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

PENN STATE'S AND PEPPER HAMILTON'S JOINT MEMORANDUM OF LAW IN SUPPORT OF PRIVILEGE CLAIMS

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PENN STATE'S AND PEPPER HAMILTON'S JOINT MEMORANDUM OF LAW IN SUPPORT OF PRIVILEGE CLAIMS

The Pennsylvania State University ("Penn State" or "the University") and Pepper Hamilton LLP ("Pepper Hamilton") submit this joint memorandum of law in support of their contentions that certain documents contained in the files of the law firm of Freeh Sporkin & Sullivan, and now, the law firm of Pepper Hamilton, are protected from disclosure by the attorney work product doctrine and/or the attorney-client privilege.

FACTUAL AND PROCEDURAL BACKGROUND

I. Penn State retains Louis Freeh's law firm to investigate and report on matters relating to the child sexual abuse perpetrated by Jerry Sandusky.

On November 5, 2011, the Office of the Attorney General of Pennsylvania made public a presentment (the "Grand Jury Presentment") that raised allegations of the sexual abuse of children by former Penn State assistant football coach Gerald Sandusky and allegations that Penn

State personnel failed to report that abuse to the appropriate police and governmental authorities. The Grand Jury Presentment also charged two high-ranking University officials with perjury concerning their testimony before the grand jury.

The Grand Jury Presentment prompted the U.S. Department of Education ("DOE") to review the University's compliance with federal crime reporting obligations under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act, 20 U.S.C. § 1092(f) (the "Clery Act"). One of Sandusky's victims, "John Doe A," filed a civil suit against the University in the Court of Common Pleas of Philadelphia County on November 30, 2011. On November 17, 2011, the NCAA announced its intention to investigate Penn State for potential violation of its Constitution and Bylaws. Shortly thereafter, the Big Ten Conference advised the University that it intended to investigate as well.

In this intense environment of criminal charges, civil litigation, administrative investigations, and a media frenzy, the University retained the law firm of Freeh Sporkin & Sullivan ("FSS" or "the Freeh Law Firm") to advise it as "external legal counsel" and to conduct an investigation into the criminal allegations of child sexual abuse on the University's campus and the alleged failure of University personnel to report that abuse to the appropriate authorities. The Freeh Law Firm also arranged for senior lawyers associated with the Pepper Hamilton law firm (Gregory Paw, Esq. and Barbara Mather, Esq., and several of their colleagues) to play key roles in the engagement. The Freeh Law Firm also retained Freeh Group International Solutions ("FGIS"), an affiliated investigative and consulting group, to assist with the investigation and with the provision of "legal services to" the University.

Penn State entered into a formal engagement letter with the Freeh Law Firm on November 18, 2011 (the "Engagement Letter") (Exhibit 1 hereto). The Scope of Engagement, set forth in § 1 of the Engagement Letter, provides:

> 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 governmental 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 for 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.[1]

The Engagement Letter is replete with references indicating that, in providing those services to the University, members of the Freeh Law Firm would be acting as lawyers and would be providing legal services to Penn State.[2] Consistent with the parties' understanding that

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[1] The "Task Force" is a reference to the Special Investigative Task Force formed by the University's Board of Trustees.

[2] See Exhibit 1 § 7 ("FSS will provide the above-described **legal services** for the Task Force's benefit, for which the Trustees will be billed in the manner set forth above.") (emphasis added); *id.*, § 8 ("Our agreement to represent the Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to [you] in any matters (whether involving the same substantive areas of law for which you have retained us . . . which do not involve the same factual and **legal issues** as matters **for which you have retained us** . . .") (emphasis added); *id.*, § 10 ("FSS may terminate its **legal services** and withdraw from this engagement in the event our invoices are not paid in a timely manner") (emphasis added); *id.*, § 11 ("In the course of our representation . . ., we will maintain a file . . . . We may also place in such file documents containing our attorney work product, mental impressions or notes, drafts of documents, and internal accounting records") (emphasis added); *id.* ("FSS, of course, is **delighted to be asked to provide legal services** to the Task Force") (emphasis added); *id.* ("should the Task Force ever wish to discuss any matter relating to **our legal representation**, please do not hesitate to call me directly"), *id.*, § 5 § 5 ("For the purpose of **providing legal services** to the Task Force, FSS will retain Freeh Group International Solutions, LLC ('FGIS') to assist in this engagement.") (all emphasis added).

the Freeh Law Firm was engaged to provide legal services to the University, the Engagement Letter also provides:

> The work and advice which is provided to the Task Force under this engagement by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, *is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges,* unless appropriately waived by the parties or otherwise determined by law.

Id., § 6 (emphasis added).

II. The Freeh Law Firm/Pepper Hamilton lawyers and the FGIS investigators conduct a confidential investigation, taking great pains not to waive the attorney-client privilege or the protections of the attorney work product doctrine.

The Freeh Law Firm, and those working with it, conducted a lengthy and comprehensive investigation of the allegations. As part of its investigation, it collected over 3.5 million emails and other documents from the University and third parties (the "Source Documents"). It placed those documents in a secure electronic database (the "Freeh Law Firm Database").[3] The Freeh Law Firm also conducted over 430 private and confidential interviews of University personnel and other knowledgeable individuals, and created reports of those interviews and other significant attorney work product. The Freeh Law Firm gathered information from persons it interviewed under an express agreement with cooperating individuals that the information was subject to the attorney-client privilege and the attorney work product doctrine.

The working papers of the Freeh team were secured and kept confidential, and they worked in a secure facility to which third parties were not permitted access. The team worked in a secured facility with access controlled by electronic locks, and physical evidence was stored in a locked room within that secured facility. Exhibit 2 (Declaration of Omar McNeill) ¶ 9.

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[3] As discussed *infra,* no disputes remain with respect to Plaintiffs' access to the Source Documents.

III. The University authorizes the Freeh Law Firm to release its Report to the public, but does not otherwise waive the attorney-client privilege or the protections of the attorney work product doctrine.

On July 12, 2012, in accordance with the University's limited waiver of the otherwise applicable privileges, the Freeh Law Firm set forth its findings, opinions, and recommendations in a written report entitled "Report of Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse committed by Gerald A. Sandusky" (the "Freeh Report"). With the University's consent and agreement, and pursuant to an agreed-upon limited waiver of the attorney-client privilege and the attorney work product doctrine, the Freeh Report was made public without any advance review by the University. *See* Exhibit 3 (Freeh Report excerpts) p. 10 ("[t]his report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege"). Consistent with the Freeh Law Firm's practice throughout the investigation of advising individuals that the information they provided in interviews would be treated as privileged and confidential, when the Freeh Law Firm released the Report, it redacted the names of all individuals whose work product, privileged interview notes are cited therein, referring instead only to the date of the interview. *See, e.g.,* Exhibit 3 p. 145 nn. 33-35.

In addition to containing redacted citations to the privileged and protected interview memos prepared by the Freeh team, the Freeh Report also contains detailed legal analyses of the provisions of the Clery Act and Pennsylvania's reporting requirements with respect to child sexual abuse. *Id.*, pp. 110-120. The Freeh Report also contains extensive recommendations for its client, the University. *Id.*, pp. 127-144. Those recommendations relate to:

> the University's administrative structure, policies and procedures and the Office of General Counsel; the responsibilities and operations of the Board; the identification of risk; compliance with federal and state statutes and reporting misconduct; the integration of the Athletic Department into the greater University community; the oversight, policies and procedures of the University's Police

Department; and the management of programs for non-student minors and access to University facilities."

Id., p. 128.

Other than authorizing the release of the Freeh Report, the University has never authorized the Freeh Law Firm to waive the attorney-client privilege or the attorney work product doctrine in any other respect. Moreover, as dismissed further *infra*, there is no evidence that the Freeh Law Firm or FGIS ever disclosed even a single privileged communication or a single piece of attorney work product to the representatives of the NCAA or the Big Ten Conference.

IV. The rulings on Plaintiffs' subpoena to Pepper Hamilton

In September 2012, several months after the Freeh Report was issued and National Collegiate Athletic Association ("NCAA") imposed on the University the Consent Decree that is the subject of this litigation,[4] the attorneys from the Freeh Law Firm became affiliated with Pepper Hamilton. Pepper Hamilton also acquired FGIS. On February 25, 2014, pursuant to Pa. R. Civ. P. 4009.21, Plaintiffs filed a notice of intent to serve a broad subpoena *duces tecum* on Pepper Hamilton. The subpoena seeks all of the Freeh Law Firm's work product, including drafts of the Freeh Report, the notes of the more than 430 interviews conducted during the course of the Freeh investigation, and all internal communications among members of the Freeh team. The requests also seek all of the communications between the University and the Freeh Law Firm lawyers in the course of the investigation.

Penn State served timely objections to Plaintiffs' notice of intent to serve the subpoena, including on the basis that the proposed subpoena requested documents protected by the

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[4] The Consent Decree since has been repealed and dissolved and has no further legal force or effect.

attorney-client privilege and the attorney work product. In an order entered September 11, 2014 (the "September 11 Order"), the Court rejected Penn State's attorney-client privilege argument, and concluded that Penn State (as the client) lacked standing to assert the attorney work product doctrine. Then, after the subpoena was served, Pepper Hamilton filed a motion for a protective order; Penn State joined in that motion. The Court denied the motion in an order entered November 21, 2014, but without addressing the merits of Pepper Hamilton's attorney work product argument (the "November 21 Order"). Thereafter, Pepper Hamilton served a response to the subpoena. Plaintiffs then filed a motion to enforce the subpoena. By order dated May 8, 2015, the Court granted that motion and directed Pepper Hamilton to produce all documents for which it and Penn State claimed privilege (the "May 8 Order").

V. The Superior Court's remand and the procedure in this Court to address it

Several appeals were taken from this Court's privilege rulings, and those appeals were consolidated before the Superior Court. In a per curiam order issued April 26, 2016, the Superior Court remanded the case to this Court with the direction that the Court conduct a more granular analysis of the privilege assertions and report back to the Superior Court in 120 days. The Superior Court retained jurisdiction over the appeals.[5]

Pursuant to the parties' agreement and this Court's consent, Penn State and Pepper Hamilton submit this joint brief in support of their arguments that the documents in question are in fact protected from disclosure by the attorney work product doctrine and/or the attorney-client privilege and that no waiver of those protections has occurred. Also pursuant to the agreed-upon

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[5] The Superior Court directed further consideration of privilege issues with respect to both the Source Documents in the FSS database and the documents in Pepper Hamilton's file. As the parties informed this Court at a discovery conference on May 16, 2016, the parties have resolved all issues regarding the Source Documents, and there is no need for the Court to consider any of the issues described in that portion of the Superior Court's order. Thus, this memorandum will address only the privilege issues as they relate to the Pepper Hamilton files.

protocol, Penn State and Pepper Hamilton have grouped the documents at issue into various numbered categories (*see* Exhibit 4).[6] Penn State and Pepper Hamilton are submitting herewith exemplars of documents from each category for the Court's consideration *in camera*. Penn State and Pepper Hamilton also are seeking to file, under seal, a privilege log that corresponds to the exemplar documents.[7]

ARGUMENT

In furtherance of the Superior Court's direction that this Court consider the privilege contentions in a more refined way, Pepper Hamilton and Penn State first set forth in this brief the operative law of Pennsylvania with respect to the attorney work product doctrine, the attorney-client privilege, and waiver issues (Sections I and II). Then, in Section III, we apply those legal principles to each of the 14 categories of documents identified on Exhibit 4.

