ORIGINAL

0000R0TQ CCGPRO 201502

THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

FILED FOR RECORD
2015 FEB 17 AM 11:47
DEBRA K. HENNEL
PROTHONOTARY
CENTRE COUNTY, PA

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

____ Medical Professional Liability Action (check if applicable)

Type of Pleading:
Defendant's Response to Plaintiff's Motion to Compel Production of Documents

Filed on Behalf of:
Defendant, The Pennsylvania State University

Counsel of Record for this Party:
Nancy Conrad, Esquire
White and Williams LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
(610) 782-4909
conradn@whiteandwilliams.com
PA I.D. Number 56157

ORIGINAL

WHITE AND WILLIAMS LLP
BY: Nancy Conrad
Identification No(s). 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034-8233
610.782.4909 / Fax 610.782.4935
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY Defendant.	CENTRE COUNTY COURT OF COMMON PLEAS CIVIL ACTION NO. 2012-1804 HON. THOMAS G. GAVIN

FILED FOR RECORD
2015 FEB 17 AM 11:47
DEBRA A. KLINE
PROTHONOTARY
CENTRE COUNTY, PA

DEFENDANT'S RESPONSE TO
PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Defendant, The Pennsylvania State University (the "University"), by and through its attorneys, White and Williams LLP, hereby files this response to Plaintiff's Motion to Compel Defendant's Production of Documents, and responds as follows:

1. This averment refers to a written document, the content of which speaks for itself. Any characterization thereof is specifically denied.

2. Admitted.

3. Admitted in part; denied in part. It is admitted only that the parties are at an impasse with respect to the University's responses to Plaintiff's

Document Request numbers 4 and 11. The remaining allegations contained in Paragraph 3 are specifically denied.

4. Paragraph 4 refers to a written document, the content of which speaks for itself. Any characterization thereof is specifically denied.

5. Denied as stated. It is admitted only that the University has supplemented its responses to Plaintiff's Document Request number 4, and that the most recent supplement was the University's Third Supplemental Written Response to Plaintiff's First Request for Production of Documents.

6. Paragraph 6 refers to a written document, the content of which speaks for itself. Any characterization thereof is specifically denied.

7. Paragraph 7 refers to a written document, the content of which speaks for itself. Any characterization thereof is specifically denied.

8. Denied. Paragraph 8 contains a conclusion of law to which no response is required. To the extent that Paragraph 8 contains factual averments, those averments are specifically denied.

9. Paragraph 9 refers to a written document, the content of which speaks for itself. Any characterization thereof is specifically denied.

10. Paragraph 10 refers to a written document, the content of which speaks for itself. Any characterization thereof is specifically denied.

ORIGINAL

11. Paragraph 11 refers to a written document, the content of which speaks for itself. Any characterization thereof is specifically denied.

12. Denied. Paragraph 12 contains a conclusion of law to which no response is required. To the extent that Paragraph 12 contains factual averments, those averments are specifically denied.

WHEREFORE, Defendant, The Pennsylvania State University, respectfully requests that this Honorable Court enter an Order denying Plaintiff's Motion to Compel Defendant's Production of Documents.

WHITE AND WILLIAMS LLP

BY: _____

Nancy Conrad, Esquire
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
Phone: (610) 782-4909
Fax: (610) 782-4935
conradn@whiteandwilliams.com
I.D. Number PA 56157
Attorneys for Defendant,
The Pennsylvania State University

Dated: February 13, 2015

ORIGINAL

WHITE AND WILLIAMS LLP
BY: Nancy Conrad
Identification No(s). 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034-8233
610.782.4909 / Fax 610.782.4935
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY Defendant.	CENTRE COUNTY COURT OF COMMON PLEAS CIVIL ACTION NO. 2012-1804 HON. THOMAS G. GAVIN

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL

Defendant, The Pennsylvania State University (hereinafter, the "University"), hereby submits this Memorandum of Law in support of its Response to Plaintiff's Motion to Compel. Plaintiff's Motion to Compel should be denied.

I. INTRODUCTION/STATEMENT OF FACTS

The instant matter is before this Court on Plaintiff's Motion to Compel, which improperly seeks to compel the University to disclose various November 2011 and February 2012 email communications that are protected by the attorney/client privilege and/or work product doctrine. By way of background, as early as January 2010, the University and Pennsylvania Attorney General were

fully engaged with respect to the Sandusky-related matters. Grand Jury Subpoenas had been issued and testimony taken by the Grand Jury. Under these circumstances, the University anticipated that litigation would ensue. University General Counsel Baldwin became involved in providing advice immediately to all University personnel. It was anticipated that any official statements made by or on behalf of the University personnel might be used in subsequent litigation. The University subsequently retained outside legal representation. Plaintiff's request for this Court to compel the production of communications between University employees, University General Counsel Baldwin and University outside counsel is neither supported by the law which governs the attorney-client privilege nor the work product doctrine. It must be rejected by this Court.

