



IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; 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.

CIVIL DIVISION

Docket No. 2013-2082

**MEMORANDUM OF LAW
IN SUPPORT OF MOTION
TO QUASH THIRD-PARTY
SUBPOENA DUCES TECUM
SEEKING DOCUMENTS
CONCERNING 1971 AND
1976 SANDUSKY
INCIDENTS AND FOR
PROTECTIVE ORDER**

Filed on Behalf of:
Non-Party The Pennsylvania
State University

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The ESTATE of JOSEPH PATERNO; and
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PATERNO, former football coaches at
Pennsylvania State University,

V.

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

Defendants.

Docket No. 2013-2082

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The Pennsylvania State University (“Penn State” or “the University”) respectfully submits this memorandum of law in support of its request that this Court quash a subpoena duces tecum in which the National Collegiate Athletic Association (“NCAA”) seeks documents about allegations asserted by individuals who allege to have been sexually assaulted by Jerry Sandusky in 1971 and 1976, respectively, when each of them was a child. For the reasons set forth herein, the Court should exercise its broad latitude to control discovery to quash the subpoena and issue a commensurate protective order, pursuant to Rules 234.4 and 4012 of the Pennsylvania Rules of Civil Procedure.

SUMMARY OF ARGUMENT

The NCAA is seeking highly sensitive information about two individuals who claim to have been sexually abused by Jerry Sandusky in the 1970s. The materials and information at issue – including documents that identify the individuals – are protected from discovery by Pennsylvania’s mediation privilege, 42 Pa. C.S. § 5949, by the confidential settlement agreements the University executed with the individuals involved in the 1971 and 1976 Sandusky Incidents, and by a protective order in another case on which one of those individuals relied when giving deposition testimony. These individuals came forward with their accusations of sexual abuse as part of a highly-confidential mediation process the University offered to alleged Sandusky victims, and they then engaged in mediated settlement discussions with the University’s representatives, all after being given myriad assurances that the information they provided, including their identities, would be held in strictest confidence. As a matter of Pennsylvania statutory law, the mediation privilege protects from disclosure all documents and information provided and created during a mediation process, including most of the documents the NCAA seeks in the subpoena.

Other documents sought by the subpoena, namely, the transcript of a deposition one of the Sandusky victims at issue gave in insurance coverage litigation, were designated as “confidential” pursuant to a protective order in that case,

And, to the extent any documents are not protected from disclosure by the mediation privilege or by a protective order in another case, this Court nevertheless should exercise its discretion to decline to order the University to produce them. This Court has the power to issue any order that justice requires to protect any person from “unreasonable annoyance, embarrassment, oppression, burden or expense.” Pa. R. Civ. P. 234.4(b), 4012(a). This presents a textbook example of over-reaching third-party discovery seeking documents that are intensely

private, where the Court should balance the competing interests and then exercise its discretion to deny the discovery.

BACKGROUND

A. The University retains Feinberg Rozen to mediate settlement discussions with Sandusky victims, including the individuals involved in the 1971 and 1976 Sandusky Incidents.

In 2012, following the indictment, and then the conviction, of Gerald Sandusky, the University retained Kenneth R. Feinberg and his partner, Michael K. Rozen, of the law firm Feinberg Rozen, LLP, to facilitate settlement discussions with individuals who came forward with allegations that they had been sexually abused by Sandusky. The October 12, 2012, engagement letter between Feinberg Rozen and Penn State (the “Engagement Letter”) that memorializes that engagement contains extensive provisions calculated to ensure that the facilitated discussions with the victims and their representatives would be conducted with the utmost confidentiality. Specifically, the Engagement Letter states, *inter alia*, that:

- “[a]ny and all meetings” between or among the participants in the facilitation sessions “will be deemed to be confidential;”
- “any documents or other pertinent materials submitted to the facilitators will similarly be deemed confidential and will not be disclosed without permission to any other participants;”
- “all oral and written communications between and among the participants and the facilitators in connection with the facilitation shall be treated and considered as having been made in the course of compromise negotiations and shall be deemed inadmissible at any subsequent proceeding or trial;”

- the participants agree that “confidential information shared during the course of the facilitation process shall not be used for any purpose outside the scope of the facilitation process;” and
- “[a]ll documents or other information supplied to an opposing participant during the course of the facilitation (as well as any copies, reproductions or summaries of such documents), shall not be made public nor shared with any person not involved in the facilitation between the participants.”

