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

ESTATE of JOSEPH PATERNO;

and

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,
Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"),

MARK EMMERT, individually and as President of the NCAA, and

EDWARD RAY, individually and as former Chairman of the Executive committee of the NCAA,
Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,
Nominal Defendant.

**Docket No.:** 2013-2082

**Type of Case:**
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

**Type of Pleading:**
**UNSEALED VERSION**
The National Collegiate Athletic Association's Brief in Support of its Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third-Party Subpoenas



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ORIGINAL

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA**

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| The ESTATE of JOSEPH PATERNO, et al., Plaintiffs, | ) | Civil Division |
| v. | ) | Docket No. 2013-2082 |
| NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al., Defendants. | ) | |

**THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS FROM THE ESTATE AND OVERRULE THE ESTATE'S OBJECTIONS TO RELATED THIRD-PARTY SUBPOENAS[1]**



[1] Portions of this brief and its exhibits contain information that has been designated "Confidential" under the Protective Order. The NCAA has redacted such information pursuant to Paragraph 9 of the Protective Order entered on September 11, 2014. The NCAA will provide the Court with an unredacted copy.

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## PRELIMINARY STATEMENT

For over a year, Plaintiffs have aggressively pushed Pennsylvania State University ("Penn State") and Pepper Hamilton LLP to release thousands of documents related to the Freeh Report, vigorously challenging any assertion of privilege. Yet, when the NCAA asked the Estate of Joseph Paterno (the "Estate") to produce documents related to the Paterno family's own publically disclosed critique of the Freeh Report, the Estate refused, claiming privilege for all but a handful of documents. The Estate has also directed third parties to withhold requested materials. The Court should not permit the Estate to block discovery of these highly-relevant documents by maintaining this inconsistent and unprincipled position.



Immediately after the Freeh Report was released in July 2012, the Paterno family commissioned a "comprehensive" and "factual" review of the report and its findings about the late Coach Joseph Paterno ("Coach Paterno"). *See* Ex. 1, *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno* at i (Feb. 2013) (the "*Critique*"). Published in February 2013 (well-before this litigation began), the *Critique* sought to exonerate publicly Coach Paterno of any wrongdoing or failures related to the Sandusky scandal. It consisted of a 52-page document prepared by King & Spalding LLP, as well as a set of three purportedly "independent analyses" prepared by Dick Thornburgh, James T. Clemente, and Dr.

Fred S. Berlin (the "Independent Analyses"). Notwithstanding the damning evidence set forth in the Freeh Report, the Paterno family's paid analysts concluded, to no one's surprise, that the Freeh Report's findings concerning Coach Paterno were "unfounded," "incorrect," "unsubstantiated," "inaccurate," and "deeply flawed." *See generally* Ex. 1, *Critique.*

The Paterno family immediately disseminated the *Critique* to the media and published it on www.paterno.com, where it resides today. Members of the Paterno family and certain of the *Critique*'s authors then commenced a national media blitz, with multiple appearances on major national broadcasts trumpeting the *Critique*'s findings and publications in major newspapers. Jay Paterno described his efforts to promote the *Critique* as a "grand tour of all the television and radio shows." Ex. 2, Jay Paterno, *Paterno Legacy* 343-45 (2014) ("Paterno Legacy").

The *Critique* claims that the Paterno family was "committed to complete transparency of [its] findings and those of the independent experts." Ex. 1 at 5. But when the NCAA requested documents concerning the *Critique* in discovery, this supposed commitment to "complete transparency" evaporated. Instead, the Estate has fought to block discovery of nearly all materials related to the *Critique* through various tactics and maneuverers:

- ***Objecting to Document Requests with Blanket Privilege Claim:*** The Estate objected to the NCAA's request for documents related to the *Critique* on the sole basis that nearly all discovery is shielded by the attorney-client privilege and work product doctrine—despite the fact the

report contains no legal advice or mention of litigation, was prepared before this litigation started with the express purpose of being publically released, and has been the subject of massive and continued voluntary disclosures.

- ***Directing Third-Party K&L Gates To Withhold Nearly All Responsive Documents and Blocking Deposition Questions***: The Estate directed Thornburgh's firm, K&L Gates, to withhold nearly all documents responsive to the NCAA's subpoena based on privilege, and instructed Thornburgh not to answer questions during his deposition.

- ***Blocking Any and All Discovery From Berlin and Clemente***: Months after the NCAA served Berlin and Clemente with valid subpoenas seeking relevant factual information, the Estate informed the NCAA that Berlin and Clemente would provide no materials concerning their pre-litigation, publicly-disclosed independent analyses (whether privileged or not), on the sole basis that they are now experts in this litigation.

Simply put, the Estate is improperly using claims of privilege and a rule about expert discovery to shield discovery of highly-relevant factual information that was developed well before this litigation began—and nearly three years before Plaintiffs had designated anyone as "experts" in this litigation.

The relevance of the requested material is beyond dispute. Plaintiffs' remaining claims turn on, *inter alia*, their ability to prove that the challenged statements in the Consent Decree (taken verbatim from the Freeh Report) are "demonstrably false," *see Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-78 (1986), and that the NCAA acted with "actual malice" in re-publishing the statements. Indeed, if the Freeh Report's findings are *true*, all of Plaintiffs' remaining claims fail. The requested materials relate directly to their claim that the

Freeh Report's findings are false and that the NCAA knew it. It would be difficult to imagine documents that would be more relevant to this case. Indeed, the Court recently ordered the other Plaintiffs to produce all documents responsive to these exact same requests.[2] Op. & Order at 8 (Oct. 7, 2015) (ordering Jay Paterno and William Kenney to produce all documents related to the *Critique* and the three Independent Analyses).

Plaintiffs' attempt to block discovery concerning the *Critique* and Independent Analyses is remarkable in light of their vigorous pursuit of virtually identical documents and information related to the Freeh Report, over which Penn State and Pepper Hamilton assert privilege. Plaintiffs' tactics are a sword and shield on steroids. Under the exact arguments that Plaintiffs used to obtain an order form this Court compelling production of the documents related to the Freeh Report,[3] *see* Op. & Order (Sept. 11, 2014), the Estate's own objections and broad assertions of privilege are meritless. For example, in its pursuit of the Freeh documentation, the Estate contended that documents or communications related to the Freeh Report were not protected by privilege or work product because the Report was prepared for public release and did not reflect confidential legal advice. Further, the Estate argued that any applicable privilege had been waived by Penn

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[2] The requests to Jay Paterno and William Kenney are therefore not the subject of this Motion.

[3] That order is currently on appeal with the Superior Court.