I. The Attorney Work Product Doctrine

The attorney work product doctrine, which is codified at Pa. R. Civ. P. 4003.3, provides, in pertinent part: "[D]iscovery 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." The work product doctrine also protects "materials prepared by agents for the attorney," including "an attorney's investigator's or other agent's opinions, theories, or conclusions . . . ." *Bagwell v. . Dep't of Educ.*, 103 A.3d 409 (Pa. Commw. 2014), *allocatur*

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[6] As reflected on page 4-5 of Exhibit 4, Pepper Hamilton and Penn State *are not* asserting any privilege with respect to many categories of documents found in Pepper Hamilton's files (categories 15 through 25).

[7] A consent Motion for Leave to File Privilege Log Under Seal is being filed contemporaneously herewith. The proposed privilege log also identifies the key individuals who authored or received the documents being submitted for *in camera* review.

denied, 117 A.3d 1282 (2015) ("*Bagwell I*"); *accord Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005); *Commonwealth v. Hetzel,* 822 A.2d 747, 757 (Pa. Super. 2003).

A. The work product doctrine protects all attorney work product, whether or not prepared in anticipation of litigation.

Pennsylvania courts have recognized that the attorney work product doctrine is *especially protective of* material prepared by an attorney in anticipation of litigation. *Nat'l R.R. Passenger Corp. v. Fowler,* 788 A.2d 1053, 1065 (Pa. Commw. 2001); *Gillard,* 15 A.3d at 59 n. 16; *Heavens v. Pennsylvania Dep't of Environmental Protection,* 65 A.3d 1069, 1077 (Pa. Commw. 2013). Pennsylvania does not, however, *require* that material be prepared in anticipation of litigation in order to qualify for protection by the attorney work product doctrine. *Bagwell I,* 103 A.2d at 415. On its face, Pa. R. Civ. P. 4003.3 includes no such limitation. *Sedat, Inc. v. Department of Environmental Resources,* 641 A.2d 1243, 1245 (Pa. Commw. 1994) (anticipation of litigation was not required as a prerequisite to application of the attorney work product doctrine because Rule 4003.3's protection of an attorney's mental impressions "is unqualified"); *Mueller v. Nationwide Mut. Ins. Co.,* 31 Pa. D. & C.4th 23 (C.C.P. Allegheny Cty. May 22, 1996) (Wettick, J.) (also rejecting the contention that Rule 4003.3 only protects material produced in anticipation of litigation; "Rule 4003.3 protects any mental impressions, conclusions, or opinions respecting the value or merit of a claim or defense. Rule 4003.3 does not refer to information prepared in anticipation of litigation.").

Indeed, in *Bagwell I* (a case involving a request for documents from the Freeh Law Firm's files under Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.,* the Commonwealth Court squarely rejected — as "novel" and inconsistent with the language of Rule 4003.3 — the requestor's argument that the work product doctrine applies only to materials prepared in anticipation of litigation. *Bagwell I,* 103 A.3d at 416-17. As the Commonwealth

Court aptly noted in *Bagwell I,* such a "confined construction" of Rule 4003.3 "would render attorney drafts of contracts, memoranda and countless other examples of work product, prepared in a transactional or any non-litigation capacity, susceptible to discovery or disclosure." *Id.* at 417.

B. The Freeh Law Firm's Investigation was conducted in anticipation of litigation.

In any event, the Freeh Law Firm plainly conducted its investigation in anticipation of litigation. Indeed, the threat of litigation at the time Penn State retained the Freeh Law Firm was both real and imminent. The Office of the Attorney General had made the Grand Jury Presentment public on November 5, 2011. That document indicated, in connection with Sandusky's indictment, that several of the University's high-ranking executives were facing allegations that they, too, had violated the law, namely, failure to report allegations of child abuse and perjuring themselves in their grand jury testimony. The Grand Jury Presentment also prompted the DOE to review the University's compliance with the Clery Act. And, the first of many of Sandusky's victims filed a civil suit against Penn State on November 30, 2011. In short, any contention that the work of the Freeh Law Firm was not performed in anticipation of litigation simply is not well-grounded in the undisputed facts of record.

In its September 11 Order overruling Penn State's objections to the subpoena, the Court accepted the Plaintiffs' invitation to rely on *Graziani v. OneBeacon Ins. Inc.,* 2 Pa. D. & C.5th 242, 249 (C.C.P. Centre Cty. 2007), for the proposition that the work product doctrine does not apply unless the Freeh Law Firm did its work specifically in anticipation *of this case.* That reliance is misplaced.[8] *Graziani* involved a "bad faith" claim by a policyholder against an

[8] Since the Court also ruled that Penn State lacked standing to raise the work product privilege as it applied to documents generated during the Freeh investigation, this aspect of the Court's ruling was dictum. Because of the procedural posture in which the work product

insurance company. In that unique context, courts have held that the protection for work product materials prepared in the underlying litigation *against the insured* does not justify the insurance company from withholding those documents *from the insured* when the insured sues the insurer for the bad faith handling of its claim. The crux of *Graziani* is that the work product protection afforded to the materials in the underlying litigation is lost in subsequent "bad faith" litigation between the insured and the insurer because the work product becomes directly relevant to that later, derivative claim. Neither *Graziani* nor any of the other cases in this line stands for the proposition that the work product doctrine applies *only* to materials prepared for the particular litigation in which the protections of the work product doctrine is claimed.

The Superior Court's decision in *Rhodes v. USAA Casualty Ins. Co.*, 21 A.3d 1253 (Pa. Super. 2011), illustrates the error in relying on *Graziani*. In *Rhodes,* the trial court had ordered the *plaintiffs-insureds* in a "bad faith" case to turn over to the insurer the contents of their attorney's file in the underlying case (in which the insureds were the defendants). The insurer, relying on cases like *Graziani,* attempted to justify that order on the ground that the work product protection no longer applied because the material was not specifically prepared *for the bad faith case*. *Id.* at 1256-57. The Superior Court rejected that approach and reversed, explaining that the reason why the work product protection is lost in bad faith cases where *insurers* are ordered to turn over their attorney's files is because the content of the insurer's files is relevant to determining whether the insurer acted in good faith. *Id.* at 1261-62. Put simply,

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issue has arisen since the September 11 Order, the Court has not squarely addressed that issue on the merits. When Pepper Hamilton moved for a protective order following service of the subpoena, the Court declined to address work product. Rather, in its November 21 Order, the Court accepted Plaintiffs' argument that Pepper Hamilton was obligated to raise the objection in a response to the subpoena, and not by way of a motion for protective order. Then, in its May 8 Order (granting the Estate's motion to enforce the subpoena), the Court held that it lacked jurisdiction to consider the merits of Pepper Hamilton's work product claim due to the pendency of appeals.

Graziani exception to the attorney work product doctrine has absolutely no place in this litigation.

In the Superior Court, Plaintiffs also tried to take advantage of the Explanatory Note to Rule 4003.3 that provides that attorney work product may be discoverable where the legal opinion of an attorney becomes a relevant issue. Specifically, Plaintiffs contend that the basis for the opinions and conclusions expressed in the Freeh Report are at issue here. However, their argument goes too far and "proves" too much. Plaintiffs cannot strip the Freeh team's attorney work product of its protections by unilaterally proclaiming that the mental impressions, conclusions or opinions of the attorneys involved in the investigation are "relevant" to their claims. Otherwise, such arguments would become commonplace and would eviscerate the work product doctrine altogether. As the Explanatory Comment to Rule 4003.3 explains, an attorney's opinion becomes relevant *only when the party receiving that opinion asserts a defense based on good faith reliance on a legal opinion of counsel*: "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." Nothing of the sort has occurred here. Neither Penn State nor Freeh/Pepper Hamilton is a defendant in this action. Likewise, and the NCAA's defense is not based on any purported reliance on an opinion of the Freeh Law Firm, as that concept is set forth in the Explanatory Comment to Rule 4003.3, *because the Freeh Law Firm never represented the NCAA.*[9] In short, Plaintiffs' effort to make the work product underlying the Freeh Report "relevant" so as to strip work product protection is misguided and untenable; it also is fundamentally inconsistent with the very purpose of Rule 4003.3.

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[9] Indeed, the NCAA has never taken any position on whether the work product of Freeh team members is discoverable.

C. Release of the Freeh Report did not constitute waiver of work product protection for the many other documents created during the course of the Freeh Law Firm's investigation.

Plaintiffs bear the burden of proving waiver. *Bagwell I,* 103 A.3d at 420. The *only* evidence Plaintiffs have adduced to meet that burden is the fact that the Freeh Report was released to the public. Plaintiffs contend that this release somehow effected a "subject matter waiver" of the work product protection for *all* materials created by the Freeh Law Firm that relate in any way to the subject matter of the Report. But the release if that Report, standing alone, cannot suffice to waive the attorney work product doctrine that protects all of the *other* work product materials the Freeh team created during its representation of the University. Instead, it was a *selective and targeted waiver* of only the protection that applied **to the Freeh Report** itself; moreover, it is irrelevant as a matter of law that Penn State always anticipated making that selective and targeted waiver with respect to the Report.

In sum, the Freeh investigation was far-ranging and explored many matters that never found their way into the Freeh Report. The publication of a report that addressed a fraction of the subjects investigated cannot possibly support waiver of work product regarding subject matters that are not even addressed in the Report.

Nor does the limited public disclosure of the Report waive work product protection for the work product related to matters that *are* discussed therein (such as drafts of the report, interview notes, and internal discussions among the Freeh team regarding what to include in the Report), any more than the filing of a complaint in the public domain gives the defendant access to the plaintiff's lawyers' drafts of the complaint, research memoranda regarding the claims at issue in the complaint, or notes of privileged and confidential interviews taken during their pre-complaint investigation into the facts. It is beyond cavil that Plaintiffs would loudly protest if the NCAA (or Penn State, while it was a party to this action) were to demand production of all

drafts of Plaintiffs' complaint or all documents containing Plaintiffs' attorneys' thought processes or analysis of the complaint's allegations, on a "waiver" theory. But that untenable result is precisely the position Plaintiffs are advocating here with respect to the Freeh Law Firm's work product.

Indeed, the Commonwealth Court squarely rejected a near-identical position regarding waiver of work product in both *Bagwell I* and *Bagwell v. Pa. Office of Attorney General,* 116 A.3d 145, 148 (Pa. Commw. 2015) ("*Bagwell II*"). In *Bagwell II*, the Commonwealth Court concluded that the release to the public of a final report by attorneys conducting an investigation does *not* result in a waiver of the work product privilege for the underlying documents that contain the attorneys' mental impressions:

> Further, we agree with the [Office of Attorney General] that Moulton's report, which was released to the public, did not destroy the protection afforded by the attorney-client privilege or the attorney-work-product doctrine. Selective waiver is recognized by our courts. [*Bagwell I,* 103 A.3d] at 419. Similar to the Freeh report, the Moulton report and "[t]he circumstances here weigh in favor of selective or limited waiver, retaining the privileged nature of the records where they contain mental impressions." *Id.* at 420.

