organization and an individual constituent in litigation or regulatory proceedings, is not adequate to address the situation in the Penn State Three case. There, Baldwin was responding to a grand jury investigation that she understood to be focused on the conduct of a third party (Sandusky), and she subsequently testified that the individual constituents (Curley, Schultz, and Spanier) of the organization she was representing (Penn State University) withheld information from her. Without that information, she did not know and, to use the language of the rule, could not reasonably have known, that the organization's interests were adverse to those of Spanier, Schultz, and Curley. To the contrary, all of their actions led her to believe that their interests and the University's interests were aligned. The Superior Court's conclusion that Baldwin's actions were deficient as discussed above, even under these circumstances, demonstrates that the existing rule is inadequate.

The second deficiency in the current Rules of Professional Conduct involves the rule that permits a lawyer for an organization to represent individual constituents of the organization if the lawyer obtains permission from the appropriate authority

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<sup>220</sup> Arguably, the same warning should be given not only in criminal matters, but in any kind of adversarial proceeding, such as shareholder litigation or civil regulatory proceedings, where the individual faces risk of personal monetary liability. This article does not go so far as to make that recommendation, because the Superior Court decision in the Penn State Three case involved a criminal investigation and much of the court's analysis was predicated on the grand jury investigation context of the case, but bar authorities in Pennsylvania and elsewhere should consider whether the Pennsylvania Superior Court decision warrants a broader *Upjohn* warning rule that extends beyond criminal cases.

<sup>221</sup> PA. R. PROF'L CONDUCT 1.13(d) (emphasis added). Pennsylvania Rule of Professional Conduct 4.3 on "Dealing with Unrepresented Person" is also not adequate to prevent the situation that arose in the Penn State Three case, because Curley, Schultz, and Spanier all knew that Baldwin was representing Pennsylvania State University. See PA. R. PROF'L CONDUCT 4.3(c); see also *supra* notes 106, 154 and accompanying text; but see *supra* notes 214, 216 and accompanying text.

within the organization.<sup>222</sup> That rule is inadequate, in light of the Superior Court's holding in the Penn State Three case, because it addresses only one side of the equation—that is the need for the lawyer to obtain the consent of the organization.<sup>223</sup> The Superior Court's decision in the Penn State Three case shows that the lawyer also must obtain informed consent of the individual constituent client<sup>224</sup> if the lawyer wishes to avoid subsequent controversy over the scope of the representation and perhaps even, as Baldwin suffered, judicial opprobrium for failing to ensure that the individual client understood the nature of the representation. At least where criminal charges are possible, a lawyer representing an organization must provide an explanation that the individual is being represented only in her official capacity, and not in her personal capacity, and document that this explanation was provided and understood, to meet the requirements imposed by the Superior Court in the Penn State Three case.

Accordingly, Rule 1.13(e) of the Pennsylvania Rules of Professional Conduct should be revised to contain the additional language suggested below, or language to similar effect, that will make clear to all lawyers practicing in Pennsylvania what they must do to meet the Superior Court's requirements, whether they have ever read or even heard of the Superior Court's opinion in the Penn State Three case:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. *If the lawyer proposes to jointly represent the organization and one of its constituents in the constituent's capacity as an agent of the organization, but only in that capacity, in a pending or threatened criminal investigation, then the lawyer must advise the constituent of the limited scope of the representation and document that the constituent understands the limited scope of the representation and has consented to it.*

The addition of this language would avoid the misunderstanding that occurred in the Penn State Three case and help all Pennsylvania lawyers avoid the mistakes that the

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<sup>222</sup> PA. R. PROF'L CONDUCT 1.13(e).

<sup>223</sup> See *id.* (referring to the lawyer obtaining consent under Rule 1.7 on "Conflict of Interest: Current Clients").

<sup>224</sup> See *Schultz*, 133 A.3d at 324 ("[T]here is no support in the record that such limited representation was adequately explained to Schultz or that he provided informed consent to such a representation.") (emphasis added).