State's publication of the Freeh Report for its own benefit. To the extent that the Estate's arguments regarding the absence of privilege over the Freeh Report are correct,[4] every argument the Estate advanced applies with far *greater* force to the *Critique*.

The NCAA therefore respectfully requests that the Court: (1) compel the Estate to produce all documents and information related to the *Critique* and its Independent Analyses; (2) order the Estate to cease blocking discovery from K&L Gates and overrule any related claims of privilege; and (3) overrule the Estate's purported "objection" to the Berlin and Clemente subpoenas.

## FACTUAL BACKGROUND AND HISTORY

### A. The *Critique* And Related NCAA Document Requests

In February 2013, the Paterno family released the *Critique* to the public and the media. The *Critique* consisted of a report authored by Wick Sollers and other attorneys of King & Spalding, as well as three purported "Independent Analyses":

- *Review of the Freeh Report Concerning Joseph Paterno* by Richard Thornburgh, the former United States Attorney General (the "Thornburgh Analysis") (Feb. 6, 2013).

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[4] The NCAA takes no position on the correctness or legal validity of Plaintiffs' arguments and this Court's rulings concerning Penn State's and Pepper Hamilton's privilege assertions over the Freeh documentation. But Plaintiffs certainly cannot have it both ways. If, as Plaintiffs have argued and this Court has held, the underlying Freeh documentation must be produced, so too must the documents and information underlying the *Critique* and Independent Analyses.

- *Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky* by James T. Clemente, a retired FBI profiler (the "Clemente Analysis") (Feb. 2013).
- A letter to Sollers from Dr. Fred S. Berlin, a physician at the National Institute for the Study, Prevention and Treatment of Sexual Trauma (the "Berlin Analysis") (Feb. 6, 2013).

The *Critique* purported to be a "comprehensive review" of the Freeh Report and Joe Paterno's conduct, ultimately concluding that "the observations as to Joe Paterno in the Freeh Report are unfounded." Ex. 1 at i. Similarly, each of the three "Independent Analyses" included within the *Critique* criticized the Freeh Report's methodology and conclusions. In the weeks and months following its release, representatives of the Paterno family—including Plaintiff Jay Paterno and public relations specialist Dan McGinn—widely publicized the *Critique* on national media and the website www.paterno.com. Plaintiffs later cited the publicly available *Critique* in the Second Amended Complaint. Second Am. Compl. ¶¶ 73, 79 (Oct. 13, 2014) ("SAC").

Accordingly, the NCAA requested "all documents" concerning the *Critique* and its three constituent "Independent Analyses" from the Estate. Ex. 3, NCAA's First Reqs. for Produc. to the Estate Nos. 4-7 (May 21, 2014) ("Requests").[5] Such

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[5] Request No. 4: "All Documents Concerning Mr. Richard Thornburgh or research and preparation for, the drafting of, or the final version of Mr. Thornburgh's February 2013 *Review of the Freeh Report Concerning Joseph Paterno*, including, without limitation, all Communications with Mr. Thornburgh,

requests asked the Estate to produce all documents concerning the King & Spalding *Critique* (including any documents in King & Spalding's possession),[6] as well as the reports prepared by Berlin, Clemente, and Thornburgh. *Id.* The Estate responded to the NCAA's requests on June 20, 2014, and objected to these Requests on the basis of the attorney-client privilege and attorney work product doctrine (with the exception of Request No. 4 regarding the Thornburgh Analysis, to which the Estate did not specifically object). Ex. 5, Estate's Objs. & Resps. to NCAA's First Reqs. for Produc. Nos. 4-7 (June 20, 2014). Nevertheless, the Estate

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all Communications regarding the basis for drafting it, compensation, research, drafts, and the final document."

Request No. 5: "All Documents Concerning King & Spalding's February 2013 *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno*, including, without limitation, all Documents regarding the basis for drafting it, compensation, research, drafts, and the final document."

Request No. 6: "All Documents Concerning James T. Clemente or the February 2013 *Analysis of the Special Investigative Counsel Report and the Crimes of Gerald A. Sandusky & Education Guide to the Identification and Prevention of Child Sexual Victimization* by James T. Clemente, including all Communications with James T. Clemente."

Request No. 7: "All Documents Concerning Fred S. Berlin or the February 6, 2013 letter from of the National Institute for the Study, Prevention and Treatment of Sexual Trauma to J. Sedwick Sollers, III, including all Communications with Fred S. Berlin."

[6] The NCAA did not separately subpoena King & Spalding for documents because the NCAA's requests to the Estate sought responsive documents from the Estate, as well as its agents, including attorneys and others working on its behalf. Ex. 3, Requests at 2. The NCAA and the Estate understand that this includes attorneys at King & Spalding with relevant information. *See* Ex. 4, Letter from B. Kowalski to P. Maher at 2 (Oct. 29, 2015).

indicated it would "produce non-privileged documents, if any" for all four Requests. *Id.* at Nos. 4-7. Months passed, however, without the Estate producing either documents or a privilege log, despite numerous requests from the NCAA. *See infra* Section I.A. and note 10.

On July 10, 2015, in the course of a meet and confer teleconference regarding other discovery issues, counsel for the Estate for the first time indicated that the Estate would be withholding nearly all responsive documents as privileged, with the narrow exception of certain communications with third-parties. *See* Ex. 6, Letter from S. Gragert to P. Maher at 1-2 & n.2 (July 16, 2015) ("NCAA M&C Letter"). On August 11, 2015—well over a year after the NCAA requested materials—the Estate made a small production of this narrow universe of communications. The Estate refused to produce the vast majority of documents in the possession of King & Spalding, the Estate, Berlin, Clemente, Thornburgh, or Dan McGinn. The Estate does not dispute that it is withholding responsive and relevant documents. *See* Ex. 4, Letter from B. Kowalski to P. Maher; Ex. 32, Letter from P. Maher to B. Kowalski (Nov. 10, 2015).

### B. NCAA Subpoenas To Berlin and Clemente

On April 22, 2015, the NCAA served Notices of Intent to Serve Subpoenas on Berlin and Clemente pursuant to Pa. R.C.P. No. 4009.21. Attached to the notices were subpoenas seeking documents and communications related to their

Independent Analyses.[7] Neither the Estate nor any other party objected to the subpoenas. *See* Certificate Prerequisite to Service of a Subpoena Upon Fred S. Berlin (May 13, 2015); Certificate Prerequisite to Service of a Subpoena Upon James T. Clemente (May 13, 2015). The NCAA obtained a Maryland subpoena for Berlin and a California subpoena for Clemente, which it served on May 15, 2015 and May 14, 2015, respectively. *See* Ex. 9, Affs. of Serv. for Berlin and Clemente (May 2015).