Exhibit 3 (Declaration of Kenneth R. Feinberg (“Feinberg Dec.”), ¶ 3); Exhibit 4 (Declaration of Michael Rozen (“Rozen Dec.”), ¶ 3).

Mr. Feinberg facilitated Penn State’s settlement discussions with the individual who is the subject of the 1976 Sandusky Incident. Ex. 3 (Feinberg Dec.), ¶ 5; Mr. Rozen facilitated the discussions with the individual who is the subject of the 1971 Sandusky Incident. Ex. 4 (Rozen Dec.), ¶ 5. Messrs. Feinberg and Rozen, respectively, assured the attorneys for those individuals that those mediated settlement discussions would be conducted in complete accord with the confidentiality provisions set forth in the Engagement Letter, and the settlement discussions with those individuals were in fact conducted on those terms. Ex. 3 (Feinberg Dec.), ¶ 6; Ex. 4 (Rozen Dec.), ¶ 6. The University, namely, the attorneys who represent the University in victim-related litigation, learned of the identities of those individuals from Messrs. Feinberg and Rozen. Exhibit 5 (Declaration of Joseph F. O’Dea, Jr. (“O’Dea Dec.”) ¶ 3.

B. The University enters into Confidential Settlement Agreements with the individuals involved in the 1971 And 1976 Sandusky Incidents that provide further assurances of confidentiality.

Following the mediated settlement discussions with Feinberg Rozen, the University entered into Confidential Settlement Agreements with the individuals at the center of the 1971

and 1976 Sandusky Incidents. Each of the Confidential Settlement Agreements provides, *inter alia*, that the University shall not “discuss with or disclose to anyone who is not a party . . . any information, correspondence, or documents related to: (1) the specific terms of [the agreement]; (2) the amount of this particular Payment; or (3) any financial information regarding the amount of any offers or counteroffers made during the course of the mediation of this particular Dispute” (collectively defined as “Confidential Information”). Ex. 5 (O’Dea Dec.) ¶ 4. The Confidential Settlement Agreements do not contain any representations or recitals about the specifics of either individual’s claim or the nature or extent of either individual’s claimed damages. *Id.*, ¶ 5.

Each Confidential Settlement Agreement further provides that where, as here, one of the parties thereto receives a subpoena requesting the Confidential Information, the recipient thereof is required to notify the other of the demand, and “may seek, if he/it chooses, a protective order or other remedy.” *Id.*, ¶ 6.

C. Pursuant to provisions of the Confidential Settlement Agreements, the University provides one of its insurers with information about the 1971 and 1976 Sandusky Incidents, and the 1976 victim testifies in the insurance coverage litigation pursuant to the provisions of a strict protective order.

In the Confidential Settlement Agreements with the individuals involved in the 1971 and 1976 Sandusky Incidents, the victims acknowledged that the University may need to share certain information the victim had provided with the University’s insurers, in order for the University to pursue the recovery of insurance proceeds. Each of the victims expressly granted the University permission to make those limited disclosures. Ex. 5 (O’Dea Dec.) ¶ 7.

The University is indeed in litigation with one of its insurers, Pennsylvania Manufacturers’ Association Insurance Company (“PMA”) over coverage for a portion of the amounts it paid in settlements to Sandusky victims. The insurance coverage action is pending in the Court of Common Pleas of Philadelphia County as *Pennsylvania Manufacturers’ Association*

Insurance Company v. The Pennsylvania State University, Civil Action Nos. 04126, 03195, 03197 (the “PMA Litigation”). On April 9, 2014, Judge Glazer, the judge overseeing the PMA Litigation, entered a Stipulation and Order Governing the Exchange of Confidential Information (the “Protective Order”). That order provides, *inter alia*, that a person (whether or not a party to the litigation) discloses information it contends is confidential, it may designate the material accordingly, thereby triggering an obligation by the persons receiving the information to abide by the terms of the Protective Order. Ex. 6 (Declaration of Linda D. Kornfeld (“Kornfeld Dec.”), ¶ 4.