Superior Court concluded Cynthia Baldwin made in that case—without regard to whether the individuals associated with the entity they represent are completely forthcoming with the lawyer or withhold relevant information from the lawyer.

If the Pennsylvania Rules of Professional Conduct had included the additional language proposed above at the time of the Penn State Three case, then presumably Cynthia Baldwin would have followed those rules and explained the scope of her representation to Curley, Schultz, and Spanier—and then documented that explanation and their consent to the limited scope of her representation. Had that happened, the criminal charges against them for conspiracy, perjury, and obstruction of justice in the Sandusky grand jury investigation would have proceeded on the merits, rather than having those charges dismissed as a result of Baldwin’s grand jury testimony and a dispute over the application of the attorney-client privilege. This outcome would have better served both the criminal justice system and the defendants. If the defendants were innocent of the perjury and obstruction of justice charges, as they vigorously asserted throughout the long process of contesting the charges, they could have defended themselves at trial and obtained an acquittal (rather than having those charges dismissed on what might be regarded as a technicality that left a cloud of doubt hanging over them because the case was not decided on the merits). If, on the other hand, the prosecution’s case had merit, then the prosecutors could have proceeded to trial and put before a jury proof beyond a reasonable doubt that the defendants were guilty and obtained a conviction, vindicating the state’s interest in prosecuting serious violations of law. Instead, the outcome of the case is in many ways the worst of all worlds for all involved—the prosecutors, the defendants, Baldwin, Penn State, and the criminal justice system in Pennsylvania.

*B. Grand Jury “Target Warnings” Should be Mandatory in Pennsylvania*

Amending the Pennsylvania Rules of Professional Conduct to make disclosure akin to *Upjohn* warnings mandatory is one way to avoid the unfortunate outcome of the Penn State Three case, an outcome that was harmful not only to Cynthia Baldwin, but also to the prosecutors in the case and to the criminal justice system’s interest in having guilt or innocence decided at trial, rather than dismissed in an appellate court ruling on a collateral legal issue. The problematic outcome of the case, which both prevented a resolution on the merits of the conspiracy, perjury, and obstruction charges relating to the Sandusky grand jury investigation and created a lingering “trap for the unwary” waiting to ensnare Pennsylvania lawyers, could also have easily been avoided in another way.

In the federal criminal justice system, the attorney-client privilege issues that consumed the Penn State Three case almost certainly never would have arisen. The reason is not that in the federal system, unlike in Pennsylvania, defense attorneys are



not permitted to accompany witnesses into the grand jury room.<sup>225</sup> The reason the issue almost surely would not have arisen in the federal system is that the U.S. Department of Justice has a policy of using an “Advice of Rights” form that notifies a witness subpoenaed to appear before a grand jury if he or she is a subject or target of the grand jury’s investigation.<sup>226</sup> The Department of Justice follows this longstanding policy even though the Supreme Court has held<sup>227</sup> that targets of a grand jury investigation are entitled to no special warnings relative to their status as “potential defendants.”<sup>228</sup> Federal prosecutors are instructed that if a witness is a target<sup>229</sup> of the grand jury’s investigation, the witness must receive “a supplemental warning that the witness’s conduct is being investigated for possible violation of federal criminal law.”<sup>230</sup>

Pennsylvania has no similar policy or rule for targets and subjects of a state grand jury investigation. Had such rule been in place, then the subpoenas to Curley and Schultz for testimony before the Sandusky investigating grand jury would have advised them that they were targets or subjects of the investigation.<sup>231</sup> If the subpoenas to Curley and Schultz been accompanied by a warning that they were subjects or targets of the grand jury’s investigation, Baldwin would have known immediately that there was a conflict or potential conflict between their interests and the interests of her client, Penn State University, and she would have advised them (and Spanier, when she “ran up the stairs” to his office to tell him about the

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<sup>225</sup> See FED. R. CRIM. P. 6(e) (limiting those who may be present before the grand jury and not including counsel for the witness among those who may be present).