On June 5, 2015, counsel for Plaintiffs informed the NCAA that Berlin and Clemente were in the process of collecting responsive materials to produce. Ex. 10, Email from P. Maher to B. Kowalski, et al. (June 5, 2015). Neither Berlin nor Clemente objected to the subpoenas or moved to quash. On July 10, 2015, counsel for Plaintiffs informed the NCAA for the first time—contrary to their earlier representation—that Berlin and Clemente would produce *no documents*, because Plaintiffs planned to designate them as consulting experts in this case. *See* Ex. 6, NCAA M&C Letter at 1-2. On July 21, 2015—long after objections to the notices of intent to serve subpoenas were due—the Estate served the NCAA objections to the Berlin and Clemente subpoenas, claiming that Rule 4003.5 purportedly protected the materials from disclosure because the Estate had recently

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[7] *See generally* Ex. 7, NCAA's Notice of Intent to Serve a Subpoena to Berlin (Apr. 22, 2015); Ex. 8, NCAA's Notice of Intent to Serve a Subpoena to Clemente (Apr. 22, 2015).

(and conveniently) designated them as experts in this case—nearly three years after the documents were created. *See* Ex. 11, Estate's Obj. Pursuant to Rule 4003.5 to Berlin Subpoena (July 21, 2015); Ex. 12, Estate's Obj. Pursuant to Rule 4003.5 to Clemente Subpoena (July 21, 2015). Plaintiffs have steadfastly maintained this position through multiple meet and confer conferences.

### C. NCAA Subpoena to K&L Gates

The NCAA served a Notice of Intent to Serve a Subpoena on K&L Gates (Mr. Thornburgh's law firm) at the same time it did for Berlin and Clemente.[8] Again, the Estate did not object. *See* Certificate Prerequisites to Service of a Subpoena upon K&L Gates (May 13, 2015). On May 13, 2015, the NCAA served a subpoena on K&L Gates seeking materials related to the Thornburgh Analysis. *See* Ex. 14, Letter from T. Scott to K&L Gates (May 13, 2015).

On July 22, 2015, counsel for K&L Gates indicated that they were willing to produce responsive documents, but said that they would withhold documents based on privilege if counsel for the Estate directed them to do so. Gragert Decl. ¶ 4. On October 20, 2015, counsel for K&L Gates said they were coordinating directly with counsel for the Estate regarding the extent to which they were withholding documents based on privilege. Ex. 15, Email from C. Tea to B. Kowalski (Oct. 20, 2015). On October 22, 2015—*five months* after the subpoena was served—K&L

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[8] Ex. 13, NCAA's Notice of Intent to Serve a Subpoena to K&L Gates (Apr. 22, 2015).

Gates served objections to the subpoena, in which they asserted privilege objections to almost all of the requests, which sought factual materials about Thornburgh's "independent" public analysis of the Freeh Report. *See generally* Ex. 16, K&L Gates Objs. & Resps. to NCAA's Reqs. for Produc. (Oct. 22, 2015). K&L Gates wrote that—"absent definitive waiver"—"the ***majority*** of responsive documents are protected from disclosure" and claimed it is withholding so many documents that it would be "unduly burdensome . . . to identify all such protected documents and to list them in a log." *Id.* at 2 (emphasis added). To date, K&L Gates has not provided a privilege log.

K&L Gates produced a mere 65 documents, which are almost entirely public documents such as press articles, with the exception of its engagement letter and heavily redacted invoices. *See* Ex. 4, Letter from B. Kowalski to P. Maher at 2. K&L Gates did not produce the requested work papers, source documents, communications, drafts, or internal documents related to the public report (as Pepper Hamilton has been ordered to do). *Id.*

On December 17, 2015, the NCAA deposed Mr. Thornburgh. At the deposition, counsel for the Estate broadly asserted privilege over any and all communications Mr. Thornburgh made as part of his investigation and his engagement, and refused to let the witness answer questions concerning that subject matter. *See infra* pp. 27-28.

### D. Plaintiffs' Ongoing Campaign To Obtain The Freeh Materials

At the same time the NCAA has been seeking discovery related to the Estate's *Critique*, Plaintiffs have waged an aggressive campaign to obtain *all* documents relating in any way to the Freeh Report, based on arguments that are flatly inconsistent with their refusal to provide the NCAA its requested discovery. On September 11, 2014, this Court granted Plaintiffs' motion to compel production of these documents from Penn State and Pepper Hamilton, concluding that the documents were not subject to any privilege or protection. *See* Op. & Order ¶ 18, at 37 (Sept. 11, 2014). Penn State and Pepper Hamilton appealed this Court's privilege rulings to the Superior Court. *See Estate of Paterno v. NCAA*, Nos. 1709 MDA 2014, 877 MDA 2015; 878 MDA 2015 (Pa. Super. Ct.).

In both the Superior Court and this Court, Plaintiffs have repeatedly argued that the Freeh Report documents are not protected by the attorney-client privilege or work-product doctrine, or that any such protection has been waived. *See generally* Ex. 17, Br. for Appellees, *Paterno*, No. 877 MDA 2015 (Oct. 30, 2015); Ex. 18, Pls.' Opp'n to App. For Stay, *Paterno*, Nos. 877 MDA 2015, 878 MDA 2015 (June 2, 2015); Pls.' Mot. To Overrule Objs. (Apr. 7, 2014). To date, Pepper Hamilton has produced approximately **161,381** pages of material in response to Plaintiffs' requests for all documents related to the Freeh Report, including internal emails, draft reports, interview notes, and many other documents. In contrast, the

Estate has produced approximately **332** pages related to the *Critique*, which do ***not*** include internal emails, drafts, interview notes, or many of the other requested items. *See* Ex. 19, P. Maher Letter to B. Kowalski (Aug. 11, 2015).

## QUESTIONS PRESENTED

1. Can the Estate refuse to produce highly-relevant materials related to the *Critique* and its Independent Analyses on privilege grounds, even though they were always intended for public consumption, and, based on the Estate's own arguments in this case, do not contain legal advice?

2. Can the Estate continue to assert privilege over highly-relevant materials related to the *Critique* and its Independent Analyses, where the Estate and its representatives repeatedly disclosed the *Critique*'s findings, analyses, and conclusions on a "grand tour of all the television and radio shows"?

3. Can the Estate block out-of-state subpoenas served on third parties by filing tardy objections in this Court and by purporting to designate pre-litigation fact witnesses as so-called "consulting experts"?

## ARGUMENT

### I. BY PLAINTIFFS' OWN ARGUMENTS, THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE DO NOT APPLY TO THE *CRITIQUE* AND ITS INDEPENDENT ANALYSES.

