

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

ESTATE of JOSEPH PATERNO; WILLIAM KENNEY)
and JOSEPH ("JAY") V. 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.)

No: 2013-2082

DEBRA C. JAMIEL
PROTHONOTARY
CENTRE COUNTY, PA

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OPINION AND ORDER

Presently before the Court are several privilege claims which are being asserted by the Pennsylvania State University ("Penn State") and Pepper Hamilton, LLP ("Pepper Hamilton"). Penn State and Pepper Hamilton filed a Joint Memorandum of Law in Support of Privilege Claims on June 6, 2016. A Privilege Log outlining the allegedly privileged material was filed

under seal by Penn State and Pepper Hamilton on June 8, 2016. The Estate of Joseph Paterno, et al. (“Plaintiffs”) filed a Response to Penn State and Pepper Hamilton’s Joint Memorandum on June 23, 2016. Penn State and Pepper Hamilton filed a Joint Reply Memorandum of Law in Support of Privilege Claims on July 1, 2016.

The Court has reviewed the record in this case, and is now ready to render a decision on these matters.

DISCUSSION

I. Attorney-Client Privilege

a. Penn State and Freeh, Sporkin, & Sullivan, LLP

The attorney-client privilege protects disclosure of professional advice by an attorney to a client or of communications by a client to an attorney to enable the attorney to render sound professional advice. Gillard v. AIG Ins. Co., 15 A.3d 44, 47 (Pa. 2011). To successfully invoke the attorney-client privilege, the individual claiming it must demonstrate:

- 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.

Office of Governor v. Davis, 122 A.3d 1185, 1191-92 (Pa. Cmwlth. 2015). The party who has asserted the attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked, then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, e.g., because the privilege

has been waived or because some exception applies. Carbis Walker, LLP v. Hill, Barth & King, LLC, 930 A.2d 573, 581 (Pa. Super. 2007).

In the case at bar, Penn State contends it was a client of Freeh, Sporkin, & Sullivan, LLP (“FSS”) and thus has standing to assert the attorney-client privilege in regards to communications between the Special Investigative Task Force (“SITF”) and FSS. Plaintiffs contend Penn State does not have standing to assert the attorney-client privilege. The Court finds Penn State was not a client of FSS and does not have standing to assert the attorney-client privilege in regards to communications between the SITF and FSS.

The Engagement Letter approved and agreed to between The Board of Trustees of the Pennsylvania State University, the SITF, and FSS states that FSS has been engaged “to represent the Task Force.” Engagement Letter at 1. The “Scope of Engagement” provides as follows:

FSS has been engaged to serve as independent, external legal counsel to the Task Force to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University (“PSU”) personnel to report such sexual abuse to appropriate police and government authorities. The results of FSS’s investigation will be provided in a written report to the Task Force and other parties as so directed by the Task Force. The report will contain FSS’s findings concerning: i) failures that occurred in the reporting process; ii) the cause of those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS’s report also will provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

Id. FSS’s engagement was “solely related to the Task Force established by The Pennsylvania State University Board of Trustees.” Id. at 6. The SITF was not merely an entity standing in the stead of Penn State. It consisted of members of the Board of Trustees, students, faculty, and alumni. The SITF was an entity which, although conceived and initiated by the Board of Trustees, had autonomy to pursue an investigation that could result in findings critical of Penn

State. FSS was retained by the SITF to conduct a review independent of Penn State's control, which was an effort to provide a transparent investigation of Penn State's conduct without the hindrance of needing to consistently act in the best interests of Penn State. Further, the signatory of the Engagement Letter on FSS's behalf, Louis Freeh, has stated that Penn State was never a client represented by FSS and that he emphasized to Penn State's counsel that Penn State was not a client represented by FSS. 02/25/2016 Freeh Dep. at 37:16 – 40:19.

Therefore, Penn State does not have standing to assert the attorney-client privilege in regards to communications between the SITF and FSS.

b. Waiver

Waiver is the voluntary and intentional abandonment of a known right. Brubacher Excavating, Inc. v. Commerce Bank/Harrisburg, N.A., 995 A.2d 362, 369 n.4 (Pa. Super. 2010). Waiver may be established by either a party's express declaration or conduct or action so inconsistent with an intention to stand on the party's right as to leave no opportunity for a reasonable inference to the contrary. Prime Medica Assocs. v. Valley Forge Ins. Co., 970 A.2d 1149, 1156-57 (Pa. Super. 2009). A client can waive the protection afforded by the attorney-client privilege by disclosing the communication at issue to a third party. Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), affirmed, 992 A.2d 65 (Pa. 2010). Once the attorney-client communication has been disclosed to a third party, the privilege is deemed waived. Joe v. Prison Health Services, Inc., 782 A.2d 24 (Pa. Cmwlth. 2001).