Bagwell II, 116 A.3d at 148. Thus, any contention that there has been a waiver of work product protection by the release of the Freeh Report has been twice rejected by the Commonwealth Court.

No Pennsylvania appellate court has ever adopted subject matter waiver for attorney work product. The two *Bagwell* decisions are the only Pennsylvania appellate decisions that speak to the issue of subject matter waiver.[10] Penn State and Pepper Hamilton respectfully

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[10] In support of their argument that subject matter waiver applies in Pennsylvania, Plaintiffs previously have cited *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259 (Pa. Super. 2007), *aff'd by equally divided court*, 992 A.2d 65 (Pa. 2010), but nowhere in that decision did the Superior Court actually adopt subject matter waiver. To the contrary, the Court noted in passing that some courts have applied the doctrine of subject matter waiver *in the context of the*

submit that there is no basis for this Court to apply a different rule of law with respect to waiver of the protections of the work product doctrine.

Indeed, even courts in other jurisdictions that recognize subject matter waiver in the context of documents protected by the attorney-client privilege have expressly *rejected* the notion that there could be subject matter waiver of documents protected by the attorney work product doctrine, holding, instead that subject matter waiver should *never* apply to attorney opinion work product.[11] *See In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988) (holding subject matter waiver does not apply to opinion work product); *In re Commercial Financial Services, Inc.*, 247 B.R. 828, 850 (Bkrtcy. N.D. Okla. 2000) ("Generally, subject matter waiver does not extend to materials protected by the opinion work product doctrine") (citing cases); *Canel v. Lincoln Nat'l Bank*, 179 F.R.D. 224, 226 (N.D. Ill. 1998) (holding that subject matter waiver does not apply to "opinion" documents covered by the work-product doctrine).

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attorney-client privilege, but the Superior Court ultimately concluded that the two documents on which the waiver claim was premised were not privileged. "Therefore, we must also conclude that, since neither of these documents is privileged, neither can form the basis for subject matter waiver of attorney-client privilege with respect to [a third document]. As asserted by Nationwide, subject matter waiver of attorney-client privilege cannot be based on the disclosure of non-privileged documents." 924 A.2d at 1268. In other words, the Court in *Nationwide* simply was not called upon to decide whether Pennsylvania has adopted subject matter waiver, and the only Pennsylvania appellate decisions that have reached the issue – *Bagwell I* and *II* – reject the doctrine.

[11] "Opinion work product" in the federal court system is defined as "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party . . . ." Fed. R. Civ. P. 26(b)(3)(B). In other words, "opinion work product" in the federal system is equivalent to "work product" as defined in Pa. R. Civ. P. 4003.3 ("the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories"). Accordingly, federal cases considering waiver in the context of "opinion work product" are instructive.

D. In any event, the facts that hypothetically might support a subject matter waiver of the work product privilege are markedly absent here.

The kind of one-sided disclosure of work product that might support subject matter waiver – if that concept applied in Pennsylvania generally or in the context of work product protection, which it does not – has not occurred here. As dismissed *infra*, in order to prove waiver in the context of the attorney-client privilege, Plaintiffs must show that Penn state released the Freeh Report in order "*to gain a tactical advantage.*" *Fleming,* 992 A.2d at 68 (emphasis added). Moreover, that attempt to gain a tactical advantage must have occurred in the context of litigation.[12] Plaintiffs made a passing attempt in the Superior Court to show that Penn State allegedly has relied on the Freeh Report as a defense in this litigation, and that this supposedly warrants a finding of subject matter waiver of documents protected by the attorney work product doctrine. This argument, too, is untenable, and, indeed, it is completely false. The only one of Plaintiffs' claims in this litigation in which Penn State was named as a nominal defendant (breach of contract) was dismissed on preliminary objections over a year ago.[13] *In short, Penn State has never mounted any defense in this litigation, let alone a defense that relied on the Freeh Report.*

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[12] *See, e.g., In re von Bulow,* 828 F.2d 94, 103 (2d Cir. 1987) ("Although it is true that disclosure in the public arena may be 'one-sided' or 'misleading,' so long as such disclosures remain extra-judicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver."); *Goss Int'l Americas, Inc. v. MAN Roland, Inc.,* No. 03-cv-513-SM, 2006 U.S. Dist. LEXIS 36245, *10 (D. N.H. June 2, 2006) ("'where a party has *not* thrust a partial disclosure into ongoing litigation, fairness concerns neither require nor permit massive breaching of the attorney-client privilege'" (citation omitted; emphasis in original); *Oxyn Telecomm, Inc. v. Onse Telecom,* No. 01 Civ. 1012 (JSM), 2003 U.S. Dist. LEXIS 2671, *18 (S.D.N.Y. Feb. 25, 2003) ("The extra judicial disclosures to which Oxyn points do not implicate the *legal* prejudice which the fairness doctrine is intended to prevent.") (emphasis in original).

[13] Former plaintiff Al Clemens voluntarily dismissed his breach of contract claim against Penn State shortly thereafter.

Plaintiffs also advanced to the Superior Court the notion that the public disclosure of the Freeh Report was somehow a sword used by Penn State "to justify the egregious actions taken against them." Quite to the contrary, however, Penn State has not taken *any* actions against any of the Plaintiffs based on the Freeh Report, as reflected by the complete absence of any claims against Penn State in this litigation. The only actions about which Plaintiffs complain in this litigation *are actions taken by, and statements made by, the NCAA.* Plaintiffs simply have no basis to argue that Penn State has used the attorney-client privilege to "justify" any action allegedly taken by Penn State, because Penn State has not used the Freeh Report in this way, *and Plaintiffs' Complaint is devoid of allegations to the contrary.*

In short, this case is as far removed as possible from one in which a party seeks to absolve itself from responsibility for a claim against it by selectively disclosing privileged material in litigation. Even if Plaintiffs were legally correct that subject matter waiver can occur when disclosures are made outside of litigation and, as discussed *supra,* that is *not* a correct statement of Pennsylvania law), as a factual matter, the release of the Freeh Report in no way "shielded" Penn State and Penn State in no way used the release of the Freeh Report as a "sword" against Coach Paterno in this litigation.

II. The Attorney-Client Privilege

A. The attorney-client privilege protects communications between an attorney and his client.

In Pennsylvania, the attorney-client privilege is codified at section 5928 of the Judicial Code, which provides:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa. C.S. § 5928. The Supreme Court of Pennsylvania has confirmed that the attorney-client privilege "operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." *Gillard v. AIG Ins. Co.,* 15 A.3d 44, 59 (Pa. 2011). Furthermore, communications between an agent of an attorney (FGIS) and the client (Penn State) also are protected by the attorney-client privilege where, as here, the agent is assisting the attorney in giving advice to the client. *Commonwealth v. Noll,* 662 A.2d 1123, 1126 (Pa. Super. 1995).

The attorney-client privilege requires that: (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 client had claimed, and has not waived, the privilege. *Commonwealth v. Mrozek,* 657 A.2d 997, 998 (Pa. Super. 1995). All of those elements are satisfied here, and the trial court erred in concluding otherwise.

B. Penn State retained the Freeh Law Firm to perform legal services.

Respectfully, the Superior Court appears tacitly to have recognized that the Court's earlier conclusion that the attorney-client privilege does not apply because Penn State did not engage the Freeh Law Firm to perform legal services cannot be squared with the express language of the Engagement Letter, the parties' own understandings of the nature of the Freeh Law Firm's work, and the work product the Freeh Law Firm generated.[14]

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[14] If the Superior Court had agreed with this Court that the University did not retain the Freeh Law Firm to provide legal services, there would have been no need for the Superior Court to remand the case for a granular document-by-document analysis of Pepper Hamilton's and Penn State's privilege claims.

As explained *supra,* the Engagement Letter between Penn State and the Freeh Law Firm notes *repeatedly* that the Freeh Law Firm would be rendering legal services to Penn State. In fact, the "Scope of Engagement" section of the Engagement Letter itself notes that "FSS has been engaged to serve as *independent, external legal counsel* to the Task Force." (emphasis added) *See* Exhibit 1. The Engagement Letter also specifically contemplates that there would be confidential, privileged communications between Penn State and the Freeh Law Firm – *the very communications for which Penn State is asserting the attorney-client privilege in this litigation.* Specifically, Section 6 of the Engagement Letter provides:

> 6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the [Penn State] Task Force under this engagement by [the Freeh Law Firm], and any third party working on behalf of [the Freeh Law Firm] to perform services in connection with this engagement, **is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges**, unless appropriately waived by the parties or otherwise determined by law. . . .

(Emphasis added)

Lest there be any doubt that the Engagement Letter meant what it says, Omar McNeill, Esq., the partner at the Freeh Law Firm who managed the Penn State engagement on a day-to-day basis, confirmed that:

> The work and advice provided under the engagement by [the Freeh Law Firm] and any third party working on behalf of [the Freeh Law Firm] to perform services in connection with the engagement was, again pursuant to the engagement letter, to be "subject to the confidentiality and privilege protection of the attorney-client . . . privilege[ ], unless appropriately waived by the parties or otherwise determined by law."

Exhibit 2 (McNeill Dec.) ¶ 6. Attorney McNeill also confirmed that Penn State and the Freeh Law Firm "understood and expected that [the Freeh Law Firm's] work would be subject to the attorney-client privilege . . ., and [the Freeh Law Firm] conducted the investigation accordingly."

Id., ¶ 8. And, toward that end, he averred, it was "routine practice" for the Freeh Law Firm investigators to "advise Penn State employee witnesses that information they provided in interviews would be protected by an attorney-client privilege that belonged to the University . . . ." *Id.*

Moreover, the Freeh Report contains extensive legal analysis (including an analysis of the reporting requirements of the Clery Act), as well as recommendations designed to help ensure that the crimes that took place on Penn State's campus would not happen again. *See generally* Exhibit 3.

Against this backdrop – Penn State retained a law firm (the Freeh Law Firm) and lawyers affiliated with, and retained by, that law firm (members of the Freeh Law Firm and lawyers affiliated with Pepper Hamilton) to investigate allegations of criminal conduct and to make recommendations designed to ensure better compliance with the law going forward – a conclusion that the Freeh Law Firm was not retained to provide, and did not provide, "legal services" to Penn State is untenable.[15]

Because Penn State did in fact retain the Freeh Law Firm to provide legal services, all communications between Penn State and the Freeh Law Firm are protected by the attorney-client privilege. *Gillard,* 15 A.3d at 59. And, because FGIS was acting as the Freeh Law Firm's agent in providing those legal services, all of Penn State's communications with FGIS are protected as well.[16] *Noll,* 662 A.2d at 1126.

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[15] Respectfully, this Court's original opinion appears to have rested on the inaccurate assumption that it was FGIS, not the Freeh Law Firm, that was "providing legal services to Penn State." September 11 Op. p. 21. The Court had it backwards: "FSS is a law firm and FGIS is a separate investigative and consulting group" that the Freeh Law Firm retained "[f]or the purpose of providing legal services to the Task Force . . . ." Exhibit 1, § 5.

[16] Penn State is *not* taking the position that the vast majority of the 3.5 million Source Documents the Freeh Law Firm gathered from Penn State and elsewhere in the course of

C. The record is devoid of evidence that the Freeh team waived the attorney-client privilege by sharing privileged documents with the NCAA or the Big Ten Conference.