The Estate's objections of privilege and work product (their *only* objections to the Requests) are meritless because, by their own arguments, neither the attorney-client privilege nor work product protection ever applied to the *Critique* and its Independent Analyses.

#### A. Plaintiffs Have Not Carried Their Burden to Show that the Requested Materials Are Privileged.

The Estate has not come close to satisfying its burden of establishing that the attorney-client privilege protects from disclosure the requested materials.

As an initial matter, the Estate has failed to "properly invoke the privilege, as it did not provide a privilege log explaining the basis for its efforts [to] withhold particular documents." Ex. 20, Br. for Appellees at 31, *Paterno*, No. 1709 MDA 2014 (May 11, 2015) (arguing same for Penn State and citing authority).[9] The NCAA has made repeated requests for a privilege log[10]; indeed in July 2015, counsel for the Estate represented that they would produce a log—but failed to satisfy that promise. *See* Ex. 6, NCAA M&C Letter at 1. Now, the Estate's counsel simply ignores the NCAA's repeated requests for a log. Counsel even ignored the NCAA's request that counsel inform the NCAA *when* they expect to produce a log. The Estate's failure to produce a log makes it "clear that the privilege does not apply." Ex. 20, Br. for Appellees at 31, *Paterno*, No. 1709 MDA 2014; *see also T.M. v. Elwyn, Inc.*, 2008 PA Super 113, ¶ 23, 950 A.2d

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[9] The Estate's privilege log is now more than a ***year-and-a-half past due***, as the NCAA served its request in May of 2014. *See* Pa. R. Civ. P. 4009.12(b)(2) (requiring a privilege log within thirty days after the request).

[10] The NCAA requested a log on (1) July 10, 2015, during a meet and confer, *see* Ex. 6, NCAA M&C Letter at 1; (2) July 16, 2015, via letter stating that we "look forward to receiving the [privilege] log at the earliest possibility opportunity", *id.*; (3) August 4, 2015, *see* Ex. 21, Email from D. Wisniewski to J. Walker; (4) September 18, 2015, during a meet and confer, *see* Ex. 4, B. Kowalski letter to P. Maher at 1 (Oct. 29, 2015); (5) October 29, 2015, via letter, *id.*; (6) November 16, 2015, *see* Ex. 22, Letter from S. Gragert to P. Maher at 2 (stating that "[w]e have made repeated requests for the Estate to produce a privilege log....Please confirm by the end of the week that the Estate will produce a privilege log by December 4, 2015"); (7) and multiple other times during meet and confers and informal conversations.

1050, 1063 (2008) ("[I]f the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked...the communication is not protected under attorney-client privilege." (citation omitted)).

Moreover, even if the Estate had complied with its obligation to produce a log, the Estate cannot assert privilege over the requested materials because (1) it never intended the *Critique* to be confidential, but rather intended it to be disclosed to the world, and (2) the Estate's own arguments in this case compel the conclusion that the *Critique* does not contain protected legal advice.

1. The *Critique* Was Not Intended To Be Confidential.

"[C]onfidentiality is the foundation of the attorney-client privilege," and the privilege therefore applies *only* to documents concerning "confidential communications." *Trib Total Media, Inc. v. Highlands Sch. Dist.*, 3 A.3d 695, 701 (Pa. Commw. Ct. 2010). In urging the production of documents related to the Freeh Report, Plaintiffs argued privilege did not apply because the final work product, the Freeh Report, "was never intended to be confidential" because "Penn State always intended to reveal the Freeh Report and its findings to the general public." Ex. 20, Br. for Appellees at 31, 32, *Paterno*, No. 1709 MDA 2014.[11] To

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[11] In contrast to the *Critique* and Independent Analyses, the Freeh Firm attempted to preserve confidentiality to the greatest extent possible. For example, they omitted the names of interview witnesses from their report, "[t]he working

the extent that the Estate's argument regarding the Freeh Report is correct, it applies with far *greater* force to the *Critique*.

The Estate and the authors of the *Critique* have made no secret of the fact that their work was prepared with the express intent that it would be made public. For example:

- Days after the Freeh Report was released—and before the Consent Decree was executed—the Paterno family said in a statement that "[o]ur interest has been and remains the uncovering of the truth" and that "it is imperative that the ***full story be told***." To that end, the family "instructed our attorneys and their experts to conduct a comprehensive review of the materials released by the Freeh Group." Ex. 24, *Paterno Family Statement in Response to the Freeh Report*, Paterno – The Record (July 16, 2012) (emphasis added).

- Jay Paterno wrote in his book, *Paterno Legacy*, that "[a]fter the Freeh Report was issued, we knew that if there was going to be a factual review of what really happened it was going to have to come from us. We set out through our attorneys to conduct a thorough and factual review and ***issue a report that could do some good in educating society....***" Ex. 2, *Paterno Legacy* at 342 (emphasis added).

- The opening pages of the *Critique* state its purpose: "The Paternos gave us a direct mandate to ***set the record straight and find the truth*** as to Joe Paterno's conduct, whether positive or negative. They committed to ***complete transparency of our findings and those of the independent experts***. All our full reports are available at www.paterno.com." Ex. 1, *Critique* at 5 (emphasis added).

- The engagement letters for Berlin and Clemente each state [redacted]

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papers of the Freeh team were secured and kept confidential, and they worked in a secure facility. The team maintained their papers in an evidence locker, they worked on secured and encrypted laptops, and they directed staff not to share work product with outsiders." Ex. 23, Br. for Appellant Penn State at 8-9, *Paterno*, No. 1709 MDA 2014.

[redacted] Ex. 25, Retainer Agreement Letter from W. Sollers to F. Berlin (Sept. 20, 2012) (emphasis added); Ex. 26, Retainer Agreement Letter from W. Sollers to J. Clemente (Sept. 20, 2012) (emphasis added).

- On January 1, 2013, the Paterno family released a statement that said that "***[we] expect to release the analysis*** of the experts in the near future." Ex. 27, *Statement from the Paterno Family Regarding the State of Pennsylvania Lawsuit*, Paterno – The Record (Jan. 4, 2013) (emphasis added).

- Clemente's report states he agreed to analyze the Freeh Report because "the public deserves to know the truth" and that it was an "opportunity to educate the public."[12] Ex. 1, Clemente Analysis at 1, 2 (JVPE_NCAA_0000824-25).