In the case at bar, the FSS attorneys communicated with the Penn State Board of Trustees, the SITF, and attorneys for Penn State. Since Penn State was not a client of FSS, all communications FSS had with Penn State parties who were not members of the SITF constituted third party communications. Therefore, no privilege attaches to said communications and any

confidential material disclosed in said communications has resulted in a waiver of the protection afforded by the attorney-client privilege, in regards to that material.

The following categories of the Privilege Log contain these unprivileged communications:

- i. Category 11a. Substantive communications between members of the Freeh Team and members of Penn State's Board of Trustees ("BOT") or Special Investigative Task Force ("SITF") that are within the scope of 42 Pa.C.S. § 5928
 - a. Insofar as said communications were made to non-members of the SITF.
- ii. Category 12 a. Communications between members of the Freeh Team and other attorneys for PSU (e.g., F. Guadagnino, C. Baldwin, L. Davis, D. Walworth, J. O'Dea) that are within the scope of 42 Pa.C.S. § 5928
- iii. Category 12b. Documents containing internal discussions among members of the Freeh Team re: communications between members of the Freeh Team and other attorneys for PSU (e.g., F. Guadagnino, C. Baldwin, L. Davis, D. Walworth, J. O'Dea) that are within the scope of 42 Pa.C.S. § 5928
 - a. Insofar as said discussions reflect the substantive material of said communications.
- iv. Category 13. Documents containing internal discussions among members of the Freeh Team re: communications with third parties (e.g., OAG, NCAA, Big Ten)
 - a. Insofar as said discussions reflect the substantive material of said communications.

II. Attorney Work Product Doctrine

a. Freeh, Sporkin, & Sullivan, LLP and the Special Investigative Task Force

The attorney work product doctrine, while closely related to the attorney-client privilege, provides broader protection. Levy v. Senate of Pennsylvania, 94 A.3d 436, 443 (Pa. Cmwlth. 2014), appeal denied, 106 A.3d 727 (Pa. 2014); Dages v. Carbon Cnty., 44 A.3d 89 (Pa. Cmwlth. 2012).

The Pennsylvania Rules of Civil Procedure set forth the attorney work-product doctrine, which provides as follows:

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. 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.

Pa.R.C.P. 4003.3. The doctrine protects any material prepared by the attorney "in anticipation of litigation," regardless of whether it is confidential. Levy, supra (citing Nat'l R.R. Passenger Corp. v. Fowler, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001)). The underlying purpose of the work-product doctrine is to shield the mental processes of an attorney by providing a privileged area within which the attorney can analyze and prepare a client's case. T.M. v. Elwyn, Inc., 950 A.2d 1050, 1062 (Pa. Super. 2008); Gocial v. Independence Blue Cross, 827 A.2d 1216, 1222 (Pa. Super. 2003). Rule 4003.3 specifically "immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more."

Pa.R.C.P. 4003.3, Explanatory Comment at ¶ 3.

In the case at bar, Pepper Hamilton contends it has standing to assert the work product privilege in regards to work product generated by FSS for the SITF. Plaintiffs contend Pepper Hamilton does not have standing to assert the work product privilege. The Court's analysis of the Engagement Letter in the preceding section confirms that an attorney-client relationship existed between FSS and the SITF. Therefore, Pepper Hamilton has standing to assert the work product privilege in regards to work product generated by FSS for the SITF.

b. Relevance

Pennsylvania Rule of Civil Procedure 4003.1 states:

Rule 4003.1 Scope of discovery generally. Opinions and contentions

- a) Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party
- b) It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Pa.R.C.P. 4003.1(a)(b). Generally, discovery “is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried.” PECO Energy Co. v. Insurance Company of North America, 852 A.2d 1230, 1233 (Pa. Super. 2004) (citing George v. Schirra, 814 A.2d 202, 205 (Pa. Super. 2002)).

Information is relevant “if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact.” Kelin v. Aronchick, 85 A.3d 487, 498 (Pa. Super. 2014); Smith v. Morrison, 42 A.3d 131, 137 (Pa. Super. 2012), appeal denied, 57 A.3d 71 (Pa. 2012).

The rules of discovery involve a standard that is necessarily broader than the standard used at trial for the admission of evidence; the purpose of allowing a broader standard is to ensure that a party has in its possession all relevant and admissible evidence before the start of trial. Com. ex rel. Pappert v. TAP Pharm. Products, Inc., 904 A.2d 986, 994 (Pa. Cmwlth. 2006); American Future Systems, Inc. v. BBB, 872 A.2d 1202 (Pa. Super. 2005).

The work-product privilege is not absolute, and items may be deemed discoverable if the “product” sought becomes a relevant issue in the action. Saint Luke's Hosp. of Bethlehem v.