No waiver of the attorney-client privilege occurred. Although this Court originally believed that Penn State may have waived the protection of the attorney-client privilege because, according to Plaintiffs, "the Freeh [Law] Firm was communicating with third parties during the investigation – specifically, The Big Ten Athletic Conference and the NCAA," (Op. p. 21), the record shows – without contradiction– that no such sharing of privileged documents occurred.

To resolve allegations of waiver, courts must employ the two-part inquiry pronounced in *In re Investigating Grand Jury of Philadelphia County, No. 88-00-3503,* 593 A.2d 402, 406-07 (Pa. 1991). Under this two-part test, a court must determine: (1) whether the attorney-client privilege applies to the particular communication in question; and if so, (2) whether an exception or waiver applies that overcomes the privilege. *Id.* Notably, the burden shifts during this two-part inquiry. *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1265-66 (Pa. Super. 2007). Here, once Penn State established that the attorney-client privilege was properly invoked, the burden shifted to Plaintiffs to establish that Penn State waived that privilege. *Id.* at 1266. Then, if the Court determines that a particular disclosure effectuated a waiver, it then may turn to the question of how far the waiver extends.

Here, the University satisfied its burden of establishing that the attorney-client privilege applies to its communications with members of the Freeh team. Plaintiffs, however, have failed to satisfy their burden of establishing that the privilege has been waived with respect to *any* communication, much less that it has been waived on a global, "subject matter" basis.

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its investigation are protected by the attorney-client privilege. To the contrary, as the parties have advised the Court, Penn State long ago searched that database using search terms provided by the Plaintiffs and produced the results of that search; nothing more remains to be done with respect to the database of Source Documents.

During the course of its work, the Freeh Law Firm took significant steps "to protect the confidentiality and attorney-client . . . privileges of the engagement." Exhibit 2 (McNeill Dec.) ¶ 9. Freeh Law Firm attorneys, staff, and third parties working on behalf of the Freeh Law Firm were advised in writing of, and frequently briefed about, the importance of maintaining confidentiality, and took significant steps to handle material and information in a secure and confidential manner. *Id.*, ¶ 9. Furthermore, when members of the Freeh Law Firm conversed with members of Penn State's Special Investigative Task Force, they did so in confidence. *Id.*,¶ 7.

And, perhaps most notably, the Freeh Law Firm *did not* share attorney-client privileged communications or attorney work product with representatives of the NCAA or the Big Ten Conference. Indeed, the record is *devoid* of evidence that any member of the Freeh team shared *even one* otherwise privileged document or even one piece of privileged information with either the NCAA or the Big Ten during the course of the investigation. To the contrary, the undisputed facts of record show that, although Attorney McNeill had periodic brief conference calls with Donald Remy (General Counsel of the NCAA) and Jonathan Barrett (outside counsel for the Big Ten Conference), those calls did not waive the attorney-client privilege. *Id.*, ¶ 10 ("Those calls did not . . . in any way either compromise the independence of the investigation or result in a waiver of the attorney-client or work product privileges).[17]

Attorney Remy confirmed in his deposition (taken in the *Corman* case) – without qualification – that the Freeh Law Firm did not provide any documents whatsoever (source documents, work product or otherwise) to the NCAA at any time:

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[17] *Accord* Exhibit 3 (Freeh Report) ("[N]o advance copy [of the report] was provided to the Board or to any other person outside of the Special Investigative Counsel's team, and the work product was not shared with anyone who was not part of the Special Investigative Counsel's team.").

Q: Was the idea of NCAA participation in witness interviews – shadowing, as you call it – rejected?

A: **It did not happen.**

Q: Did any of the elements that you have described as typical, in your internal investigative process in which NCAA participates, get folded into the interaction between Freeh Group and NCAA?

A: Status updates.

Q: We'll talk about those. Sharing of documents?

A: We gave them educational information. **They never shared any documents with us, that I recall of.**

Q: **Did they ever give you the substance of any documents**, even if they didn't show you the documents themselves?

A: **Not that I recall.**

Q: Did they ever give you, to your recollection, summaries of interviews?

A: No. No.

Q: No interview notes?

A: No.

Q: How about during status updates? Any type of preliminary results?

A: No.

Exhibit 5 (Remy Tr. at 107:15 – 108:16) (emphases added).

As Attorney McNeill made abundantly clear in *his* deposition, although Penn State had authorized the Freeh Law Firm to speak with representatives of the NCAA and the Big Ten, Penn State did *not* authorize the Freeh Law Firm to undermine the privileges in any way in those calls:

Q. Ultimately was there a decision about whether you could communicate information to NCAA and Big Ten?

A. Yes.

Q. And what was the decision?

> A. The decision was that at the direction of the task force and with permission of the task force, could provide general updates to the NCAA, but **we couldn't go into anything that, again, would in any way undermine the privilege. We couldn't share information with them that would in any way be deemed attorney work product**. And we agreed that we would have regular calls, and I think that was the sum and substance.

Exhibit 6 (McNeill Tr. at 39:22 – 40:11) (emphasis added); *see also id.* at 148:13 – 148:22 (confirming that Penn State never authorized the Freeh Law Firm to waive the provisions of the attorney-client privilege and that the Freeh Law Firm never waived the protections of the work product doctrine).

Moreover, in order to establish a subject matter waiver, Plaintiffs were required to show, but failed to show, not only that Penn State (or the Freeh Law Firm) voluntarily disclosed otherwise confidential information to the NCAA or the Big Ten, but that it did so in order "*to gain a tactical advantage*." *Fleming,* 992 A.2d at 68 (emphasis added). *Accord Murray v. Gemplus Int'l S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (applying Pennsylvania law and finding that "[w]here one party attempts to utilize the privilege as an offensive weapon, selectively disclosing communications *in order to help its case*, that party should be deemed to have waived the protection otherwise afforded it by the privilege it misused") (emphasis added). Here, even if one assumes, counter-factually, that the Freeh Law Firm *did have* substantive conversations with representatives of the NCAA and the Big Ten and divulged privileged information or materials to them, Plaintiffs have not shown that the Freeh Law Firm did so in order for Penn State to achieve a tactical advantage in any litigation, including this one.

In sum, because Plaintiffs have not established, and cannot establish, that any subject matter waiver of the attorney-client privilege occurred, the applicability of the privilege, and the determination of whether it was waived with respect to any particular document, must, of necessity, be evaluated on a document-by-document basis. Plaintiffs have no evidence, however,

that even a limited, document-specific waiver of an otherwise privileged communication occurred.

III. Application Of Work Product And Attorney-Client Privilege Principles To Categories Of Freeh investigation Documents

As the above discussion establishes, work product protection extends to documents that contain the mental impressions of the attorneys and investigators involved in the Freeh investigation or that contain their conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. As also discussed above, Penn State and the Freeh Law Firm plainly stood in an attorney-client relationship, such that communications between them are protected by the attorney-client privilege. Moreover, the public release of the Freeh Report did not in any way waive either the protection of the work product doctrine or the attorney-client privilege. Penn State and Pepper Hamilton maintain that this ends the analysis and requires the Court to reject Plaintiffs' attempt to strip documents of these protections. Nevertheless, cognizant of the Superior Court's order directing further consideration of the privilege claims, Penn State and Pepper Hamilton address the privilege claims as they variously apply to the specific categories of documents they have identified in Exhibit 4.

A. Drafts of the Freeh Report and related documents (Categories 2a and 2b)[18]

More perhaps than any other aspect of an investigation such as that conducted by the Freeh Law Firm, the process of drafting the ultimate report and the documents in which the members of the team share their thoughts during that process reflect the mental impressions of the attorneys and investigators. The sifting through the evidence, the back and forth as to what subjects to include in the Report, the way to describe the evidence, the conclusions to be drawn

[18] As set forth on Exhibit 4, Pepper Hamilton and Penn State are *not* asserting that the final, public Freeh Report is protected by the attorney work product doctrine.

and the way to express those conclusions all go to the heart of the attorney's thought process and are entitled to the highest level of protection from intrusion. Had the Freeh Report not been made public, no one, not even Plaintiffs, could contend they were entitled to strip away that protection. Thus, the only possible basis on which to permit access to drafts and related materials is that release of the Freeh Report constituted a waiver of documents relating to the drafting of the Report. But that is precisely the contention rejected by the Commonwealth Court in *Bagwell I* and *Bagwell II*, and countless other courts outside Pennsylvania.

B. Drafts of chapters or sections not included in the Freeh Report and related documents (Categories 3a and 3b)

The files of the Freeh investigation contain documents that constitute or contain drafts of chapters or sections that were considered for inclusion in the final Report, but ultimately were not included, and related internal documents that discuss or comment on those drafts. These documents, like drafts of sections that were ultimately used in the Report, are work product and, absent a waiver, are protected from production to Plaintiffs. But even if the concept of "subject matter waiver" of work product were applicable (as discussed *supra,* it is not), it would not extend so far as to cover aspects of the Freeh investigation *that never found their way into the Freeh Report* – which is the only evidence Plaintiffs present to meet their burden to prove waiver. Unless Plaintiffs can show that the Freeh Law Firm disclosed information about those other subjects, chapters, and issues in some other way (and it is inconceivable that they could make such a showing), they simply cannot meet their burden of establishing that any waiver has occurred.

C. Drafts of the press release and remarks by Louis Freeh at the time the Freeh Report was issued and related documents (Category 4)

On July 12, 2012, when the Freeh Report was made public, a press release was issued and Judge Louis Freeh met with members of the press. Penn State and Pepper Hamilton do not

claim any privilege for the release itself or the remarks. However, for the same reason that drafts of the Freeh Report are protected work product, notwithstanding the Report's release to the public, drafts of the press release and drafts of Judge Freeh's remarks and related documents are protected work product and that protection has not been waived.

D. Documents containing legal analysis (Categories 1 and 5)

As part of the investigation, the Freeh team analyzed various legal issues relevant to the subjects of the investigation, such as the requirements of the Clery Act and the legal obligations to report child abuse. Rule 4003.3 expressly defines "legal research" and "legal theories" as work product. Accordingly, legal memoranda and other documents that reflect the Freeh team's legal analysis are protected from disclosure to Plaintiffs. Any contention that the work product protection for these materials has been waived would be untenable, even to the extent those legal matters are discussed in the Freeh Report. Such an argument would be tantamount to the absurd argument that one party can demand its opponent's attorney's internal legal analysis on the ground that the product of that analysis was set out in a brief filed in court.

One specific application of the protection for legal analysis occurs in the context of a series of interim recommendations the Freeh team provided to Penn State's Board of Trustees in January 2012. Documents that discuss interim recommendations the Freeh team was considering making to the University, or the legal analysis that informed those recommendations, remain protected work product.

E. Documents containing internal discussions regarding the plan for the Freeh investigation or its progress (Category 6)[19]

From the outset of the Freeh investigation, members of the team made notes and communicated frequently about planning for and executing the investigation, including: whom to interview and in what order; what topics to consider; the assignment of team members to particular tasks; the relative importance of the information being assembled; how to treat information from different sources that was inconsistent; and whether and when to conduct follow up interviews. These types of documents, and many others that arose in an investigation of this breadth, necessarily reveal the mental impressions and conclusions of the attorneys and investigators on the Freeh team.