- The family widely disseminated the *Critique* and accompanying analyses to the media and posted them on the website www.paterno.com, which went "live" at the time of their release. *See* Ex. 28, Email from S. Paterno to D. Harris (Feb. 10, 2013). The website features the findings, interviews with Sollers and the purported experts, bios, and other content. *See* Ex. 30, Paterno – The Record, www.paterno.com. In his book, Jay Paterno describes the media efforts to publicize the *Critique* as a "full-court press" and recounts his "grand tour of all the television and radio shows" that were "an effort to get people to take a second look at the facts."[13]

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[12] During his deposition, Mr. Thornburgh indicated that he prepared and delivered his Independent Analyses to the client without knowing whether or not it would be made public, and that it was entirely the client's decision to publish the Thornburgh Analysis. But whatever Mr. Thornburgh's understanding, the record is clear that his client wished to publicize the *Critique* from the inception. In any event, Mr. Thornburgh's testimony makes out a text-book case of waiver of any applicable privilege. *See infra* pp. 27-28.

[13] Ex. 2, *Paterno Legacy* at 343-45 (noting that the interview for *Katie*, a day time talk show hosted by Katie Couric, was taped a week before the reports were publically issued, and listing other media interviews, including: *Mike & Mike*,

- The Paterno family engaged a public-relations strategist, Dan McGinn, who was involved in preparing the *Critique* and Independent Analyses and the public relations efforts in connection with them. Clemente's and Berlin's retainer letters [redacted] Exs. 25 and 26.

As Plaintiffs themselves said, "[h]aving boasted repeatedly about commissioning a public [*Critique*]," Plaintiffs "cannot now insist on confidentiality." Ex. 20, Br. for Appellees at 33, *Paterno*, No. 1709 MDA 2014. Plaintiffs "always intended to reveal the [*Critique*] and its findings to the general public." *Id.* at 32. And as Plaintiffs themselves conceded, "that is dispositive." *Id; see also Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001) ("Application of the privilege requires *confidential* communications made in connection with providing legal services." (emphasis added)); *Commonwealth v.*

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*SportsCenter*, *First Take*, Colin Cowherd, *The Stephen A Smith Show*, Scott Van Pelt's show, Mike North's FOX Sports radio show, LaVar Arrington's radio show in D.C., Erin Burnett's show on CNN, "interviews with nearly two dozen more people," and "all the local media outlets as well." *Id.* at 346).

Wick Sollers, Dick Thornburgh, and Dan McGinn also appeared on a one-hour special of Bob Costas's nationally broadcasted show to discuss the *Critique* and litigation. Charles Thompson, *Five Takeaways from the "Costas Tonight" Hour for Joe Paterno*, Penn Live (May 30, 2013, 8:14 AM), http://www.pennlive.com/midstate/index.ssf/2013/05/five_takeaways_from_the_costas.html.

*Boyd*, 397 Pa. Super. 468, 471, 580 A.2d 393, 394 (1990) ("[T]he attorney-client privilege is confined to confidential communications.").[14]

2. The Paterno Family Did Not Commission The *Critique* For Legal Advice.

The Estate cannot invoke the attorney-client privilege over the requested materials for the additional reason that, by the Estate's own arguments, the *Critique* and Independent Analyses did not involve protected legal advice. It is axiomatic that "[a]n essential element of an attorney-client privileged document is that the document must relate to 'securing either an opinion of law, legal services or assistance in a legal matter.'" Op. & Order at 20 (Sept. 11, 2014) (quoting *Commonwealth v. Mrozek*, 441 Pa. Super. 425, 428, 657 A.2d 997, 998 (1995)). The Estate described the Freeh Report to the Superior Court as "not a legal document in the slightest" – a mischaracterization considering that it was an

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[14] Plaintiffs also have argued that because the Freeh Firm emphasized that it "'operated with total independence,'" that somehow reaffirms that Penn State did not have an expectation of confidentiality over the Freeh Report. Ex. 20, Br. for Appellees at 32-33, *Paterno*, No. 1709 MDA 2014. Again, the same would be true here. Clemente and Berlin trumpeted their "independence," and they were authorized to "go wherever the facts and theories led us," Ex. 1, *Critique* at 4, and "agreed to the engagement only if [the Paternos' law firm] would accept their unvarnished, objective opinions, whatever those turned out to be." *Id.* King & Spalding was retained by the Paterno family "to set the record straight and find the truth as to Joe Paterno's conduct, whether positive or negative," thereby "commit[ing] to *complete transparency* of [their] findings." *Id.* at 5 (emphasis added)); *id.* at 4 ("[W]e did not cherry-pick from a group of possible experts to find and secure the most favorable opinions."); Ex. 1, Thornburgh Analysis at 8 (JVPE_NCAA_0000789) ("Mr. Paterno's family did not influence the scope of the review or my findings in any way.").

internal investigation performed by attorneys and intended to advise Penn State on potential institutional shortcomings and potential remediation. Ex. 20, Br. for Appellees at 35, *Paterno*, No. 1709 MDA 2014; *see also In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015) (materials related to internal investigation into company's product defect and recall are privileged). In any event, if the Freeh Report was "not a legal document," then the *Critique* ***certainly*** is not. The *Critique* analyzes the Freeh Report's conclusions and methodology—it reviews the facts underlying the Report, offers alternative "*factual*" findings, and criticizes the Freeh firm's investigative techniques.

Not once does the *Critique* mention litigation or provide anything that could be deemed legal advice (much less advice in general). As discussed above, the *Critique* and Independent Analyses were developed with the intent to publicly release the results. The family's numerous public statements, the involvement of their public-relations strategist (McGinn), and the post-publication media tour to tout the findings all reveal that the *Critique* was part of a public relations and media campaign intended to discredit the Freeh Report. As Plaintiffs themselves recognize, "[a] media campaign is not a litigation strategy." *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003); *see also* Ex. 20, Br. for Appellees at 44, Paterno, No.

1709 MDA 2014 (arguing that protection was not warranted for Freeh Report documents because "Penn State has used that report for its own advantage and as a public relations document.").

Plaintiffs also contended that the purported "non-legal" nature of the Freeh Report was due to the fact that the Freeh investigation "could just as easily have been performed by former law enforcement officials, educators, and other non-lawyers," rather than counsel. Ex. 20, Br. for Appellees at 35, *Paterno*, No. 1709 MDA 2014. Plaintiffs' hypothetical about who *could* have drafted the Freeh Report perfectly describes who *actually drafted* the Independent Analyses: former law enforcement officials (Thornburgh and Clemente) and other non-lawyers (Clemente and Berlin).

Having taken the position that the Freeh Report does not contain legal advice, the Estate cannot credibly contend that the *Critique* and Independent Analyses do. The Court should reject the Estate's blanket assertion of privilege and order it to produce all documents and communications related to the *Critique* and its Independent Analyses.