<sup>226</sup> See DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL, § 9–11.151 [hereinafter DOJ MANUAL].

<sup>227</sup> *United States v. Washington*, 431 U.S. 181 (1977).

<sup>228</sup> See DOJ MANUAL, *supra* note 226 (citing *Washington*, 431 U.S. at 186).

<sup>229</sup> A “target” is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer’s or employee’s conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target. A “subject” of an investigation is a person whose conduct is within the scope of the grand jury’s investigation. DOJ MANUAL, *supra* note 226.

<sup>230</sup> See *id.*

<sup>231</sup> See *Commonwealth v. Schultz*, 133 A.3d 294, 302 n.8 (Pa. Super. Ct. 2016) (“Despite the OAG’s representation [to Baldwin] that Schultz and Curley were not targets, the OAG was already aware that McQueary had told investigators that he reported a sodomy to Schultz and Curley, and it knew there had been no follow up police investigation. Thus, at that time, the OAG ostensibly had a basis upon which to charge Curley and Schultz with failure to report suspected child abuse.”).

subpoenas)<sup>232</sup> that they needed separate counsel to represent them personally. Had that occurred, the whole issue of her role in representing them in connection with their grand jury testimony almost certainly would have been avoided from the outset, and the criminal case against them would have proceeded on the merits with no attorney-client privilege issues complicating the case.

Beyond serving to avoid the attorney-client privilege issue that largely consumed the Pennsylvania Attorney General's criminal case against the Penn State Three, there are important policy reasons Pennsylvania should adopt, either by statute or by internal policy in the Office of Attorney General, a requirement like the federal Department of Justice policy requiring that grand jury targets and subjects be advised of their status as such if they are subpoenaed to appear before a grand jury. As noted above, unlike in the federal system, in Pennsylvania the attorney who represents a grand jury witness can accompany the witness into the grand jury room.<sup>233</sup> Counsel for a witness is permitted to be present in the grand jury room with the witness during testimony and is allowed to advise the witness during questioning, but is not allowed to make objections or arguments or otherwise address the grand jury or the prosecutor who is questioning the witness.<sup>234</sup> Thus, in the Pennsylvania grand jury system, counsel for a witness is permitted to play a greater role in the grand jury process than in the federal system, where counsel cannot accompany the witness into the grand jury room, and the witness must ask to leave the grand jury room to consult with counsel.<sup>235</sup>

This more expansive role of counsel representing witnesses appearing before grand juries in Pennsylvania makes it essential that Pennsylvania law should not permit prosecutors to withhold information from defense counsel that would help defense counsel determine whether a conflict of interest exists, as the Superior Court

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<sup>232</sup> See *supra* note 106 and accompanying text.

<sup>233</sup> See 42 PA. CONS. STAT. § 4549(c) (2017). See also *Schultz*, 133 A.3d at 314–15 (describing “The Grand Jury in Pennsylvania and the Advent of the Statutory Right to Grand Jury Counsel”). As noted above, when Baldwin appeared with Curley and Schultz, and later Spanier, at their grand jury testimony, she informed Supervising Judge Feudale that she was appearing with them as counsel to Pennsylvania State University and appearing with them in their professional capacity, and Judge Feudale permitted her to appear with them for their grand jury testimony. See Feudale’s Order, *supra* note 204.

<sup>234</sup> See 42 PA. CONS. STAT. § 4549(c)(3) (2017).