Consistent with the permissions provided by the victims in their respective Confidential Settlement Agreements, the University divulged to PMA the names of the individuals involved in the 1971 and 1976 Sandusky Incidents, and certain information and documentation those victims’ representatives had submitted in the mediated discussions with Feinberg Rozen. Ex. 6 (Kornfeld Dec.), ¶ 5. Penn State designated that information, and those documents, as “Confidential” under the Protective Order. *Id.* Counsel for PMA then issued a subpoena to, and deposed, the individual involved in the 1976 Sandusky Incident. *Id.*, ¶ 6. The attorney for the 1976 victim made clear that the client was giving deposition testimony on the understanding that the testimony would be treated as Confidential under the Protective Order. *Id.*

The *PMA* Protective Order provides that, if the University receives a subpoena for documents designated as Confidential, it: (i) shall give written notice to the person who designated the material as Confidential; (ii) shall refrain from producing the documents in question until the earlier of (a) receipt of a written notice from the disclosing party that he does not object to the production of the documents in question, or (b) a court with jurisdiction over the objection of the disclosing party resolves his objections. *Id.*, ¶ 7. Pursuant to the Protective

Order, counsel for the University gave the attorneys for the individuals involved in the 1971 and 1976 Sandusky Incidents written notice that the NCAA's subpoena calls for the production of, *inter alia*, the transcript of his deposition testimony in the PMA Litigation. The attorney for the 1976 Victim has *not* consented to the production of that transcript.¹ *Id.*

D. The NCAA serves a subpoena seeking documents and information about the individuals involved in the 1971 and 1976 Sandusky Incidents.

On May 24, 2016, the NCAA served the University with a subpoena that requests:

REQUEST NO. 1: All testimony, statements, and accounts of any actual or alleged victim or victims, or their agents, representatives, or any persons on their behalf, Concerning (a) the 1971 Sandusky Incident or (b) the 1976 Sandusky Incident, and any non-privileged Documents or Communications related thereto, including any settlement agreement or agreements.

And

REQUEST NO. 2: To the extent not included in Request No. 1, Documents sufficient to identify the name and address of any victim or victims, and their counsel, involved in the 1971 Sandusky Incident or the 1976 Sandusky Incident.

See Exhibit 1. The time period for the document requests is January 1, 2011 through the present.

Id., Instruction No. 5. The University served herewith written responses and objections to the subpoena.² *See* Exhibit 2.

The University's counsel engaged in communications with counsel for the NCAA in an effort to avoid filing this motion. In those conversations, counsel for the NCAA represented that, despite the breadth of the subpoena, the NCAA principally is interested in receiving (a)

¹ Recently, in response to a motion filed by various media outlets, the judge presiding over the *PMA* litigation issued an order unsealing those portions of the transcript of the deposition of the 1976 victim that had been filed with the court under seal in connection with motion practice. The court's order (attached as Exhibit 7 hereto) provides that the court will first redact the names and other personally-identifying information from those deposition excerpts.

² In a telephonic conference call held June 13, 2016, the Court granted the parties' oral motion to extend the deadline for responding to the NCAA's subpoena to June 20, 2016.

documents sufficient to identify the individuals involved in the 1971 and the 1976 Sandusky Incidents; and (b) the transcript of the deposition the 1976 victim gave in the PMA Litigation. The NCAA's narrowing of the subpoena notwithstanding, this Motion addresses the full scope of the documents the subpoena seeks on its face.

ARGUMENT

Most of the documents sought by the subpoena are protected from disclosure as a matter of law by Pennsylvania's mediation privilege, 42 Pa. C.S. § 5949. To the extent this Court has discretion with respect to the production of documents not protected from disclosure as a matter of law, this Court should exercise that discretion under Rules 234.4(b) and 4012(a) to quash the subpoena and issue a protective order.