II. BACKGROUND

As this Court may be aware, Plaintiff commenced this action on or about May 8, 2012, by filing a Praecipe to Issue Writ of Summons for a "Whistleblower" action against the University. On October 2, 2012, Plaintiff filed a three-count Complaint alleging violation of the Pennsylvania Whistleblower Law (Count I), Defamation (Count II), and Misrepresentation (Count III) claims against the University (hereinafter "Complaint").[1]

[1] Five critical factual events lie at the heart of the Complaint: (1) Plaintiff witnessing misconduct by former Penn State Assistant Football Coach and Defensive Coordinator, Gerald A. Sandusky ("Sandusky") on February 9, 2001 in a University locker room; (2) Plaintiff's

ORIGINAL

The instant discovery dispute pertains to the University's response to Plaintiff's First Request for Production of Documents. Specifically, the dispute pertains to Request for Production numbers 4 and 11.

In response to Plaintiff's Request for Production numbers 4 and 11, the University produced, in redacted format, the following e-mail communications between: (1) University General Counsel Baldwin, the University's Director of Public Information, and other University employees (Bates Nos. PSU 000353-000355); (2) University General Counsel Baldwin, other outside University counsel, and University employees (Bates Nos. PSU 000407-000425); and, (3) University General Counsel Baldwin and counsel for Curley and Schultz (Bates Nos. PSU 000341-000352). Collectively, these e-mails are referred to as the "Communications." The University properly prepared and produced a privilege log asserting that the Communications are protected from disclosure by the attorney-client privilege and/or work product doctrine. Plaintiff claims that these documents are not subject to the attorney-client privilege and/or work product doctrine and should be produced.

---

subsequent reporting of the incident to former Penn State Head Football Coach, Joseph Vincent Paterno ("Paterno"); (3) the alleged response to the incident by former University officials, including President Graham B. Spanier ("Spanier"), Senior Vice President Gary Schultz ("Schultz"), and Director of Intercollegiate Athletics Timothy Curley ("Curley"); (4) Spanier's public statement in November 2011, which allegedly offered support for Curley and Schultz; and, (5) the end of Plaintiff's fixed-term employment with the University in June 2012.

As outlined below, the University properly withheld the Communications as protected from disclosure by the attorney-client privilege and/or work product doctrine. Plaintiff's motion to compel production of these communications is without merit and must be rejected by this Court.

III. STATEMENT OF QUESTION INVOLVED

Whether this Honorable Court should deny Plaintiff's Motion to Compel the University's disclosure of the Communications because the Communications are protected from disclosure by the attorney-client privilege and/or work product doctrine.

Suggested Response: Yes.

IV. LEGAL ARGUMENT

Plaintiff claims that the Communications are not protected by the attorney-client privilege or the work product doctrine because the Communications were not between an attorney and a client for the purpose of obtaining or providing professional legal advice. As more fully set forth herein, Plaintiff's argument is without factual or legal merit.

To establish the applicability of the attorney-client privilege in Pennsylvania, the party invoking the privilege must initially set forth facts showing that the privilege was properly invoked. See Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1267 (Pa. Super. 2007), aff'd 992 A.2d 74 (Pa. 2010). Thereafter, the burden shifts to the party seeking disclosure to set forth facts showing that

disclosure will not violate the privilege, that is, the privilege was waived or some exception applies. Id.

A. The e-mail communications between the University's Director of Public Information and other University employees that were copied to University General Counsel Baldwin are protected by the attorney-client privilege.

The e-mail communications between the University's Director of Public Information, Lisa Powers, and other University employees that were copied to University General Counsel Baldwin (Bates Nos. PSU 000353-000355) are protected from disclosure by the attorney-client privilege. Plaintiff's assertion that the University failed to properly invoke the privilege because it copied University General Counsel Baldwin is without merit and fails as a matter of law.