<sup>235</sup> As a practical matter, the difference between the role of counsel in the two systems is very significant. By virtue of being able to hear the questions put to the witness before the grand jury and hear the responses of the witness, counsel under the Pennsylvania system is in a much better position to assist the witness.

concluded took place in the Penn State Three case.<sup>236</sup> Moreover, fundamental concepts of justice and fair play support advising witnesses prior to their grand jury testimony if they are a subject or target of the investigation. This is why the Department of Justice has long adhered to this policy, even after Supreme Court decisions made clear that it is not constitutionally required.<sup>237</sup> Finally, as a practical matter, such a rule might help prevent overzealous prosecutors from falling prey to their worst adversarial instincts and seeking to construct a “perjury trap” for unwitting grand jury witnesses.<sup>238</sup>

For all of these reasons, Pennsylvania law should be changed to make “target warnings” mandatory when witnesses appear before an investigating grand jury. Ideally, this change would be made through an amendment to the Pennsylvania Investigating Grand Jury Act.<sup>239</sup> Alternatively, the Pennsylvania Office of Attorney General could adopt an internal policy, similar to the Department of Justice policy discussed above, requiring that target warnings be provided to grand jury witnesses in advance of their testimony.

In addition to both preventing the kind of attorney-client privilege problem that arose in the Penn State Three case and generally improving the administration of justice in Pennsylvania, making target warnings for grand jury witnesses mandatory would bring Pennsylvania into conformity with the practice of federal prosecutors and with other of states that require target warnings.<sup>240</sup> In light of the Pennsylvania Superior Court’s criticism of the prosecutors in the Penn State Three case, both the Pennsylvania legislature and the Pennsylvania Office of Attorney General should

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<sup>236</sup> See *supra* note 200 and accompanying text.

<sup>237</sup> See *supra* note 226 and accompanying text (discussing the Department of Justice policy on target notifications).

<sup>238</sup> See *supra* note 201 and accompanying text (discussing the use of a “perjury trap” in grand jury investigations).

<sup>239</sup> See 42 PA. CONS. STAT. § 4549(c) (2017).

<sup>240</sup> See CONN. GEN. STAT. § 54-47f(e) (“The official conducting the investigation shall inform any witness who is a target of the investigation that he is a target and shall advise him that he has the right under the Constitution of the United States and the Constitution of Connecticut not to be compelled to be a witness, or to give evidence, against himself.”); N.M. STAT. ANN. § 31-6-11(C) (“A district attorney shall use reasonable diligence to notify a person in writing that the person is the target of a grand jury investigation.”); S.D. CODIFIED LAWS § 23A-5-13 (“Before testifying or providing other evidence at any proceeding before a grand jury impaneled before a circuit court, the subject of the grand jury investigation shall be given adequate and reasonable notice . . . .”); UTAH CODE ANN. § 77-10a-13 (“A witness who is also a target shall at the time he appears as a witness, be advised . . . that he is a target.”); *Robinson v. State*, 453 N.E.2d 280 (Ind. 1983) (holding that a grand jury witness must be advised if he or she is a subject of an investigation).

recognize the need to make target warnings mandatory for witnesses appearing before investigating grand juries in Pennsylvania.

#### IV. CONCLUSION

The Penn State Three case shows that current Pennsylvania law is not adequate to protect the rights of witnesses in grand jury investigations or the public interest in the effective administration of justice in the Commonwealth of Pennsylvania. The case also shows that the Pennsylvania Rules of Professional conduct are not adequate to prevent unintended ethical violations by attorneys in multiple representation situations involving organizational clients. To address these deficiencies, the Pennsylvania Investigating Grand Jury Act should be amended to make target warnings mandatory for witnesses appearing before Pennsylvania investigating grand juries. If the legislature does not act to require target warnings, the Pennsylvania Attorney General's Office should implement internal policies, consistent with current Department of Justice policies for federal grand juries, to require target warnings. In addition, the Pennsylvania Rules of Professional Conduct should be amended to make *Upjohn* warnings mandatory whenever an attorney representing an organization gives advice to constituents of that organization in connection with a pending or threatened criminal investigation.

Until these changes are implemented, the risk remains that the mistakes identified by the Pennsylvania Superior Court in the Penn State Three case—mistakes by both defense counsel and Pennsylvania Office of Attorney General prosecutors—will be repeated in other cases. As should be obvious after reading this Article, every effort should be made to avoid that outcome. Legislatures, attorneys general, and bar associations in all states should review their rules and policies in light of the outcome in the Penn State Three case.