The very genius of the work product doctrine is that, by protecting these internal communications from disclosure, team members can be frank and probing and even feel free to disagree with one another, with the result that the ultimate decisions made are well-informed, thoroughly vetted, and in the client's best interests. The members of the Freeh team properly believed that the work product doctrine applied to their internal discussions about the planning for and progress of the investigation, and they engaged in free and open communications in which they brought to bear their perspectives on the issues as they developed – just as any legal team working on a litigation matter or a transaction would do.

Plaintiffs contend that work product protection has been waived for every single document in this category, from the retention of the Freeh Law Firm in November 2011 to the issuance of the Freeh Report in July 2012, simply because the Freeh Report was made public. If

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[19] As set forth in Exhibit 4, Pepper Hamilton and Penn State are *not* asserting that documents containing internal discussions among members of the Freeh team regarding logistics, or scheduling, or other non-substantive internal communications are protected by the attorney work product doctrine.

Plaintiffs' contention is accepted, it would turn the work product doctrine on its head, since, in almost every type of matter in which attorneys are engaged, be it litigation, transactions or investigations, some amount of ultimate work product – whether in a pleading, an agreement, or a report – is disclosed to the court, to opponents, or to the public at large. It is not a stretch to say that Plaintiffs' view of waiver would completely obliterate the work product doctrine as it has been applied for decades, and, with it, the protection attorneys throughout the Commonwealth believe that doctrine provides. Moreover, if work product protection is stripped, Pennsylvania attorneys will, in the future, necessarily retreat from any communication that might reveal their mental impressions, to the detriment of their clients and the justice system.

F. Notes of interviews cited in the Freeh Report and related documents (Categories 7a, 7b, 8a and 8b)

As the Freeh Law Firm noted in its Report, it interviewed more than 430 individuals in the course of its investigation. The lawyers' notes of these interviews plainly are protected as attorney work product.[20] In fact, the Explanatory Note to Rule 4003.3 expressly notes that "a lawyer's notes and memoranda of an oral interview of a witness, who signs no written statement, are protected" as attorney work product.[21] Pa. R. Civ. P. 4003.3, Explanatory Comment – 1978. As the U.S. Supreme Court noted in *Upjohn Co. v. United States,* 449 U.S. 383, 400 (1981), interview memoranda will be discoverable only in rare situations, in part because they may reveal the attorney's mental processes and have limited utility, especially where the witness is available; *see also In re Grand Jury Investigation,* 599 F.2d 1224, 1231 (3d Cir. 1979); *In re Grand Jury Investigation,* 412 F. Supp. 943, 949 (E.D. Pa. 1976) (an attorney's memorandum of

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[20] As set forth on Exhibit 4, Pepper Hamilton and Penn State are *not* claiming privilege with respect to lists of individuals who were interviewed in the course of the Freeh Law Firm investigation.

[21] The Freeh Law Firm's interview notes are not signed by any witness.

a telephone conversation is "so much a product of the lawyer's thinking and so little probative of the witness's actual words that [it is] absolutely protected from disclosure").

Another reason that interviews notes are protected was articulated in *In re Linerboard Antitrust Litigation*, 237 F.R.D. 373 (E.D. Pa. 2006):

> It is hard to conceive of a circumstance in which an attorney's mental impressions would be more "thoroughly intertwined" with facts than in counsel's recollection of an internal investigation. In addition, [counsel], during the course of the investigation, selected witnesses to be interviewed and decided what questions to ask them based on the FTC's inquiry. Those selections constitute core work product. *See Coleman v. General Elec. Co.*, 1995 WL 358089, at *2 (E.D. Pa. June 8, 1995) ("facts which counsel considers significant, or any specific questions about the investigation . . . all fall under the category of questions about mental impressions").

Id. at 386. Thus, even the selection of individuals to be interviewed constitutes work product.[22]

Unquestionably, then, the notes of the interviews undertaken by the Freeh team, as well as documents that report, comment on, discuss or evaluate those interviews, are work product. Approximately only 132 of the more than 430 interview notes were cited in the Freeh Report (without public identification of the names), and Plaintiffs may contend that such a use of those interview notes results in a waiver. But the citations in the Report are to very specific sections of the interview on a specific topic, whereas the interviews, and the memos thereof, cover a *broad* range of topics, many of which are not even mentioned in the Freeh Report. At a minimum, this unrelated material – which remains protected work product – must be redacted before any production of the notes can take place.

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[22] As set forth *supra,* Penn State and Pepper Hamilton have agreed to disclose the names of the interviewees, subject to the terms of the Protective Order in this action. That disclosure is without prejudice to the privilege claims as they apply to the interview notes themselves and related documents.

Toward that end, Penn State has in its possession redacted versions of the interview notes, which contain the name/title of the interviewee and the content referenced or quoted in the Freeh Report. Because Penn State waived privilege with respect to the Freeh Report itself, aned because those particular passages from those cited interview notes could reasonably be construed as being integral to the Report itself, Penn State and Pepper Hamilton are prepared to waive privilege with respect to those redacted notes and produce them. This offer is contingent, however, on Plaintiffs agreeing (or this Court making clear) that this voluntary, limited production of these redacted interview notes does not waive the protections of the attorney work product doctrine as to the remaining content of those interview notes or as to any other privileged or protected materials. *See generally* Exhibit 4 ¶ 17.

The Freeh team's interviews of then-current Penn State employees, trustees, and emeritus trustees also are independently protected from disclosure by the attorney-client privilege. The University strongly urged those individuals to cooperate with the Freeh investigation. Any information those individuals provided to the Freeh team in their interviews falls squarely within the ambit of the statutory privilege. The University is, however, prepared to waive (in a limited form) the attorney-client privilege that attaches to the interview notes of University employees, trustees, and emeritus trees that are cited in the Report, on the same terms described *supra.*

G. Notes of interviews <u>not cited in</u> Freeh Report and related documents (Categories 9a, 9b, 10a and 10b)[23]

As discussed *supra,* the vast majority (nearly 70%) of the interview notes the Freeh team prepared were **not** quoted or cited in the Freeh Report. Accordingly, the public issuance of that Report cannot possibly form the basis of a waiver argument with respect to those documents.

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[23] *See* n. 22, *supra.*

Inasmuch as that is the only basis on which Plaintiffs claim waiver, they have not met their burden, and these documents remain subject to work product protection.

And, as discussed *supra,* the attorney-client privilege provides an independent source of protection for the notes of interviews of then-current Penn State employees, trustees, and emeritus trustees that were not cited in the Report.

H. Communications between the Freeh team and Penn State trustees (category 11a)

As explained *supra,* the University's Board of Trustees established a Special Investigative Task Force ("SITF"), which in turn, retained the Freeh Law Firm. The SITF was chaired by University Trustees Kenneth Frazier and Ron Tomalis. From time to time, members of the SITF, most particularly, Messrs. Frazier and Tomalis, communicated with members of the Freeh Law Firm for the purpose of obtaining legal advice and in furtherance of the engagement.[24] Those communications go to the heart of the attorney-client privilege and are protected from disclosure.

I. Communications between the Freeh team and other lawyers representing Penn State (category 12a)

Not surprisingly in view of the panoply of legal issues raised by the criminal indictments of Sandusky, Curley and Schultz, a number of other lawyers represented the University throughout the period the Freeh team conducted its investigation. These included, but were not limited to: Cynthia Baldwin, Esq. (the University's General Counsel until January 2012); Frank Guadagnino, Esq. (then a partner with Reed Smith LLP who was advising the University's Board of Trustees on Sandusky-related issues); Lanny Davis, Esq. (a Washington, D.C.-based lawyer

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[24] As set forth on Exhibit 4 (¶ 22), Penn State and Pepper Hamilton are *not* asserting the attorney-client privilege for communications between the University and the Freeh Law Firm that fall outside the scope of 42 Pa. C.S. § 5928.

who was also retained to advise the Board of Trustees); Joseph F. O'Dea and James A. Keller, Esq. (partners with Saul Ewing, who were representing the University in connection with actual and threatened litigation by Sandusky victims and in connection with the DOE's investigation), and Michael Mustokoff, Esq. and Dan Walworth, Esq. (partners with Duane Morris, who were representing the University's interests in connection with the various criminal proceedings).

Members of the Freeh team communicated and liaised with these lawyers from time to time, and shared information with them as warranted, all in furtherance of the University's interests. These lawyer-to-lawyer communications on behalf of a shared client, too, are at the very core of communications protected by the attorney-client privilege.

J. Documents related to attorney-client privileged documents (Categories 11b and 12b)

As discussed above, there are two sets of documents that are subject to the attorney-client privilege – (1) communications between Freeh team members and members of Penn State's Board of Trustees, including members of the Task Force, and (2) communications between Freeh team members and other attorneys representing Penn State in other matters. The Freeh investigation files contain documents that relate to these privileged communications in a variety of ways. For example, some contain analysis in preparation for client communications, some comment on the communications after they have occurred, and others propose additional steps to be taken as a result of the communications with the client or the client's other lawyers. These documents are protected by the work product doctrine and, since the attorney-client privilege has not been waived with respect to the underlying communications, no waiver of work product has occurred.

K. Internal documents relating to communications with third parties (Category 13)

Neither Penn State or Pepper Hamilton has ever asserted that communications between the Freeh Law Firm and third parties (including the NCAA and the Big Ten) are protected by any privilege. To the contrary, Pepper Hamilton produced all such documents long ago. However, the Freeh/Pepper Hamilton files contain internal documents between and among members of the Freeh team that relate to those third-party communications. *Those* internal documents are replete with mental impressions, analysis and conclusions of members of the Freeh team regarding such matters as positions to be taken, issues to be considered and information to be provided in dealing with third parties. Although the Freeh Law Firm's ultimate communications with third parties are not privileged, the preparation for and potential responses to those communications – which were never provided to the third parties – are unquestionably work product. As with the categories discussed above, such as Report drafts – for which external disclosure does not waive work product protection for the internal analysis relating to that disclosure – there is no basis to find waiver simply because the internal communications relate to a third-party communication.

L. "Independently privileged" documents (category 14)

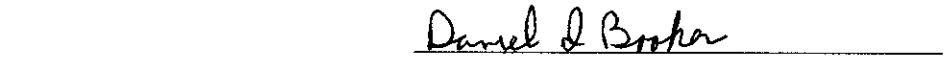
Lastly, the Freeh Law Firm's files contain documents that are protected by the attorney-client privilege for reasons independent of whether the Freeh Law Firm stood in an attorney-client relationship with Penn State. As Penn State previously explained to the Court, at the outset of the Freeh investigation, the Freeh team obtained millions upon millions of Source Documents, from hundreds of University custodians. Although those Source Documents are housed in the 3.5 million-document database, copies of some of them also appear in the internal Freeh Law Firm/Pepper Hamilton files that are the subject of this briefing. These documents

include, *inter alia,* communications between University Trustees and attorneys for the University (*e.g.,* attorneys Davis and Guadagnino), communications between Trustees or other University representatives and then-General Counsel Baldwin, and communications between University representatives and that the law firm of McQuaide Blasko (which represented the University on a wide range of matters over a long period of time). *The Estate has never contended that these documents lost their privileged status simply because they came into the possession of the Freeh Law Firm in the course of its investigation.* Accordingly, this Court should confirm that those materials remain subject to the attorney-client privilege.