In Pennsylvania, the attorney-client privilege is codified at Section 5928 of the Judicial Code, which provides: "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case, this privilege is waived upon the trial by the client." See 42 Pa. C.S.A. § 5928. Four elements must be satisfied to successfully invoke the protections of the attorney-client privilege:

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; and,

4. The privilege has been claimed and is not waived by the client.

See Nationwide Mut. Ins. Co., 924 A.2d at 1264.

Notably, the Supreme Court of Pennsylvania recently interpreted the parameters of attorney-client privilege and chose to expand, rather than contract, the scope of the privilege. See Gillard v. AIG Ins. Co., 15 A.3d. 44 (Pa. 2011). In Gillard, the Court decided in favor of an expansive attorney-client privilege and held that the privilege operates in a "two-way fashion" to protect both client-to-attorney and attorney-to-client communications. Id. at 56, 59.

The e-mails at issue are communications between the University's Director of Public Information and other University employees with a copy to University General Counsel Baldwin. The e-mails included University General Counsel Baldwin because the University's Director of Public Information was seeking legal advice during the exchange of these communications. See Affidavit of the University Director of Public Information, attached hereto as Exhibit "A" ("I copied University General Counsel Baldwin on email communications [PSU 000353-000355] to seek legal advice"). The University has not waived the privilege with respect to these communications. Therefore, the subject e-mails

meet the four elements necessary to invoke the protections of the attorney-client privilege. See Nationwide Mut. Ins. Co., 924 A.2d at 1264.

The University properly withheld the e-mail communications between the University's Director of Public Information and other University employees that were copied to University General Counsel Baldwin (Bates Nos. PSU 000353-000355) as protected by the attorney-client privilege.

B. The e-mail communications between University General Counsel Baldwin, outside University counsel and the University are protected by the attorney-client privilege and work product doctrine.

(1) The e-mail communications are protected by the attorney-client privilege.

The e-mail communications between University General Counsel Baldwin, University outside counsel and the University (Bates Nos. PSU 000407-000425) are protected from disclosure by the attorney-client privilege. Plaintiff's assertion that the University has failed to properly invoke the privilege is without merit and fails.

Here, the e-mail chain at issue contains messages authored by and directed to several attorneys for the University, including Lanny J. Davis[2]; University

[2] The e-mail chain at issue also contains e-mails to and from Eleanor McManus, who is a colleague and agent of Attorney Davis. In Pennsylvania, communications between an agent of an attorney and the client are covered under the penumbra of the attorney-client privilege when the agent is assisting the attorney in providing

General Counsel Baldwin; and, Frank Guadagnino, an outside counsel retained by the University.

The University, the holder of the attorney-client privilege, retained Lanny J. Davis and Associates as University counsel to "advise on legal issues ..." and public statements likely to become the subject matter of future litigation. See Revised Engagement Letter, dated February 1, 2012, redacted in part, attached hereto as Exhibit "B" and Affidavit of Dr. Rodney Erickson, attached hereto as Exhibit "C." The parties further contemplated that such advice would be subject to the attorney-client privilege. Id. The e-mails were sent for the purposes of securing legal advice from Lanny J. Davis and Associates, University General Counsel Baldwin and Attorney Guadagnino. See Exhibit "C" (the email communications Bates Numbered PSU 000407-000425 "were made for the purpose of securing legal advice . . . ."). The University has not waived any privilege with respect to these communications. The subject e-mails meet the four elements necessary to invoke the protections of the attorney-client privilege. See Nationwide Mut. Ins. Co., 924 A.2d at 1264.

It is not uncommon for many organizations to retain consultants to perform tasks of varying degree of complexity that they might not have the organizational capacity to handle in-house. The practical reality is that as consultants play a

advice to the client. See Commonwealth v. Noll, 662 A.2d 1126, 1126 (Pa. Super. 1995).

larger role in operations, they inevitably require access to privileged information necessary to enable general counsel to make informed legal decisions for the business. This was particularly true of Mr. Davis, who, as a lawyer and media consultant, was expected to provide uniquely particularized advice. Courts have embraced this practical reality by expanding the scope of the attorney-client privilege to cover confidential communications with consultants that assist the company's attorneys in rendering legal advice, particularly because it fits within the "underlying purpose of the attorney-client privilege." See In re Flonase Antitrust Litigation, 879 F. Supp. 2d 454 (E.D. Pa. 2012) (citing U.S. ex rel. Strom v. Scios, Inc., 2011 WL 4831193, at *4 (N.D. Cal. 2011) ("[T]he dispositive question is whether by virtue of that relationship he possesses information about the company that would assist the company's attorneys in rendering legal advice."). See also In re: Grand Jury Subpoenas Dated March 24, 2003, 265 F.Supp.2d 321, 330 (S.D.N.Y.) (lawyers' ability to perform their most fundamental client functions would be undermined if lawyers were not able to engage in frank discussions of fact and strategies with lawyers' public relations consultants).