### B. Plaintiffs Have Not Carried Their Burden to Show that the Requested Materials Are Protected Work Product.

The Estate has also objected to producing documents related to the *Critique* and its Independent Analyses based on the work product doctrine. Again, the Estate's own arguments mandate production.

*First*, according to the Estate itself, Pennsylvania's "narrow" work product doctrine did not protect the "vast majority" of the Freeh Firm's files, including documents reviewed, records of interviews, other factual information, and even emails among the investigating lawyers. *See* Ex. 20, Br. for Appellees at 38-39, *Paterno*, No. 1709 MDA 2014. The *Critique* and Independent Analyses are no different—yet the Estate is now hiding from discovery precisely these same types of materials. The *Critique* itself states that its conclusions are "based on our interviews, including of Coach Paterno before his death, based on our review of documents and testimony, and importantly, based on information from our access to the lawyers for other Penn State administrators." Ex. 1, *Critique* at ii. By Plaintiffs' own arguments, the NCAA is "entitled at least to the production of factual information that supports statements in the [*Critique*], as well as any ... witness statements ... and any other information that the [authors] obtained from witnesses." Ex. 20, Br. for Appellees at 38-39, *Paterno*, No. 1709 MDA 2014; *see also Commonwealth v. Harrell*, 2013 PA Super 82, ¶ 65 A.3d 420, 431 (2013) ("The 'protective cloak' of the qualified work product privilege 'does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.'" (quoting *Commonwealth v. Brinkley*, 505 Pa. 442, 449, 480 A.2d 980, 984 (1984))); *see also Brinkley*, 505 Pa. at 448, 480 A.2d at 983

(affirming trial court's order to disclose "substantially verbatim statements of the witnesses").

*Second*, although the Freeh Report was prepared against the backdrop of numerous (potential and actual) investigations and litigations, the Estate still argued to this Court that "work product protections do not apply to the Freeh firm because it was engaged not in anticipation of litigation, but to conduct an independent, full and complete investigation of the recently publicized allegations of sexual abuse." *See* Pls.' Mot. to Overrule Objs. ¶ 38 (Apr. 4, 2014). Regardless of whether that is true as to the Freeh Report, Plaintiffs' argument undeniably applies to their own *Critique*. The *Critique* and its Independent Analyses say *nothing* about litigation, but instead explicitly state that their purpose was to provide the public with the "full story," to "set the record straight," and to "educate the public." Ex. 1, *Critique* at 5; Ex. 1, Clemente Analysis at 2, 3 (JVPE_NCAA_0000825-26). The retention letters for Clemente and Berlin—signed *eight months before this litigation was initiated*—specifically state [redacted] Exs. 25 and 26 (emphasis added). As Plaintiffs argued, documents prepared "for public purposes"—that have nothing to do with this litigation—cannot be shielded by the work product doctrine and "would be an odd way to prepare for litigation." Ex. 20, Br. for Appellees at 39-40, *Paterno*,

No. 1709 MDA 2014; *see also* Op. & Order (Sept. 11, 2014) at 22-23 (holding that work product protection did not apply because Freeh's scope of engagement "did not contemplate legal advice or legal services in conjunction with the case at bar" and recognizing that "in Pennsylvania, the work product protection is not available unless the requests are made in connection with the litigation for which the material was prepared").

Finally, Plaintiffs have argued—and this Court has held—that "[u]nlike the attorney-client privilege, which belongs to the client to assert, the work product doctrine is asserted by the attorney." Op. & Order at 22. As such, the Court held that "Penn State does not have standing to object based on the privilege of work product." *Id.* at 23. If that is so, then certainly the Estate lacks standing to assert work product protections on behalf of others. For this additional reason, the work product protection is no bar to discovery of the requested materials.

## II. THE ESTATE WAIVED ANY APPLICABLE ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT PROTECTION.

Even if any of the materials related to the *Critique* could otherwise be deemed privileged or work product (they cannot), the Estate has knowingly and deliberatively waived those protections by making multiple, voluntarily disclosures for its own advantage. *See id.* at 21-22 ("[V]oluntary disclosure waives the privilege as to remaining documents of that same subject.") (citing authority); *see also Prison Health Servs., Inc.*, 782 A.2d at 31 ("[O]nce the attorney-client

communications have been disclosed to a third party, the privilege is deemed waived."). As Plaintiffs have argued to the Superior Court, "well-established principles of privilege law, not to mention elementary notions of fairness, prevent [Plaintiffs] from parading" the *Critique*'s "conclusions in front of the trial court and the public while depriving those unfairly maligned" by the *Critique*, including the NCAA and Penn State, "of discovery relevant to challenging the basis for it." Ex. 20, Br. for Appellees at 21, *Paterno*, No. 1709 MDA 2014.

At Plaintiffs' urging, this Court has already held that a "subject-matter waiver" extending to all documents concerning the Freeh investigation and Report was "appropriate" because Penn State was "attempting to invoke the Attorney-Client privilege as both a shield and sword." Op. & Order re Stay at 4 (Nov. 20, 2014). In particular, the Court agreed with Plaintiffs that Penn State had waived privilege "by authorizing disclosure of the contents of the [Freeh] Report at a national press conference . . . but denying access to the information underlying the Report's conclusions." *Id.*[15] The same is true for the *Critique*, and it requires the Estate to produce all of the materials over which it now asserts privilege.

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[15] Plaintiffs continue to fight to uphold this ruling at the Superior Court. *See* Ex. 18, Opp'n to App. for Stay at 17 (June 2, 2015) (citing the Court's holding with favor and explaining that "Penn State hired the Freeh Firm to conduct an 'independent' investigation the results of which were to be (and in fact were) disclosed to the public").

To permit the Estate to now assert privilege over materials related to these highly publicized disclosures would make a mockery of the waiver doctrine. The Estate and its attorneys cannot affirmatively use the underlying materials to *wage a national public relations campaign* aimed at discrediting the Freeh Report, Penn State, and the NCAA, yet claim that they are protected from disclosure almost three years later. Even worse, the Estate is now attempting to achieve a tactical advantage in this litigation by using the *Critique* to support its claims, yet blocking any discovery of the facts and analysis that support its self-serving conclusions. In Plaintiffs' own words: "If one principle of privilege law is clear, it is that the attorney-client privilege may not be used as both a sword and a shield." *See* Ex. 18, Opp'n to App. for Stay at 18 (June 2, 2015).