CONCLUSION

Penn State and Pepper Hamilton respectfully submit that their invocation of both the attorney work product doctrine and the attorney-client privilege is in complete accord with Pennsylvania law, and the Plaintiffs have failed to meet their burden of proving that any waiver occurred. As per the agreed-upon protocol Penn State and Pepper Hamilton ask the Court to issue a ruling with respect to each of the categories on Exhibit 4, and also propose that the Court make clear in its Order that its privilege ruling with respect to any given category applies to all documents within that category.

Respectfully submitted,



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Attorney for Pepper Hamilton LLP

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 6th day of June 2016, a true and correct copy of the foregoing PENN STATE'S AND PEPPER HAMILTON'S JOINT MEMORANDUM OF LAW IN SUPPORT OF PRIVILEGE CLAIMS was served upon the following counsel via United States mail, first class, postage prepaid:

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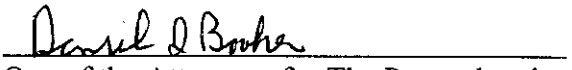
Counsel for NCAA, Mark Emmert and Edward Ray

Hon. John B. Leete, S.J.
Specially Presiding
Court of Common Pleas of Centre County
102 South Allegheny Street
Bellefonte, PA 16823



One of the Attorneys for The Pennsylvania State University

Freeh Sporkin & Sullivan, LLP

PRIVILEGED AND CONFIDENTIAL

November 18, 2011

Steve A. Garban
Chairman, Board of Trustees
and
Paula R. Ammerman
Director, Office of the Board of Trustees
The Pennsylvania State University
205 Old Main
University Park, PA 16802

Re: Engagement to Perform Legal Services

Dear Mr. Garban and Ms. Ammerman:

We are pleased that the Board of Trustees of The Pennsylvania State University ("Trustees", "you" or "your"), on behalf of the Special Committee established by the Trustees (the "Special Committee"), has engaged us to represent the Special Committee. This is a new engagement for Freeh Sporkin & Sullivan, LLP ("FSS"). Accordingly, this is to set forth the basic terms upon which FSS has been engaged to represent the Special Committee, including the anticipated scope of our services and billing policies and practices that will apply to the engagement. Although our services are limited at this time to the specific matter described herein, the general terms of this letter will apply to any other matters that FSS may hereafter undertake to handle for the Trustees or the Special Committee.

1. Scope of Engagement. FSS has been engaged to serve as independent, external legal counsel to the Special Committee 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 Special Committee and other parties as so directed by the Special Committee. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for 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 Special Committee and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

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Freeh 1
2/25/16

It is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that FSS will act under the sole direction of the ~~Special Committee~~ Task Force in performing the services hereunder. It also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that FSS's investigation will be completed in parallel to, but independent of, any other investigation that is conducted by any policy agencies, governmental authorities or agencies, or other organizations within or outside of (e.g., The Second Mile) PSU, and will not interfere with any such other investigations.

It also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that during the course of FSS's independent investigation performed hereunder, FSS will immediately report any discovered evidence of criminality to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~ Task Force. If FSS's investigation identifies any victims of sexual crimes or exploitation, FSS will immediately report such information to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~ Task Force.

FSS also will communicate regarding its independent investigation performed hereunder with media, police agencies, governmental authorities and agencies, and any other parties, as directed by the ~~Special Committee~~ Task Force. However, it also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that neither the Trustees nor the ~~Special Committee~~ Task Force will interfere with FSS's reporting of evidence of criminality or identities of any victims of sexual crimes or exploitation discovered throughout the course of FSS's independent investigation performed hereunder, as discussed in the paragraph immediately above.

The precise time frame in which FSS's services will be performed cannot presently be determined. However, FSS, the Trustees and the ~~Special Committee~~ Task Force all recognize that the investigation must be completed in a thorough manner, but also as expeditiously as possible.

2. Rates. It is anticipated that Louis J. Freeh will be the lead and billing attorney on this engagement. Other FSS, and other non-FSS professionals, will be assigned from time to time to assist in the representation. FSS will charge you for the services provided under the terms of this engagement letter based on the hourly rates of the professionals working on this matter, plus reasonable expenses as described below in the "Disbursements" section of this engagement letter. The hourly rates that will be charged in connection with this matter are as follows: Mr. Freeh -- $900.00 USD per hour; other FSS partners -- $550.00 USD per hour; investigators and FSS non-partner lawyers -- $300.00 USD per hour; and paraprofessional support staff -- $150.00 USD per hour. We reassess our hourly rates from time to time and adjustments are made when we believe such adjustments are appropriate. These adjustments may be reflected in the billing rates utilized to determine our charges to you during the course of our engagement. FSS bills in quarter of an hour increments.

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3. Disbursements. In addition to fees for our services, we also charge separately for certain costs incurred on the Special Committee's behalf, such as travel related expenses. Our invoices also will include costs incurred on the Special Committee's behalf for services and materials provided by third-party vendors, including but not limited to courier and messenger service, airfreight service, outside copy service, shipping and express mail, filing fees, deposition transcripts, and court reporters. Under certain circumstances, for certain large disbursements, we may either bill you directly or ask you to advance funds outside our normal billing cycle. In addition to the third-party disbursements noted above, other charges that will be reflected on our invoices include the following:

   - International calling costs will be charged at the standard provider rates.
   - Computerized research costs will be charged at the standard provider rates.
   - Office supply costs are not passed on to a client unless a purchase is specifically required for a particular engagement.

   We make every effort to include disbursements in the invoice covering the month in which they are incurred. However, there may be occasions when disbursements may not be posted in the billing system until the following month. If the required payment of our invoices is based on the completion of a specific assignment, pursuant to any alternative timing arrangements that have been established and are described in the "Rates" section of this engagement letter, an estimate of unposted disbursements in addition to an estimate of unposted charges for services will be included in our invoice payable at completion.

4. Payment Terms. Generally, our invoices are prepared and forwarded to our clients monthly covering fees and costs incurred for the prior month. Any alternative timing arrangements for invoicing that have been established are described in the "Rates" section of this engagement letter.

   Unless stated differently in the "Rates" section of this engagement letter, our invoices for service are due and payable within thirty (30) days of receipt. Clients whose invoices are not paid within this period may have a late charge assessed on their unpaid balance at the rate of 1% per month. The intent of the late charge is to assess on an equitable basis additional costs incurred by FSS in carrying past-due balances.

   FSS requires payment at the conclusion of this engagment of all accrued and unpaid fees and disbursements to the extent invoiced, plus such additional amounts of fees and disbursements as shall constitute our reasonable estimate of fees and disbursements incurred or to be incurred by us through the conclusion of this engagement (though such estimate shall not thereafter preclude a final settling of accounts between us when final detailed billing information is available).

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During this engagement, the Trustees and the ~~Special Committee~~ Task Force may request from us an estimate of fees and/or costs that we anticipate incurring on the ~~Special Committee's~~ Task Force's behalf. While we may provide an estimate for your or the ~~Special Committee's~~ Task Force's general planning purposes, our estimate is only a preliminary approximation based on facts that are currently available and the currently anticipated level of work required to complete the engagement. In no event is an estimate to be construed as a commitment of FSS to render services at a minimum or maximum cost.

Unless otherwise agreed, our invoice will be presented in our standard format. If this format is not sufficient for your needs, we will work with you to find one that is. FSS will review individually any requests to use a third party vendor for electronic billing. Depending on the vendor requested, we might provide alternative recommendations in order to insure that electronic billing through a third party is both practical and efficient. All charges related to using a third party vendor for this purpose, including initial start-up costs and maintenance fees, will be payable by the Trustees directly.

Where required, your billing statement may include applicable international taxes such as VAT, GST, and consumption tax, etc.

Upon request, we will forward our billing statements to a third party designated by you who is assuming payment responsibility for your or the ~~Special Committee's~~ Task Force's legal expenses, e.g., an insurance carrier who holds your liability coverage. In the event that timely payment is not received from the third party, we will look to the Trustees for payment of our legal fees and costs and you agree that you are responsible for prompt payment in that event.

All payments should be sent directly to: 3711 Kennett Pike, Suit 130, Wilmington, Delaware 19807. If you choose to pay by wire transfer, wire transfer instructions are as follows:

Account Holder:	Freeh Sporkin & Sullivan, LLP
Bank:	Bank of America
Account No.:	383006519445
ABA/Routing No.: (For Domestic Payments)	026009593
SWIFT Code: (For International Payments)	BOFAUS3N

The billing attorney assigned to this matter will review your billing statement before it is sent to you and make any adjustments he or she views as appropriate. If you have

any questions concerning any invoice item, please do not hesitate to contact the billing attorney.

5. Retention of Third Parties. We may determine that it is necessary to involve third parties to assist us in performing services in connection with this engagement. If that determination is made, we will notify the ~~Special Committee~~ Task Force promptly to discuss the proposed third parties, the expected scope of the services to be provided by the third parties and the related fees and costs expected to be charged by those third parties. FSS will consult with the ~~Special Committee~~ Task Force about any changes to the third parties' scope of services or related fees and costs that may occur throughout the course of this engagement.

   For the purpose of providing legal services to the ~~Special Committee~~ Task Force, FSS will retain Freeh Group International Solutions, LLC ("FGIS") to assist in this engagement. It should be noted that Louis J. Freeh is a partner and member in FSS and FGIS, respectively, and has a controlling interest in both. FSS is a law firm and FGIS is a separate investigative and consulting group.

   As described in the "Disbursements" section of this engagement letter, our invoices will include fees and costs incurred on the ~~Special Committee~~ Task Force's behalf for services and materials provided by third parties, unless stated otherwise in the "Rates" section of this engagement letter, or in a separate writing signed by FSS and the Trustees.

6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the ~~Special Committee~~ Task Force under this enagagment by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law. In the event that FSS, or any third party working on behalf of FSS to perform services in connection with this engagement, is required to respond to a subpoena or other formal request from a third party or a governmental agency for our records or other information relating to services we have performed for the ~~Special Committee~~ Task Force, or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide you and the ~~Special Committee~~ Task Force notice of such a request and give you and the ~~Special Committee~~ Task Force a reasonable opportunity to object to such disclosure or testimony. It is understood that you will reimburse us for our time and expense incurred in responding to any such demand, including, but not limited to, time and expense incurred in search and photocopying costs, reviewing documents, appearing at depositions or hearings, and otherwise litigating issues raised by the request.

7. General Responsibilities of Attorney and Client. FSS will provide the above-described legal services for the ~~Special Committee~~ Task Force's benefit, for which the Trustees will be billed in the manner set forth above. We will keep the ~~Special Committee~~ Task Force

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apprised of developments as necessary to perform our services and will consult with the ~~Special Committee~~ Task Force as necessary to ensure the timely, effective and efficient completion of our work. However, although we will make every reasonable effort to do so, we cannot guarantee that we will be able to provide specific results and the Trustees and the ~~Special Committee~~ Task Force acknowlege that FSS does not promise any result.