Federal courts that have addressed this issue have also adopted a pragmatic approach that focuses on whether the consultant was the "functional equivalent" of an employee. In re Bieter, 16 F.3d 929 (8th Cir. 1994); Federal Trade Commission v. GlaxoSmithKline, 294 F.3d 141, 147-48 (D.C. Cir. 2002) (reasoning that

communications with consultants were privileged because they were assigned to deal with the issue completely intertwined with [GSK's] litigation and legal strategies). Under this standard, communications with consultants are privileged if, by virtue of their role, they possess or have access to confidential information necessary for the provision of legal advice. Id. In applying the "functional equivalent" doctrine, courts will focus upon the closeness of the relationship between the client and the consultant, whether the consultant kept the communications confidential and made for purposes of providing or obtaining legal advice. In re Flonase Antitrust Litigation, 879 F. Supp. 2d at 460 (concluding that sharing confidential information with a pharmaceutical consultant did not waive the protection of the attorney-client privilege).

The University properly withheld the e-mail communications between Lanny J. Davis and Associates, Attorney Guadagnino and the University (Bates Nos. PSU 000416-000425) as protected by the attorney-client privilege.

(2) The e-mail communications are protected by the work product doctrine.

The e-mail communications between University General Counsel Baldwin, University outside counsel and the University (Bates Nos. PSU 000407-000425) are also protected from disclosure by the work product doctrine.

In Pennsylvania, the work product doctrine provides an even broader protection than the attorney-client privilege. See Noll, 662 A.2d at 1126. The

work product doctrine protects the disclosure of mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. See Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity, 91 A.3d 680, 686 (Pa. 2014) (citing Pa. R.C.P. 4003.3). Moreover, the work product doctrine protects "material [containing mental impressions, conclusions, or opinions], regardless of whether it is confidential [or] prepared by the attorney in anticipation of litigation." Bagwell v. Penna. Dep't of Educ., 103 A.2d 409, 417 (Pa. Commw. 2014) (stating that "materials do not need to be prepared in anticipation of litigation for the work-product privilege to attach"); National R.R. Passenger Corp. v. Fowler, 788 A.2d 1053, 1065 (Pa. Commw. 2001) (recognizing that the work product doctrine has been expanded and applies to documents prepared for attorneys by their agents). In this regard, Pennsylvania Rule of Civil Procedure 4003.3 provides, in pertinent part: "With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics." See Pa. R.C.P 4003; Bagwell, 103 A.3d at 416 (holding that the work product doctrine protects materials prepared by agents for the attorney, including an agent's opinions, theories, or conclusions as part of preparing a case).

Here, the e-mail communications between University General Counsel Baldwin, Lanny J. Davis and Associates, Attorney Guadagnino and the University contain the conclusions, mental impressions and/or opinions respecting draft versions of statements that were being prepared in anticipation of imminent litigation. See Barrick, 91 A.3d at 686; Bagwell, 103 A.3d at 417. These e-mail communications are protected by the work product doctrine.

C. Messrs. Curley and Schultz Have Asserted an Individual Attorney-Client Privilege With Former University General Counsel Baldwin.

As this Court is aware, Messrs. Curley and Schultz have asserted an individual attorney-client relationship with former University General Counsel Baldwin. Counsel for Messrs. Curley and Schultz have informed counsel for the University that the e-mail communications between them and University General Counsel (Bates Nos. PSU 000341-000352) reflect attorney-client privileged and/or work product protected communications. Undersigned counsel understands that Counsel for Messrs. Curley and Schultz intend to request an opportunity to be heard on this matter.

V. CONCLUSION

Based on the foregoing, Defendant, The Pennsylvania State University, respectfully requests that this Honorable Court deny Plaintiff's Motion to Compel Documents and enter the attached proposed order.