Months before this litigation commenced, the Estate went to extraordinary lengths to publish and disseminate what they now claim is protected information, including the analyses, opinions, and conclusions of their counsel and other authors. *See supra* pp. 16-18. As part of its campaign to "educate the public," the Estate publicly disclosed the *Critique* and its Independent Analyses *in their entirety*. As designed, the public release generated significant media attention, and the authors, the Estate's lawyers, Plaintiffs, and their representatives touted the

*Critique's* analysis and conclusions on a national media tour and promoted it on their website, www.paterno.com. *See id*; *see also* Ex. 30.[16]

In a recent deposition, Mr. Thornburgh left no doubt that the Estate has engaged in a textbook example of a subject matter waiver of any applicable privileges. Mr. Thornburgh explained that he had been retained by the Paterno family [redacted] Ex. 29, Thornburgh Dep. 17:6-10 (Dec. 17, 2015); *see also id.* at 16:3-8 [redacted] According to Thornburgh, [redacted] *Id.* at 17:25-18:11. Although Thornburgh stated that he did not know [redacted], the Paterno family subsequently decided to make that report public in its entirety and arranged for Mr. Thornburgh to discuss his analysis on national television. *See id.* at 29:19-31:9 (testifying that

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[16] The Estate's barrage of third-party disclosures continued well after the initial release of the *Critique*. For example, Thornburgh appeared with Sollers and McGinn on an hour-long program of Costas Tonight with Bob Costas for an in-depth discussion of their findings with a national audience. In addition, Jay Paterno discussed the *Critique* and the Independent Analyses at length in his 2014 book, *Paterno Legacy*, and Paterno family members and representatives discussed their analysis and the ultimate findings of the *Critique* and its Independent Analyses with the makers of the 2014 documentary *Happy Valley*, and then *again* with author Joe Posnanski in his April 21, 2015 article "What's In a Name? Joe Paterno's Family Won't Quit the Fight to Restore His Legacy."

Thus, Mr. Thornburgh's testimony confirms that all of the supposed legal advice that the Paterno family sought from him was knowingly and deliberately made public, which waives any applicable privileges over the entire subject matter of his report. Nonetheless, counsel for the Estate refused to allow Mr. Thornburgh , *see id.* at 18:15-19:6; 27:14-15, and K&L Gates has declined to produce the drafts, notes, emails and other attorney work product that Mr. Thornburgh confirmed *id.* at 33:6-34:1.

Just as with Mr. Thornburgh's report, there can be no doubt that the Paterno family similarly made the voluntary and deliberate decision to publicize the *Critique* and the other Independent Analyses. In doing so, the Paterno family unabashedly revealed the analyses, opinions, and conclusions of the authors—including counsel at King & Spalding. Ex. 1, *Critique* at i (King & Spalding attorneys wrote that "[w]e conclude that the observations as to Joe Paterno in the Freeh report are unfounded.").

If that were not enough, the *Critique* and its authors have also repeatedly disclosed communications with the Paterno family itself. The *Critique* explicitly states that its findings and conclusions are *based on interviews of Joe Paterno*

*"and others,"* which presumably includes other members of the Paterno family. Ex. 1 at ii. In a video on www.paterno.com, Sollers discusses at length his communications with his client about their views of the Freeh Report, Sollers' own views (and criticism of) the Freeh Report, King & Spalding's investigation of the Freeh Report, and Joe Paterno's actions (or inactions). *See* Ex. 30, (screenshots from www.paterno.com). Despite these massive disclosures for their own benefit, the Estate refuses to provide the NCAA with *any* underlying documents or communications related to their analysis or development of the *Critique*.

It is also evident that the Estate and its representatives have discussed the contents of the *Critique* and the otherwise purportedly confidential information on which it was based with other third parties *before it was ever made public*. Both Sollers and Thornburgh explicitly state that in performing their analyses, they communicated with the "lawyers for Dr. Spanier and Messrs. Curley and Schultz." Ex. 1, *Critique* at 26 (basing conclusions on these communications); *see also* Ex. 1, Thornburgh Analysis at 8 (JVPE_NCAA_0000789) ("I also spoke with counsel for Messrs. Curley and Schultz to gather information relevant to my review."). Such collaboration is inconsistent with maintenance of the attorney-client privilege and work product protection. Of course, the Estate refuses to produce any of these communications, which almost certainly contain highly-relevant information.

Further, Sollers and McGinn met with investigators from the Freeh Firm during the 2012 investigation [redacted] *See* Ex. 31, Interview Report of Freeh, Sporkin & Sullivan LLP (June 13, 2012). Regardless of the *Critique*, these disclosures alone waive privilege over all documents and communications between Coach Paterno or members of the Paterno family and counsel on the broad subject matters discussed with the Freeh Firm. *See* Op. & Order at 21-22.

This Court's prior rulings and—as Plaintiffs said, "elementary notions of fairness"—demand that the Estate disclose all materials and communications regarding the "subject matter of what was disclosed." Ex. 18, Pls.' Opp'n to App. For Stay at 18, *Paterno*, No. 877 and 878 MDA 2015 (June 2, 2015); *see also, e.g.*, Op. & Order re Stay (Nov. 20, 2014) at 4 (holding that Penn State waived privilege by "attempting to invoke the Attorney-Client privilege as both a shield and sword" when it publicly released the Freeh Report); *see also Nationwide Mut. Ins. Co. v. Fleming*, 2007 PA Super 145, ¶ 15, 924 A.2d 1259, 1265 (2007) ("A litigant attempting to use attorney-client privilege as an offensive weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse."). In this instance, the scope of

waiver is at least that broad, and covers all communications and documents related to the subject matter of the *Critique* and its Independent Analyses. At bottom, as the Estate itself has argued, Plaintiffs "cannot avoid the consequences of [their] strategic decision to publicize the [reports] and use [them] as a sword for [their] own public-relations purposes." Ex. 20, Br. for Appellees at 25-30, *Paterno*, No. 1709 MDA 2014.

## III. THE ESTATE CANNOT BLOCK DISCOVERY OF THE PRE-LITIGATION INDEPENDENT ANALYSES BY CLAIMING BERLIN AND CLEMENTE ARE NOW NON-TESTIFYING EXPERTS.

In a last ditch attempt to block appropriate discovery concerning the Berlin and Clemente Analyses, the Estate has taken the position that ***any and all*** discovery—including factual, non-privileged documents and deposition testimony—concerning Berlin and Clemente is off-limits entirely on the ground that these individuals are now at least consulting experts for the Estate. *See* Ex. 4, B. Kowalski letter to P. Maher at 1 (Oct. 29, 2015). Would the Estate accept this result if the NCAA now designated Judge Freeh as an expert? Or would they think it was an improper shell game? The Estate's argument is neither procedurally nor substantively valid; the Court should reject it, order that Berlin and Clemente produce responsive documents without any further delay, and sit for depositions.