We understand that the ~~Special Committee~~ Task Force will provide us with such factual information and documents as we require to perform the services, will make any business or technical decisions and determinations as are appropriate to facilitate the completion of our services, and will remit payment of our invoices when due, pursuant to the terms of this engagement letter.

Moreover in connection with any investigation, civil or criminal action, administrative proceeding or any other action arising out of this matter, the Trustees have agreed to indemnify FSS, it's partners, employees, agents and third-party vendors who have provided or are providing services in connection with this engagement, for all costs, expenses, attorney's fees (to be paid as accured and billed) and judgements, including any amounts paid in settlement of any claims. This obligation shall survive the termination of this engagement.

8. Waiver of Future Conflicts. Our agreement to represent the ~~Special Committee~~ Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to either you or an affiliate in any matters (whether involving the same substantive areas of law for which you have retained us on behalf of the ~~Special Committee~~ Task Force or some other unrelated areas, and whether involving business transactions, counseling, litigation or otherwise), which do not involve the same factual and legal issues as matters for which you have retained us on behalf of the ~~Special Committee~~ Task Force or may hereafter retain us. In this connection, you and the ~~Special Committee~~ Task Force should be aware that we provide services on a wide variety of legal subjects, to a number of clients, some of whom are or may in the future operate in the same areas of business in which you are operating or may operate. Subject to our ethical and professional obligations, we reserve the right to withdraw from representing the ~~Special Committee~~ Task Force should we determine that a conflict of interest has developed for us.

9. Engagement Limited to Identified Client. This will also confirm that, unless we otherwise agree in writing, our engagement is solely related to the ~~Special Committee~~ Task Force established by The Pennsylvania State University Board of Trustees and the specific matter described above. By entering into this engagement, we do not represent any individuals or entities not named as clients herein, nor do we represent any owner, officer, director, founder, manager, general or limited partner, employee, member, shareholder or other constituent of any entity named as a client in this letter, in their individual capacities or with respect to their individual affairs.

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10. Termination. Our engagement may be terminated at any time by FSS or the Special Committee upon written notice and, with respect to FSS, subject to our ethical and professional obligations. In addition to other reasons, the Trustees and the Special Committee agree that FSS may terminate its legal sevices and withdraw from this engagement in the event our invoices are not paid in a timely manner, pursuant to the terms of this engagment letter. Upon termination, all fees and expenses due and owing shall be paid promptly. Your and the Special Committee's acceptance of this engagement letter constitutes your and the Special Committee's understanding of, and consent to, the particular terms, conditions, and disclosure herein.

11. Client Files. In the course of our representation of the Special Committee, we will maintain a file containing, for example, correspondence, pleadings, agreements, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary for the Special Committee's representation ("Client File"). We may also place in such file documents containing our attorney work product, mental impressions or notes, drafts of documents, and internal accounting records ("Work Product"). The Special Committee is entitled upon written request to take possession of its Client File, subject to our right to make copies of any files delivered to the Special Committee. The Trustees and the Special Committee agree that the Work Product is and shall remain our property. Under our document retention policy, we normally destroy files ten years after a matter is closed, unless other arrangements are made with the client.

FSS, of course, is delighted to be asked to provide legal services to the Special Committee, and we are looking forward to working with the Special Committee on this engagement. While ordinarily we might prefer to choose a less formal method of confirming the terms of our engagement than a written statement such as this, it has been our experience that a letter such as this is useful both to FSS and to the client. Moreover, in certain instances, FSS is required by law to memorialize these matters in writing. In any event, we would request that the Trustees and the Special Committee review this letter and, if it comports with your and the Special Committee's understanding of our respective responsibilities, so indicate by returning a signed copy to me at your earliest convenience so as not to impede the commencement of work on behalf of the Special Committee. If you or the Special Committee have any questions concerning this engagement letter, or should the Special Committee ever wish to discuss any matter relating to our legal representation, please do not hesitate to call me directly, or to speak to one of our other attorneys who is familiar with the engagement.

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Again, we look forward to serving the ~~Special Committee~~ Task Force and thank the ~~Special Committee~~ and the Trustees for looking to FSS to assist the ~~Special Committee~~ Task Force in this matter.

Sincerely,

Louis J. Freeh*
Senior Managing Partner
Freeh Sporkin & Sullivan, LLP

APPROVED AND AGREED TO ON BEHALF OF
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Board of Trustees of The Pennsylvania State University

Printed Name: Steve A. Garban

Title: Chair, Board of Trustees
The Pennsylvania State University

Date: 12/2/11

Investigation Task Force

APPROVED AND AGREED TO ON BEHALF OF
The Special ~~Committee~~ established by
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Special ~~Committee~~ Investigation Task Force established by
The Board of Trustees of The Pennsylvania State University

Printed Name: K. C. Frazier

Title: Chair, Special Investigations Task Force

Date: 12/2/11

* Licensed to practice law in New York, New Jersey and Washington, DC only.

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO, et al.,	)	
	)	
Plaintiffs.	)	Docket No. 2013-2082
	)	
vs.	)	Type of Case: Commercial
	)	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al.	)	
	)	
Defendants.	)	

DECLARATION OF OMAR Y. MCNEILL

I, Omar Y. McNeill, do hereby declare and say as follows based on personal knowledge:

1. I am an adult citizen of Delaware and have been admitted to practice law in Delaware since 1992. I am currently on inactive status because I am not engaged in the practice of law at this time.

2. From 2009 to 2012, I was an attorney with Freeh Sporkin & Sullivan, LLP ("FSS"), a partnership engaged in the practice of law, ultimately holding the title of Partner and General Counsel. In late 2011, I began work on an investigation at The Pennsylvania State University and served for the next eight months as the lead project manager of this engagement. I was a practicing attorney during the entire course of the investigation.

3. On or about December 2, 2011, the Board of Trustees (the "Board") of The Pennsylvania State University ("Penn State" or the "University"), on behalf of a Special Investigations Task Force (the "Task Force") created by the Board, engaged FSS as counsel to perform an independent investigation, as set forth in an engagement letter.

[redacted]

4. As part of its engagement as legal counsel, FSS was to provide the results of the investigation in a written report to the Task Force and to other parties as the Task Force may direct. Pursuant to the engagement letter, FSS was also engaged to "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."

5. FSS's engagement was conducted in anticipation of litigation. Indeed, as the investigation took place, litigation and criminal investigations were already pending and more litigation was anticipated.

6. The work and advice provided under the engagement by FSS and any third party working on behalf of FSS to perform services in connection with the engagement was, again pursuant to the engagement letter, to be "subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law." If FSS were required to respond to a subpoena or other formal request from a third party or governmental agency for FSS records or other information relating to the services performed for the University, or to testify by deposition or otherwise concerning such services, FSS was to provide the University with notice of the request to provide a reasonable opportunity to object to such disclosure or testimony.

7. FSS attorneys and staff communicated with members of the Special Investigative Task Force from time to time in confidence.

8. The Board and FSS understood and expected that FSS's work would be subject to the attorney-client privilege and the work product doctrine, and FSS conducted the investigation accordingly. It was routine practice, for instance, for the investigators to advise Penn State employee witnesses that information they provided in interviews would be protected

by an attorney-client privilege that belonged to the University, and for the investigators to advise witnesses that the interviews were confidential. The notes taken by FSS attorneys, staff, and third parties working on behalf of FSS incorporated those individuals' mental impressions.

9. FSS took other steps to protect the confidentiality and attorney-client and attorney work product privileges of the engagement as well. FSS attorneys, staff, and third parties working on behalf of FSS were advised in writing of confidentiality expectations for the engagement. The attorneys and staff worked within a secured facility with access controlled by electronic locks. Physical evidence was stored in a locked room within the secured facility. The attorneys and staff frequently were briefed on the importance of maintaining confidentiality on the engagement.

10. During the course of the investigation, I participated in telephone conference calls on multiple occasions with Donald Remy, General Counsel of the National Collegiate Athletic Association ("NCAA") at the time, and Jonathan Barrett, outside counsel for the Big Ten Conference ("Big Ten"). I participated in these calls at the direction of the Task Force to cooperate with the NCAA and the Big Ten. Those calls did not, however, in any way either compromise the independence of the investigation or result in a waiver of the attorney-client or work product privileges. Although initially scheduled to take place on a weekly basis during the course of the investigation, the conference calls were frequently canceled.

11. During the conference calls with Messrs. Remy and Barrett, which lasted on average approximately fifteen minutes, I informed them in general terms about the progress of the investigation. I did not provide them with detailed information nor did I reveal our work product to them. In particular, to the best of my recollection, I did not provide the names of specific individuals that we interviewed or that we were scheduled to interview. Instead, I

informed Messrs. Remy and Barrett of the general categories of personnel that we were interviewing, but I did not reveal individual names and I did not disclose the substance of any of the interviews we conducted.

12. My only recollection of the discussion of interviews of specific named individuals is that Mr. Remy or Mr. Bartlett inquired whether we intended to interview Graham Spanier, Tim Curley or Gary Schultz and I told them that we were attempting to interview each of these individuals.

13. I hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

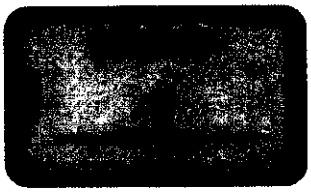
Date: December 15, 2014

OMAR Y. McNEILL

Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky

Freeh Sporkin & Sullivan, LLP

July 12, 2012



maintained in a secure and confidential manner. This report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege by the Board.

Citations in this report have been redacted to protect the identity of people who spoke with the Special Investigative Council. Citations also include references to the internal database maintained by the Special Investigative Council to collect and analyze documents and emails. The references include citation to a unique identifying number assigned to each individual piece of information and are located in the endnotes and footnotes of this report.

CHAPTER 8
FEDERAL AND STATE CHILD SEXUAL ABUSE REPORTING REQUIREMENTS

KEY FINDINGS

- The Clery Act requires the University to collect crime statistics relating to designated crimes, including sexual offenses, occurring on University property, make timely warnings of certain crimes that pose an ongoing threat to the community, and prepare an annual safety report and distribute it to the campus community. The Clery Act requires "Campus Security Authorities," including coaches and athletic directors, to report crimes to police. From approximately 1991 until 2007, University officials delegated Clery Act compliance to the University Police Department's Crime Prevention Officer ("CPO"). The delegated CPO was not provided any formal training before taking over the position nor does he recall receiving any Clery Act training until 2007.
- In 2007, the Director of the University Police Department transferred the Clery Act compliance responsibility from the CPO to a departmental sergeant and instituted some Clery Act training programs. The sergeant could only devote minimal time to these duties. Despite the efforts of the University Police Department, awareness and interest in Clery Act compliance throughout the University remained significantly lacking.
- As of November 2011, the University's Clery Act policy was still in draft form and had not been implemented. Many employees interviewed were unaware that they were required to report incidents and had been provided with little, if any, training. Although University administrators identified compliance with laws and regulations as one of the top 10 risks to the University in 2009, Clery Act compliance had never been audited by the University's internal auditors or received attention from any other University department, including the Office of General Counsel.
- The University Police Department instituted an electronic report format in 2007 for easier reporting, but it received only one completed form between 2007 and 2011.
- Paterno, Curley and McQueary were obligated to report the 2001 Sandusky incident to the University Police Department for inclusion in Clery Act statistics and for determining whether a timely warning should be issued to the University community. No record exists of such a report. While Schultz and Spanier were arguably not Campus Security Authorities under the Clery Act, given the leadership positions they held within the University, they should have ensured that the University was compliant with the Clery Act with regard to this incident.