ORIGINAL

WHITE AND WILLIAMS LLP

BY: _____

Nancy Conrad, Esquire
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
Phone: (610) 782-4909
Fax: (610) 782-4935
conradn@whiteandwilliams.com
I.D. Number PA 56157
Attorneys for Defendant,
The Pennsylvania State University

Dated: February 13, 2015

MICHAEL J. MCQUEARY Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY Defendant.	CENTRE COUNTY COURT OF COMMON PLEAS CIVIL ACTION NO. 2012-1804 HON. THOMAS G. GAVIN

AFFIDAVIT OF LISA MARIE POWERS

I, Lisa Marie Powers, being duly sworn according to law, deposes and states as follows:

1. I am an adult individual and have personal knowledge of the averments in this Affidavit;

2. I have been employed by the Pennsylvania State University (the "University") since 1991;

3. From 2007 until 2013, I was the Director of the Department of Public Information for the University;

4. During my employment with the University, I copied University General Counsel Baldwin on e-mail communications to seek legal advice;

5. On November 5, 2011, I copied University General Counsel Baldwin on e-mail communications (Bates Nos. PSU 000353-000355), attached to this Affidavit as Exhibit "A," addressed to Gary C. Schultz to seek legal advice; and,

6. The facts set forth above are true and correct.

EXHIBIT "A"

Date: February 11, 2015

LISA MARIE POWERS

SWORN TO and SUBSCRIBED
before me this 11 day of
FEBRUARY, 2015.

Diane K Keshvari
NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
DIANE K. KESHVARI, Notary Public
State College Boro., Centre County
My Commission Expires July 26, 2015

Lanny J. Davis
& Associates LLC
Law A Media A Legislative/Political Strategies

VIA E-MAIL: [redacted]

February 1, 2012

Mr. Thomas G. Poole
Vice President for Administration
The Pennsylvania State University
108 Old Main
University Park, PA 16802

Re: Revised Engagement Letter

Dear Tom:

This confirms the engagement of Lanny J. Davis & Associates, LLC (LJD&A) for Lanny J. Davis to act as "University Counsel" for The Pennsylvania State University ("the University") to advise on legal issues, including the need to correct the record concerning the University's reputation in media and other published misstatements (the "Services"). Such legal advice efforts and strategies are rendered with the understanding that their communication to you and your reliance on them are subject to the attorney-client and work product privilege.

I will be principally responsible for services provided to the University. As circumstances warrant, subject to your approval, other lawyers or non-lawyer professionals might be engaged by me to work on this matter under my supervision and as my subcontractors.

[redacted]

600 13th St. N.W., Suite 600 Washington, D.C. 20005 **Direct:** 202.756.8211 **Fax:** 202.737.1141
ldavis@lannyjdavis.com

EXHIBIT "B"

[redacted]

[redacted]

[redacted]

Sincerely,

[redacted]

Lanny J. Davis

Agreed to and accepted:

By: [redacted]

Dr. Rodney Erickson
President

[redacted]

MICHAEL J. MCQUEARY Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY Defendant.	CENTRE COUNTY COURT OF COMMON PLEAS CIVIL ACTION NO. 2012-1804 HON. THOMAS G. GAVIN

AFFIDAVIT OF RODNEY A. ERICKSON

I, Rodney A. Erickson, being duly sworn according to law, deposes and states as follows:

1. I am an adult individual and have personal knowledge of the averments in this Affidavit;

2. On November 9, 2011, the Board of Trustees of the Pennsylvania State University (the "University") appointed me as Interim President of the University;

3. I served as President of the University until May 12, 2014;

4. In November 2011, the University retained Lanny J. Davis and Associates;

5. On October 7, 2014, I testified during my deposition in this matter that "Lanny Davis was a consultant – a media consultant" and that "he or his company had a contract with [the University] to provide media consulting services."

6. The above contract that I referred to during my deposition is the Revised Engagement Letter signed by me and as between the University and Lanny J. Davis and Associates, dated February 1, 2012, a true and correct redacted copy of which is attached to this Affidavit as Exhibit "A";

EXHIBIT "C"

7. The Revised Engagement Letter states that Lanny J. Davis and Associates was retained "to advise on legal issues, including the need to correct the record concerning the University's reputation in the media." See Exhibit "A."

8. To the best of my knowledge, the e-mail communications between University General Counsel Baldwin; outside counsel, Frank Guadagnino; representatives for Lanny J. Davis and Associates, University employees and me (Bates Nos. PSU 000407-000425) were made for the purpose of obtaining legal advice and/or contained work-product, including mental impressions, conclusions and/or opinions.

9. The facts set forth above are true and correct.

Date: February 13th 2015

RODNEY A. ERICKSON

SWORN TO and SUBSCRIBED
before me this 13th day of
FEBRUARY, 2015.