### A. The Estate's Attempt to Block the Berlin and Clemente Subpoenas is Procedurally Improper.

In attempting to challenge the Berlin and Clemente subpoenas, the Estate has abandoned any semblance of compliance with the requisite Pennsylvania Rules of Civil Procedure. Indeed—having initially informed the NCAA that Clemente and Berlin were collecting responsive documents to produce—the Estate changed course over a month later and decided to assert a haphazard "objection," through which the Estate said that Clemente and Berlin would provide no discovery. *See supra* pp. 9-10. This "objection" is invalid, untimely and/or waived for myriad separate reasons:

- The Estate failed to object to this discovery during the 20-day period allotted for a party to object. *See* Pa. R. Civ. P. 4009.21. The NCAA properly issued notices of intent to serve subpoenas on Berlin and Clemente and only served the subpoenas after receiving no objection during the 20-day waiting period. Any "objection" now is untimely and/or waived.

- The Estate lacks standing to prevent *third parties* from complying with valid subpoenas. The Estate is not taking the position that Rule 4003.5 shields the Estate's own documents from production; rather that it prevents *third parties* from complying with valid out-of-state subpoenas. Indeed, the Estate previously argued that Penn State did not have standing to object to the Estate's subpoena to third party Pepper Hamilton. Pls.' Mem. to Overrule at 19-24 (May 9, 2014). Thus, the Estate is now attempting to do precisely what it previously argued Penn State could not.

- The Estate's objections are to *Pennsylvania* subpoenas (the only subpoenas they attached to their objections). They ignore the operative Maryland and California subpoenas that were already served on Berlin and Clemente, respectively.

- At this point, any objection must be filed in the underlying jurisdiction.[17] For Berlin, this is Maryland, and for Clemente, California.
- Meanwhile, the individuals served with the subpoena—Berlin and Clemente—have not objected, and if they did, any objections would now be untimely. It thus appears that the Estate has directed them to unlawfully disobey a valid subpoena.
- Finally, even if the entities could object in this Court, any objection to a subpoena must be *filed with the Court*—not merely served on the NCAA, as the Estate did here. *See* Pa. R. Civ. P. 4009.21(c).

For each of these reasons, the Estate's objections are procedurally improper and should be rejected.

### B. As a Substantive Matter, Rule 4003.5 Does Not Shield Pre-Litigation Fact Discovery.

The Estate's objections are also substantively infirm, as Pennsylvania Rule of Civil Procedure 4003.5 does not apply to the *Critique* and its Independent Analyses. The purpose of Rule 4003.5 is to ensure that a party can maintain the confidentiality of its communications with non-testifying experts about the litigation at hand. *See Cruz v. Wanamaker*, 18 Pa. D. & C.4th 410, 414 (Pa. Com.

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[17] *See* Md. Code Ann., Cts. & Jud. Proc. § 9-405 ("An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under § 9-402 of this subtitle shall comply with the rules and statutes of this State and be submitted to the circuit court for the county in which discovery is to be conducted."); Cal. Civ. Proc. Code § 2029.600(a) ("If a dispute arises relating to discovery under this article, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief may be filed in the superior court in the county in which discovery is to be conducted and, if so filed, shall comply with the applicable rules or statutes of this state.").

Pl. 1993). The *Critique* and its Independent Analyses were prepared well-before this litigation. Plaintiffs broadcast them to the world as part of a public relations campaign in which the Estate attempted to discredit the Freeh Report and the NCAA. They may not be shielded, years later, under a rule intended to protect expert discovery in litigation.

The Estate's position leads to the absurdity in which a party can knowingly and deliberately waive the attorney-client privilege and work product protection, as the Estate did here by engaging in a massive public relations campaign, only to–years later—block any discovery of these individuals simply by referring to them as "non-testifying experts" in a litigation that did not exist when the disclosures were first made. Rule 4003.5 cannot be so construed. The Rule protects from discovery "facts known or opinions held" by non-testifying experts who have "been *retained or specially employed by another party in anticipation of litigation or preparation for trial.*" Pa. R. Civ. P. 4003.5(a)(3) (emphasis added). Rule 4003.5 does ***not*** shield discovery of "'facts or opinions [that] were acquired or developed independently of the litigation and not for trial.'" *Shambach v. Fike*, 82 Pa. D. & C.4th 535, 541 (Pa. County. Ct. . 2006 (citation omitted)). But here, the Estate made the calculated decision to *disclose repeatedly* the "facts known or opinions held" by Berlin and Clemente and did so long before these individuals were engaged as Rule 4003.5 experts. Under the Estate's approach, the NCAA

could even designate Judge Freeh as a "consulting expert" in this litigation and thereby head off any discovery of the Freeh investigation and Freeh Report. To assert such a position reveals that the Estate is engaged in gamesmanship in its purest form.

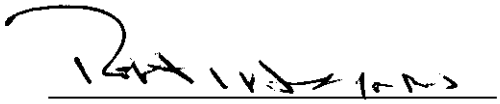
Ultimately, even if Berlin and Clemente are somehow serving as "non-testifying experts" now such that their post-litigation communications with Plaintiffs are protected, they (along with Sollers and Thornburgh) are fact witnesses about the pre-existing *Critique* and its Independent Analyses, including the process behind these reports and the content supporting them.

## CONCLUSION

Long before initiating this litigation, the Estate embarked on an aggressive public relations campaign to attempt to discredit the Freeh Report and Consent Decree—the centerpiece of which was commissioning and publicizing the *Critique* and Independent Analyses. Now, years later, the Estate refuses to produce materials related to the *Critique* based on privilege—a claim that directly flies in the face of every argument the Estate has made in its quest for documents related to the Freeh Report. The Estate has also instructed Berlin and Clemente to disobey valid subpoenas on the grounds that their newfound "expert" status in this litigation blocks any fact discovery related to "independent" reports they prepared prior to this litigation.

The Estate's discovery tactics are squarely aimed at blocking the NCAA's ability to defend itself against Plaintiffs' baseless claims. The Critique claims that the Paterno family was "committed to complete transparency of our findings." It is time for the Estate to abide by their commitment. The NCAA respectfully requests that the Court (i) compel the Estate to produce all documents related to the *Critique* and its Independent Analyses; (ii) for the same reasons, order the Estate to cease blocking discovery from Thornburgh; and (iii) overrule the Estate's purported "objection" to the Berlin and Clemente subpoenas.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving *The National Collegiate Athletic Association's Brief in Support of its Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third-Party Subpoenas*, as well as the supporting exhibits and proposed orders, on the following by First Class Mail and email. Supporting exhibits served on counsel by email only.

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*Via FedEx Overnight Delivery*
The Honorable John B. Leete
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Dated: December 30, 2015

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