A. The Court may quash a subpoena and issue a protective order where, as here, the discovery sought would invade a privilege or would impose unreasonable annoyance, embarrassment, oppression, burden or expense.

Pursuant to Rule 4003.1(a) of the Pennsylvania Rules of Civil Procedure, the scope of discoverable material excludes materials that are "privileged." Indeed, Rule 4011(d) expressly provides: "No discovery, including discovery of electronically stored information, shall be permitted which . . . is prohibited by any law barring disclosure of mediation communications and mediation documents."

Furthermore, even with respect to non-privileged information, a party may obtain discovery only of matters that are "relevant to the subject matter involved in the pending action." Pa. R. Civ. P. 4003.1(a). Although one may not object to discovery on the grounds that the information would be inadmissible at trial, the information sought must "appear[] reasonably calculated to lead to the discovery of admissible evidence." Pa. R. Civ. P. 4003.1(b). Moreover, the Court "may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense" Pa. R. Civ. P.

4012(a). Rule 234.4(b) contains the same language with respect to third-party subpoenas in particular.

B. The mediation privilege protects most of the documents sought in the subpoena from discovery as a matter of law.

Pennsylvania has a statutory mediation privilege, which provides:

[A]ll mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process. Mediation communications and mediation documents shall not be admissible as evidence in any action or proceeding, including, but not limited to, a judicial, administrative or arbitration action of proceeding.

42 Pa. C.S.A. § 5949(a).³

“Mediation” is defined for purposes of the statutory privilege as “[t]he deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute. For purposes of this section, mediation commences at the time of initial contact with a mediator or mediation program.” 42 Pa. C.S.A. § 5949(c). A “mediation communication” is defined as “[a] communication, verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program.” *Id.* And, a “mediation document” is “[w]ritten material, including copies, prepared for the purpose of, in the course of or pursuant to

³ Although there are several enumerated exceptions to the existence of the privilege (42 Pa. C.S.A. § 5949(b)), none of those exceptions apply here. Specifically, § 5949(b), “Exceptions,” provides that: (1) a settlement document may be introduced in an action to enforce the settlement agreement; (2) the privilege does not apply to the extent that the communication is relevant evidence in certain criminal matters; (3) the privilege does not apply to a fraudulent statement made in a mediation that is relevant to an action to enforce or set aside a mediated agreement; and (4) the privilege does not apply to “[a]ny document which otherwise exists, or existed independent of the mediation and is not otherwise covered by this section”

mediation. The term includes, but is not limited to, memoranda, notes, files, records and work product of a mediator, mediation program of party.” *Id.*

A federal case applying Pennsylvania law set out the purpose of the mediation privilege thusly:

If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tightlipped, noncommittal manner more suitable to poker players in a high-stakes game than to adversaries *attempting to arrive at a just resolution of a civil dispute*. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements . . . , thereby expediting cases at a time when . . . judicial resources . . . are sorely taxed.

United States Fidelity and Guaranty Co. v. Bilt-Rite Contractors, Inc., 2005 U.S. Dist. LEXIS 9299, *18 (E.D. Pa. 2005) (internal citations and quotations omitted).

Here, the mediation privilege protects from discovery, *as a matter of law*, all of the mediation communications and the all mediation documents (as those terms are defined in the statute) with respect to the 1971 and the 1976 Sandusky Incidents. This includes, but is not limited to: the identities of the victims; all descriptions of the incidents that the victims (or their representatives) gave to Messrs. Feinberg or Rozen; all records of medical and other treatment the victims’ representatives gave to Messrs Feinberg and Rosen; all communications between the victims (or their representatives) and Messrs. Feinberg and Rosen; and the mediators’ files.