NOTARY PUBLIC

ERIN SMITH
MY COMMISSION # EE117878
EXPIRES August 01, 2015
(407) 398-0153 FloridaNotaryService.com

UNPUBLISHED OPINION

Not Reported in F.Supp.2d, 2011 WL 4831193 (N.D.Cal.)
(Cite as: 2011 WL 4831193 (N.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
UNITED STATES ex rel. STROM, Plaintiff,
v.
SCIOS, INC. and Johnson & Johnson, Defendants.

No. C05–3004 CRB (JSC).
Oct. 12, 2011.

Matthew Brian Pavone, Law Offices Of Matthew B. Pavone, Novato, CA, Alison Kathleen Hurley, Keith Glenn Bremer, Bremer Whyte Brown & O'Meara LLP, Berkeley, CA, Kenneth Joseph Nolan, Nolan & Auerbach, P.A., Fort Lauderdale, FL, Marcella Auerbach, Nolan & Auerbach, P.A., Fort Lauderdale, FL, Matthew B. Pavone, Novato, CA, Renee S. Orleans, Washington, DC, Sara Winslow, Jonathan D. Schmidt, Julie Ann Arbuckle, U.S. Attorney's Office, San Francisco, CA, Kimberly Friday, United States Department of Justice, Washington, DC, Adelina Orozco Berumen, CA State Attorney General's Office, San Diego, CA, Michael J. Karpinski, Office Of The Attorney General, Tallahassee, FL, for Plaintiff.

John Mark Potter, Adam Seth Cashman, Meagan Kara Bellshaw, Nicole Y. Altman, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, CA, Ashley Elizabeth Martabano, Christopher Tayback, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, CA, Diane M. Doolittle, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, CA, for Defendants.

ORDER RE: PLAINTIFF'S MOTION FOR RECONSIDERATION (Dkt. No. 138)

JACQUELINE SCOTT CORLEY, United States Magistrate Judge.

***1** Now pending before the Court is Plaintiff's motion for reconsideration of the Court's September 21, 2011 Order finding that communications made in a March 2002 telephone call between various Scios, Inc. ("Scios") employees and Scios outside consultant Dr. Lipicky are protected by the attorney-client privilege. Plaintiff contends that Dr. Lipicky's deposition testimony obtained after the Court's ruling demonstrates that the communications are not protected by the privilege.

A. Leave to file

As a preliminary matter, the Court must determine whether to grant Plaintiff leave to seek reconsideration of the Order. Civil Local Rule 7–9 provides that a party must first seek leave to file a motion for reconsideration and that to be granted such leave the party must show

> [t]hat at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did [missing text].

Civ. L.R. 7–9(b)(1). While Plaintiff has not formally sought such leave, the Court interprets the October 5, 2011 joint letter brief as a request for leave to seek reconsideration on the ground of a material difference of fact; namely, the subsequent deposition of Dr. Lipicky. Interpreting the letter in this manner is consistent with the Court's standing order and its intent to have discovery disputes resolved as efficiently and with as little cost to the parties as is reasonably possible.

While the taking of Dr. Lipicky's deposition creates a potentially material difference in fact, Defendants nonetheless argue that Plaintiff has not demonstrated that it has exercised the required due diligence because Plaintiff declined the Court's offer to defer any ruling on the privilege issue until after Dr. Lipicky's deposition. Plaintiff, however, requested a ruling before Dr. Lipicky's deposition because it understood that due to Dr. Lipicky's

© 2015 Thomson Reuters. No Claim to Orig. US Gov. Works.

health he would not be available for a second deposition should Plaintiff prevail on its privilege argument; in other words, it needed to know prior to his deposition whether he could be required to answer questions regarding the content of the March 2002 telephone call. Plaintiff does not seek to retake Dr. Lipicky's deposition as a result of his testimony; instead, it seeks to reopen the depositions of others who refused to testify as to the content of the March 2002 telephone call on the basis of attorney-client privilege. Accordingly, the Court grants Plaintiff leave to seek reconsideration of the September 21, 2011 order in light of Dr. Lipicky's subsequent testimony.

B. Request for Reconsideration

The application of the attorney-client privilege in a federal question case is governed by an eight-part test:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

***2** *United States v. Graf,* 610 F.3d 1148, 1156 (9th Cir.2010) (internal quotation marks and citation omitted). The only requirement at issue on Plaintiff's motion for reconsideration is the fifth element-the identity of the "client." [FN1] In *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), the United States Supreme Court held that for corporations (such as Scios), the attorney-client privilege extends to communications with counsel made by all of the corporation's employees, not just upper management or those from a "control group." *Id.* at 394–95.