Vivian, 99 A.3d 534, 55051 (Pa. Super. 2014), appeal denied sub nom. Saint Luke's Hosp. of Bethlehem, Pa. v. Vivian, 114 A.3d 417 (Pa. 2015); Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 32 A.3d 800, 812 (Pa. Super. 2011), affirmed sub nom. Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity, 91 A.3d 680 (Pa. 2014) (documents ordinarily protected by the attorney work-product doctrine may be discoverable if the work product itself is relevant to the underlying action); T.M., supra at 1062; Gocial, supra at 1222. The Explanatory Comment to Rule 4003.3 provides as follows:

There are, however, situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action; for example, an action for malicious prosecution or abuse of process where the defense is based on a good faith reliance on a legal opinion of counsel. The opinion becomes a relevant piece of evidence for the defendant, upon which defendant will rely. The opinion, even though it may have been sought in anticipation of possible future litigation, is not protected against discovery. A defendant may not base his defense upon an opinion of counsel and at the same time claim that it is immune from pre-trial disclosure to the plaintiff.

Pa.R.C.P. 4003.3, Explanatory Comment at ¶ 4. The work-product privilege cannot be overcome by merely asserting that the protected documents reference relevant subject matter, rather, the attorney's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research or legal theories must be directly relevant to the action. Barrick, supra.

In the case at bar, Plaintiffs contend FSS's attorney work product is at issue in this litigation and is discoverable. Pepper Hamilton and Penn State contend FSS's attorney work product is not at issue in this litigation and is not discoverable. The Court finds FSS's attorney work product is not relevant to the subject matter of Plaintiffs' claims, and thus FSS's attorney work product is not at issue in this litigation and is not discoverable.

The integral relevant issue in this case is whether Defendants adopted the allegedly false findings of the *Freeh Report* either with knowledge that the findings were false, or with reckless

disregard of the findings' truth or falsity. See Green v. Mizner, 692 A.2d 169, 172 (Pa. Super. 1997) (when the plaintiff is a public figure, the defendant must have made the defamatory statement with "actual malice," i.e. with knowledge or reckless disregard to the falsity). When considering this issue in conjunction with FSS's attorney work product, the relevance of the work product to Plaintiffs' claims turns on whether FSS communicated or shared the work product with Defendants. Whether FSS acted with actual malice or reckless disregard for the truth in reaching the findings in the *Freeh Report* is wholly irrelevant to whether Defendants acted with said requisite state of mind. Therefore, any attorney work product which remained internal amongst the FSS team of attorneys is irrelevant to Plaintiff's claims in this case and is not discoverable.

The following categories of the Privilege Log contain this irrelevant material:

- i. Category 1. Documents containing internal discussions among members of the "Freeh Team" (Freeh Sporkin & Sullivan, Freeh Group International Solution, Pepper Hamilton) re: interim recommendations provided to PSU in February 2012
- ii. Category 2a. Draft of the Freeh Report or individual chapters thereof
- iii. Category 2b. Documents containing internal discussions among members of the Freeh Team re: draft chapters, possible findings, possible recommendations
- iv. Category 3a. Drafts of chapters/sections that were not included in the final Freeh Report
- v. Category 3b. Documents containing internal discussions among members of the Freeh Team re: drafts of chapters/sections that were not included in the final Freeh Report
- vi. Category 4. Drafts of and documents containing internal discussions among members of the Freeh Team re: press release/L. Freeh remarks upon issuance of Freeh Report
- vii. Category 5. Legal research memoranda, including discussion or analysis in preparation for drafting

- viii. Category 6. Documents containing internal discussions among members of the Freeh Team re: the plan for the investigation/the progress thereof
- ix. Category 7b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews cited in the Freeh Report—then-current PSU employees, trustees, emeritus trustees
- x. Category 8b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews cited in the Freeh Report—all others
- xi. Category 8b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews cited in the Freeh Report—all others
- xii. Category 9b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews not cited in the Freeh Report—then-current PSU employees, trustees, emeritus trustees
- xiii. Category 10b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews not cited in the Freeh Report—all others
- xiv. Category 11b. Documents containing internal discussions among members of the Freeh Team re: Substantive communications between members of the Freeh Team and members of Penn State’s Board of Trustees (“BOT”) or Special Investigative Task Force (“SITF”) that are within the scope of 42 Pa.C.S. § 5928

c. Partially Discoverable Documents

The underlying purpose of the work-product doctrine is to shield the mental processes of an attorney by providing a privileged area within which the attorney can analyze and prepare a client's case. T.M., *supra*; Gocial, *supra*. See Briem v. Coppola, 37 Pa. D. & C.3d 350 (C.P. Allegheny 1984) (memoranda that summarize interviews are discoverable, provided that the mental impressions, conclusions or opinions respecting the value or merit of the claim or defense or respecting strategy or tactics of the person who prepared these writings are deleted).