Consistent with Pennsylvania’s mediation privilege, and as described in the accompanying declarations of Messrs. Feinberg and Rozen, the individuals involved in the 1971 and the 1976 Sandusky Incidents were given express promises that all information they provided during the mediated settlement discussions would be held in confidence, as more fully set forth in the Engagement Letter. Those assurances were provided so that these individuals – who alleged to have been victims of a horrific crime in their youths – could speak candidly

throughout the mediation process, without fear that their identities, their descriptions of the incidents in question, or other evidence they may have submitted in support of their quest for compensation would be shared with anyone who was not a participant in the mediation. The victims undoubtedly relied upon the University's – and the mediators' – promises of confidentiality when they supplied details in support of their claims. The Court should quash the subpoena to the extent it seeks materials and information protected from disclosure as a matter of law by the mediation privilege.

C. The Court should respect the confidentiality of information the victims and Penn State provided to PMA pursuant to the Protective Order in that case.

For similar reasons, the Court also should respect the confidentiality provisions of the PMA Protective Order. The individual involved in the 1976 Sandusky Incident sat for a deposition testimony in reasonable reliance on that testimony being treated as confidential pursuant to the terms of the Protective Order. There is no basis for the Court to squelch and defeat that individual's well-founded expectation that his testimony would be kept in confidence.

Judge Glazer's recent decision to unseal the record in the PMA Litigation does not warrant the Court enforcing the NCAA's subpoena. To the contrary, Judge Glazer made it clear that: (a) only those portions of the transcript that had been filed under seal would be produced to the media; and (b) all personally-identifying first would be removed from those materials. *See* Exhibit 7. Here, in contrast, the NCAA's subpoena expressly seeks the identities about the individuals involved in the 1971 and 1976 Sandusky Incidents, and it also seeks the entire, unredacted transcript of the deposition given by the 1976 victim.

D. The NCAA has no legitimate reason for seeking the production of the Confidential Settlement Agreements.

The Court also should quash the subpoena to the extent it asks Penn State to produce the Confidential Settlement Agreements it entered into with these individuals, and/or documents or

information relating to those agreements. As explained *supra*, the University expressly committed to the victims that it would not to disclose the terms of those agreements, including the amounts of the settlements. And, as also explained *supra*, the Confidential Settlement Agreements are devoid of any discussion or representations about the specifics of the victims' claims. Accordingly, once those agreements are redacted to shield: (a) the names of the victims (as discussed *supra*, the mediation privilege shields the victims' identities from discovery as a matter of law) and (b) the terms of the settlements, the agreements themselves would have no conceivable relevance to the claims and defenses remaining in this litigation. This Court accordingly should exercise its discretion to bar the NCAA from seeking the production of those Confidential Settlement Agreements.

E. To the extent the Court concludes that some documents sought in the subpoena are not protected from disclosure as a matter of law, the court nevertheless should exercise its discretion to issue a protective order.

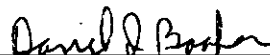
As discussed *supra*, most of the documents and information sought in the subpoena, including but not limited to the identities of the 1971 and 1976 victims and all documents exchanged or created in the mediation process are protected from disclosure as a matter of law by the statutory mediation privilege. However, to the extent the Court concludes otherwise with respect to any document, it nevertheless should balance the competing interests and then exercise its discretion to quash the subpoena and issue a protective order. The NCAA presumably is seeking information about the 1971 and 1976 Sandusky Incidents so it can depose the victims. Both of the individuals in question claim to have been subjected to a horrible crime in their youths. Rather than file civil litigation against the University, they long ago settled their claims as part of a highly-confidential mediation process, and have chosen to keep their identities private. Enforcing the NCAA's subpoena, however, is a start down the path of subjecting these individuals to the stressful prospect of needing to testify about the abuse to which they contend

they were subjected. This Court should exercise its discretion to respect those individuals' privacy and dignity interests, and quash the subpoena.

CONCLUSION

For all of the foregoing reasons, Penn State respectfully requests that the Court quash the subpoena and issue a commensurate protective order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 20th day of June, 2016, a true and correct copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH THIRD-PARTY SUBPOENA DUCES TECUM SEEKING DOCUMENTS CONCERNING 1971 AND 1976 SANDUSKY INCIDENTS AND FOR PROTECTIVE ORDER was served upon the following counsel via United States mail, first class, postage prepaid:

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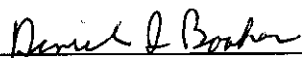
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