> FN1. Plaintiff's October 5, 2011 letter notes that Dr. Lipicky did not understand that Jane Moffitt was an attorney or that his role was to provide advice to help Scios' attorneys provide Scios with legal advice. (Dkt. No. 138 at 2.) It is unclear whether Plaintiff is arguing that the Court should reconsider its order because this testimony means that the March 2002 telephone conference was not related to legal advice, a different question from whether Dr. Lipicky qualifies as a representative of Scios. In any event, as Dr. Lipicky could not even remember with whom he worked at Scios or the conversation itself, *see infra* at 5, the Court does not find his testimony persuasive on this point.

In *In Re Bieter Co.,* 16 F.3d 929 (8th Cir.1994), the Eighth Circuit held further that "an independent consultant can be a representative of the client for the purpose of applying the attorney-client privilege." *Id.* at 936. Indeed, "it is inappropriate to distinguish between those on the client's payroll and those who are instead, and for whatever reason, employed as independent contractors." *Id.* at 937. The court's fear was that "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess just the very sort of information that the privilege envisions flowing most freely." *Id.* at 938. The court went hold to hold that the privilege applied to communications between counsel and the outside consultant at issue there because he was retained

> "to provide advice and guidance regarding commercial and retail development based upon [his] knowledge of commercial and retail business in the State of Minnesota," just as one would retain an outside accountant for her knowledge of, say, the proper accounting practices and taxation concerns of partnerships. There is no principled basis to distinguish [the Bieter consultant's] role from that of an employee, and his involvement in the subject of the litigation makes himrecisely the sort of person with whom a lawyer would wish to confer confidentiality.
>
> *Id.* at 938.

© 2015 Thomson Reuters. No Claim to Orig. US Gov. Works.

The Ninth Circuit found the reasoning of *Bieter* persuasive and adopted its principles in *Graf,* 610 F.3d at 1159.

Applying this caselaw, the Court previously found that Dr. Lipicky qualified as the functional equivalent of an employee for the purpose of the attorney-client privilege.

> The written consultant agreement governing the relationship between Scios, Inc. ("Scios") and Dr. Lipicky at the time of the communications at issue required Dr. Lipicky to keep confidential "knowledge and information pertaining to Scios which is confidential" and that such confidential information included Dr. Lipicky's work product under the consulting agreement. (Dkt. No. 128–1 ¶ 9.) Further, the subject matter for which Defendants claim privilege was a legal matter-FDA regulatory requirements and Netrecor's label-and a participant in the call was Jane Moffitt, an attorney and Defendants' Vice President of Regulatory Affairs. Indeed, pursuant to the relevant consulting agreement Ms. Moffitt was responsible for Dr. Lipicky's work assignments and Dr. Lipicky was required to report to Ms. Moffitt. (*Id.* ¶ 5).
>
> *3 ....
> Here, the record supports a finding that during the three years that Dr. Lipicky served as a paid consultant to Scios, Scios shared information with him about Scios and its products to enable Dr. Lipicky to assist Scios with various decisions. Some of those decisions were business matters, such as how to design a clinical trial, and some were legal, such as FDA regulations in connection with product labels. Due to Dr. Lipicky's specialized knowledge and his knowledge of Scios he was therefore the type of nonemployee who "posses[es] the very sort of information that the privilege envisions flowing most freely." To put it another way, it makes sense that Scios' attorneys would wish to consult with someone with knowledge of Scios and FDA regulations "to discover the information they need to successfully advocate on behalf of their client." *Memry Corp.,* 2007 WL 39373 at *3. Dr. Lipicky's role at Scios "was that of a functional employee." *Graf,* 610 F.3d at 1159.

(Dkt. No. 134 at 2–3.)

Plaintiff seeks reconsideration on the ground that Dr. Lipicky's subsequent deposition testimony demonstrates "Scios shared no information with him about the company and its products, and that he had no pertinent knowledge of Scios or Natrecor that came from any source other than his work at the FDA." (Dkt. No. 138 at 2.) In particular, Plaintiff highlights Dr. Lipicky's testimony that when he provided advice to Scios it was based on his knowledge from working at the FDA and not "on anything else." (Lipicky Depo. at 100.) He further testified that he did not think that Scios provided any new information to him, although he could not explicitly recall. (*Id.* at 131.) Plaintiff argues, in effect, that it was as if Dr. Lipicky was still a FDA employee and was merely giving advice as any FDA employee could do.