In the case at bar, several categories of the Privilege Log contain memoranda of interviews prepared by FSS interviewers. These memoranda contain a confluence of the

statements made by the interviewees and the mental impressions, conclusions, and opinions of the interviewer. The attorney work product doctrine only applies to the interviewer's mental impressions, conclusions, and opinions. Therefore, said memoranda are discoverable so long as the attorney work product portions are redacted.

The following categories of the Privilege Log contain this partially discoverable material:

- i. Category 7a. Memos of interviews cited in the Freeh Report—then-current PSU employees, trustees, emeritus trustees
- ii. Category 8a. Memos of interviews cited in the Freeh Report—all others
- iii. Category 9a. Memos of interviews not cited in the Freeh Report—then-current PSU employees, trustees, emeritus trustees
- iv. Category 10a. Memos of interviews not cited in the Freeh Report—all others

Accordingly, the Court enters the following Order:

ORDER

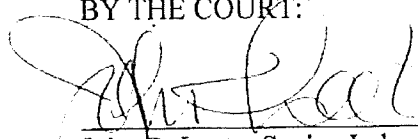
AND NOW, this 11 day of ~~July~~^{AUGUST}, 2016, the Court hereby ORDERS:

- 1) The following categories of the Privilege Log are discoverable as they contain unprivileged communications:
 - a. Category 11a. Substantive communications between members of the Freeh Team and members of Penn State's Board of Trustees ("BOT") or Special Investigative Task Force ("SITF") that are within the scope of 42 Pa.C.S. § 5928
 - i. Insofar as said communications were made to non-members of the SITF.
 - b. Category 12 a. Communications between members of the Freeh Team and other attorneys for PSU (e.g., F. Guadagnino, C. Baldwin, L. Davis, D. Walworth, J. O'Dea) that are within the scope of 42 Pa.C.S. § 5928
 - c. Category 12b. Documents containing internal discussions among members of the Freeh Team re: communications between members of the Freeh Team and other attorneys for PSU (e.g., F. Guadagnino, C. Baldwin, L. Davis, D. Walworth, J. O'Dea) that are within the scope of 42 Pa.C.S. § 5928
 - i. Insofar as said discussions reflect the substantive material of said communications.
 - d. Category 13. Documents containing internal discussions among members of the Freeh Team re: communications with third parties (e.g., OAG, NCAA, Big Ten)
 - i. Insofar as said discussions reflect the substantive material of said communications.

- 2) The following categories of the Privilege Log are undiscoverable as they contain irrelevant material:
- a. Category 1. Documents containing internal discussions among members of the “Freeh Team” (Freeh Sporkin & Sullivan, Freeh Group International Solution, Pepper Hamilton) re: interim recommendations provided to PSU in February 2012
 - b. Category 2a. Draft of the Freeh Report or individual chapters thereof
 - c. Category 2b. Documents containing internal discussions among members of the Freeh Team re: draft chapters, possible findings, possible recommendations
 - d. Category 3a. Drafts of chapters/sections that were not included in the final Freeh Report
 - e. Category 3b. Documents containing internal discussions among members of the Freeh Team re: drafts of chapters/sections that were not included in the final Freeh Report
 - f. Category 4. Drafts of and documents containing internal discussions among members of the Freeh Team re: press release/L. Freeh remarks upon issuance of Freeh Report
 - g. Category 5. Legal research memoranda, including discussion or analysis in preparation for drafting
 - h. Category 6. Documents containing internal discussions among members of the Freeh Team re: the plan for the investigation/the progress thereof
 - i. Category 7b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews cited in the Freeh Report—then-current PSU employees, trustees, emeritus trustees

- j. Category 8b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews cited in the Freeh Report—all others
 - k. Category 8b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews cited in the Freeh Report—all others
 - l. Category 9b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews not cited in the Freeh Report—then-current PSU employees, trustees, emeritus trustees
 - m. Category 10b. Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: memos of interviews not cited in the Freeh Report—all others
 - n. Category 11b. Documents containing internal discussions among members of the Freeh Team re: Substantive communications between members of the Freeh Team and members of Penn State’s Board of Trustees (“BOT”) or Special Investigative Task Force (“SITF”) that are within the scope of 42 Pa.C.S. § 5928
- 3) The following categories of the Privilege Log are partially discoverable:
- a. Category 7a. Memos of interviews cited in the Freeh Report—then-current PSU employees, trustees, emeritus trustees
 - b. Category 8a. Memos of interviews cited in the Freeh Report—all others
 - c. Category 9a. Memos of interviews not cited in the Freeh Report—then-current PSU employees, trustees, emeritus trustees
 - d. Category 10a. Memos of interviews not cited in the Freeh Report—all others

- 4) All of the Court's discovery findings contained in this Order are to be interpreted in collaboration with the findings in the attached Opinion.

BY THE COURT:

John B. Leete, Senior Judge
Specially Presiding