The Court has reviewed Dr. Lipicky's deposition in its entirety and declines to reconsider its earlier decision. Dr. Lipicky repeatedly testified that he remembered very little about his consulting work for Scios. He did not remember the March 2002 telephone conference; indeed, he did not remember whether he participated in any telephone calls with Scios. (Lipicky Depo. at 90.) He could not remember the subject matter of any of the telephone calls that he might have had with Scios during his Scios consultancy. (*Id.* at 130–31.) He did not remember who he worked with at Scios, except for the name of one employee who was on the telephone line at least one time. (*Id.* at 131.) Thus, it makes sense that he would also not remember what, if any, information Scios officials conveyed to him during his relationship with Scios. Moreover, Jane Moffitt has stated under oath that she and others at Scios "shared with Dr. Lipicky confidential information about Scios, its business and its products as part of an ongoing relationship with Dr. Lipicky

© 2015 Thomson Reuters. No Claim to Orig. US Gov. Works.

where he provided advice and guidance on those aspects of Scios' business that related to FDA rules and decisions." (Dkt. No. 128–1 at ¶ 14.) Finally, it defies common sense that Dr. Lipicky's advice was not based, at least in part, on information conveyed to him by Scios. As he himself testified, in order to obtain his advice Scios had to tell him "what it is that's going on, what the issue is." (Lipicky Depo. at 132.)

*4 Plaintiff also argues that Dr. Lipicky does not qualify as a representative of Scios for the purpose of the attorney client privilege because he testified that he had other clients in addition to Scios, his work was done almost exclusively by telephone, and he did not have any authority to act on behalf of Scios or manage any Scios employees. The Court, however, does not read the caselaw, including *Graf,* as limiting the application of the privilege to outside consultants who work full time at the physical headquarters of the corporation. Rather, the dispositive question is the consultant's relationship to the company and whether by virtue of that relationship he possesses information about the company that would assist the company's attorneys in rendering legal advice. For example, the *Bieter* court analogized the outside consultant there—whose communications were protected by the privilege—to an outside accountant retained for her knowledge of the proper accounting practices and taxation concerns of partnerships. 16 F.3d at 938. An outside accountant has other clients, works from her own office, and does not manage her client/corporation's employees; yet, the accountant by virtue of her specialized knowledge of accounting rules and knowledge of the client/corporation is precisely "the sort of person with whom a lawyer would wish to confer confidentially." *Graf,* 610 F.3d at 1158.

Finally, it should be noted that the privilege does not apply to Dr. Lipicky's own views or information developed without any confidential attorney-client information from Scios; indeed, he testified at length and without objection (at least any objection other than as to form) as to Natrecor's indications and its label. Thus, this is not a case where a corporation is attempting to use a consulting agreement with a former FDA official to prevent the official from giving testimony as to his views as a FDA official or what he communicated to the corporation when he was so employed.

CONCLUSION

For the reasons explained above, Plaintiff is granted leave to file a request for reconsideration, but the request for reconsideration is DENIED.

IT IS SO ORDERED.

N.D.Cal.,2011.
U.S. ex rel. Strom v. Scios, Inc.
Not Reported in F.Supp.2d, 2011 WL 4831193 (N.D.Cal.)

END OF DOCUMENT

© 2015 Thomson Reuters. No Claim to Orig. US Gov. Works.

ORIGINAL

WHITE AND WILLIAMS LLP
BY: Nancy Conrad
Identification No(s). 56157
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034-8233
610.782.4909 / Fax 610.782.4935
conradn@whiteandwilliams.com

Attorneys for Defendant,
The Pennsylvania State University

MICHAEL J. MCQUEARY Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY Defendant.	CENTRE COUNTY COURT OF COMMON PLEAS CIVIL ACTION NO. 2012-1804 HON. THOMAS G. GAVIN

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 13th day of February, 2015, a true and correct copy of the foregoing DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS was served upon the following persons via first class, United States mail, postage prepaid:

Elliot A. Strokoff, Esquire
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101
Attorney for Plaintiff

and

ORIGINAL

William T. Fleming, Esquire
Fleming Law Offices
204 East Calder Way, Suite 304
State College, PA 16801
Local Counsel for Plaintiff

WHITE AND WILLIAMS LLP

By:_____

Nancy Conrad, Esquire
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034
610.782.4909/ Fax 610.782.4935
conradn@whiteandwilliams.com
I.D. Number PA 56157
Attorneys for Defendant,
The Pennsylvania State University