- Spanier advised the Special Investigative Counsel that although the University was "big" on compliance, he was not aware that the Clery Act policy had not been implemented; that anyone had ever advised him that the University was not in compliance with the Clery Act; or whether there had ever been an internal or external audit of the University's Clery Act compliance.

I. The Federal "Clery Act"

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) ("Clery Act"), is a federal law applicable to any institution ("Institution") of higher learning that participates in federal student financial aid programs. The Pennsylvania State University ("Penn State" or "University") participates in such programs and, therefore, must comply with the requirements of the Clery Act. The Clery Act is enforced by the United States Department of Education ("Department of Education"), which has the authority to issue fines for violations of the Clery Act or, in extreme cases, to end federal funding to the Institution.

The purpose of the Clery Act is to provide an Institution's students, parents and employees with information about campus safety so that members of the campus community can make informed decisions to protect themselves from crime. Among other things, the Clery Act requires Institutions to: (1) collect crime statistics relating to designated crimes ("Clery Crimes") occurring on designated locations associated with the Institution; (2) make timely warnings of certain Clery Crimes that pose an ongoing threat to the community; and, (3) prepare and distribute to the campus community an annual safety report that contains the crime statistics described above, as well as other information about the Institution's safety policies and procedures.[oo] Institutions are required to collect crime data from all "Campus Security Authorities."[pp]

A. Campus Security Authorities ("CSAs")

The Department of Education establishes the regulations for implementing the Clery Act and broadly defines the term "Campus Security Authority" to include the following entities or individuals:

1. A campus police department or a campus security department of an Institution.

2. Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a

[oo] 20 U.S.C. § 1092(f)(1), (3), (5). The Clery Act was originally passed in 1990, and Congress amended the law several times over the years.

[pp] 20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(a).

campus security department . . . such as an individual who is responsible for monitoring entrance into Institutional property.

3. Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.

4. *An official of an institution who has significant responsibility for student and campus activities* including, but not limited to, student housing, student discipline, and campus judicial proceedings. [emphasis added][qq]

The Department of Education has defined the last group of CSAs to include, among others, the following individuals:

- A dean of students who oversees student housing, a student center or student extracurricular activities.
- *A director of athletics, a team coach* or a faculty advisor to a student group. [emphasis added]
- A student resident advisor or assistant or a student who monitors access to dormitories.
- A coordinator of [fraternity and sorority affairs].
- A physician in a campus health center, a counselor in a campus counseling center or a victim advocate or sexual assault response team in a campus rape crisis center if they are identified by [an Institution] as someone to whom crimes should be reported or if they have significant responsibility for student and campus activities. . . .[rr]

B. Collecting Crime Statistics

The Clery Act requires Institutions to collect information about all Clery Crimes,[ss] which include forcible and non-forcible sex offenses,[tt] so that the information

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[qq]34 C.F.R. § 668.46(a).

[rr]While the above citation is from 2011, the Department of Education has had similar guidance in place setting forth its interpretation of the definition of Campus Security Authorities since at least 1999. United States Department of Education, Handbook for Campus Safety and Security Reporting (hereinafter U.S. Dept. of Education Clery Handbook) (Washington D.C., February 2011), 75. *See* 64 F.R. 59060, 59063 (November 1, 1999).

[ss]20 U.S.C. § 1092(f)(1)(F)(i).

can be used for reporting statistics to the public on an annual basis and determining whether to issue timely warnings to the campus community. Institutions are required to report Clery Crimes that are "reported to campus security authorities or local police agencies" on an annual basis.[uu] Institutions are required to include any Clery Crime in their collected statistics, even if there is no criminal charge filed or arrest made. The Institution must collect and report the crime if the information is reported to a CSA who believes that the allegation was made to him or her "in good faith."[vv]

C. Issuance of Timely Warnings

The Clery Act requires an institution to issue "timely warnings" of Clery Crimes if the crime is reported to a CSA and is "considered by the Institution to represent a threat to students and employees."[ww] If the Institution, in the exercise of its judgment, determines that the reported crime poses an ongoing threat to students and employees, the Institution must utilize appropriate procedures to notify students and employees of the threat "in a manner that is timely and will aid in the prevention of similar crimes."[xx]

D. Preparation of an Annual Safety Report

The Clery Act requires Institutions to prepare and distribute an annual safety report ("ASR") to the campus community, which includes, among other things, the annual Clery Act crime statistics described above. The Clery Act and accompanying regulations set forth in detail what the ASR must include, including where and how crimes should be reported, crime prevention policies, alcohol and drug information, and emergency response and evacuation information.[yy]

[uu]Clery Crimes include: murder, manslaughter, forcible and non-forcible sex offenses, robbery, aggravated assault, motor vehicle theft, arson, and certain drug and alcohol violations. 20 U.S.C. § 1092(f)(1)(F)(i).

[vv]20 U.S.C. § 1092(f)(1)(F)(i).

[ww]"If a campus security authority receives the crime information and believes it was provided in good faith, he or she should document it as a crime report. In 'good faith' means there is a reasonable basis for believing that the information is not simply rumor or hearsay. That is, there is little or no reason to doubt the validity of the information." U.S. Dept. of Education, Clery Handbook, 73.

[xx]34 C.F.R. § 668.46(e); see 20 U.S.C. § 1092(f)(3).

[yy]34 C.F.R. § 668.46(e).

[zz]20 U.S.C. § 1092(f).

II. The University's Failure To Implement the Clery Act

The Clery Act was passed in 1990 and became effective in 1991. From approximately 1991 until 2007, University officials delegated Clery Act compliance to the University Police Department's Crime Prevention Officer ("CPO").[630] The CPO was not provided any formal training before taking over the position nor does he recall receiving any Clery Act training until 2007.[631] The CPO was supervised by others in the University Police Department, including, ultimately, then Chief Thomas Harmon.[632] Before 2007, the CPO was unaware that the Clery Act included the concept of CSAs or that the University had an obligation to collect crime data from student organizations, coaches, and others who have regular contact with students. To the CPO's knowledge, his supervisors were also unaware of these requirements.[633] In fact, according to the CPO, he told one of his supervisors in 2007 that there was a need for additional personnel to assist with the Clery Act and "we could get hurt really bad here."[634] The supervisor responded by saying "we really don't have the money."[635]

In 2007, the Director of the University Police Department, Stephen Shelow, transferred the Clery Act compliance responsibility from the CPO to a departmental sergeant, because he believed that compliance with the Clery Act had not been handled well in the past.[636] However, the sergeant in the University Police Department was only able to devote minimal time to Clery Act responsibilities.

Shelow also directed a number of University police department employees to attend a training program on the Clery Act. When the trainers discussed the requirements to identify and train CSAs, the attendees realized that the University did not have a sufficient process for those tasks.[637] In fact, Shelow does not believe that anyone at the University understood, before that conference, that the Clery Act requires that information be gathered from outside the University Police Department.[638]

Realizing that the University had serious deficiencies in the way that it gathered Clery Crime information,[639] the University Police Department began to provide training and conduct outreach to the broader group of CSAs to gather crime data. They developed a crime report form to be completed by any CSA to whom a crime was reported and made the form available on the internet.[640] The sergeant created PowerPoint materials and provided some training and information sessions for groups at University Park and some of the Commonwealth campuses.[641] The University Police

Department also held meetings with faculty and staff members involved in athletics, student activities and the fraternity and sorority system to increase awareness of the Clery Act and to explain the obligations of some of these individuals as CSAs.[642]

Despite the efforts of the University Police Department, awareness and interest in Clery Act compliance remained lacking throughout the University.[643] Since making the report form available electronically in 2007, the University Police Department has received only one completed form through 2011.[644] No record reflects that any Commonwealth campus used the form until 2009.[645] The training sessions and outreach efforts were conducted primarily for just one or two years, were "sporadic" and were not well attended.[646]

The Director and the sergeant's intention to properly follow Clery Act regulations also were stymied by their own lack of time and resources. The sergeant, in addition to her Clery Act responsibilities, also was in charge of all criminal investigations and was only able to devote minimal time to Clery Act compliance.[647] The Director suggested to the then Senior Vice President Finance and Business that the University appoint a "compliance coordinator" to assist with Clery Act implementation.[648] The Director was told that while the need for the position existed, the University had other priorities that needed attention first.[649]

In April 2009, the University's outside legal counsel provided information to the University about Clery Act compliance.[650] The Director, the sergeant and others created a "draft" Clery Act policy that would have required written notification to all CSAs of their roles and responsibilities.[651]

As of November 2011, the University's Clery Act policy was still in draft form and had not been implemented.[652] Many University employees interviewed were unaware of their CSA status or responsibilities under the Clery Act. In an interview with the Special Investigative Counsel, Spanier said that he was not aware that the Clery Act policy had not been implemented and remained in draft form.[653] Spanier said no one at Penn State had ever informed him that the University was not in compliance with the Clery Act.[654] Spanier also stated that there had been no internal or external audits for Clery Act compliance.[655] He also said he had never briefed the Board on Clery Act compliance, nor had the Board asked him questions on this issue.[656] Spanier emphasized that Penn State "was big on compliance, more than other universities."[657]

III. Pennsylvania Child Sexual Abuse Reporting Requirements

The Commonwealth of Pennsylvania charged Curley and Schultz in November 2011 with violating Pennsylvania's statute, 23 Pa. C.S. § 6311, relating to the mandatory reporting of child abuse in 2002. That statute requires certain individuals who are "mandatory reporters" to report suspected child abuse to the appropriate state agency. The statute has been amended several times but the relevant provision in effect in 2001 states:

> Persons who, in the course of their employment, occupation or practice of their profession, come into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when they have reasonable cause to suspect, on the basis of their medical, professional or other training and experience, that a child coming before them in their professional or official capacity is an abused child. . . .

The 2012 version of the statute states:

> A person who, in the course of employment, occupation or practice of a profession, comes into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when the person has reasonable cause to suspect, on the basis of medical, professional or other training and experience, that a child under the care, supervision, guidance or training of that person or of an agency, institution, organization or other entity with which that person is affiliated is a victim of child abuse, including child abuse by an individual who is not a perpetrator.

Both the 2001 and 2012 versions of the law also state:

> In addition to those persons and officials required to report suspected child abuse, any person may make such a report if that person has reasonable cause to suspect that a child is an abused child.[zz]

[zz] 23 Pa. C.S. § 6312.

IV. Implications of The University's Failure to Report Allegations of Child Sexual Abuse

McQueary testified at the preliminary hearing on December 16, 2011 that he described the 2002[658] incident involving Sandusky and a child in the Lasch Building to Paterno as "a young boy in the shower and it was way over the lines" and "extremely sexual in nature."[659] McQueary testified at that same hearing that he later met with Curley and Schultz, and told them that he observed Sandusky in the shower with a young boy and that he "thought that some kind of intercourse was going on."[660] While Curley and Schultz dispute McQueary's version of what he told them about the incident, Paterno testified to the Grand Jury on January 12, 2011 that McQueary described the incident to him as "fondling" and "a sexual nature."[661] The conduct described by McQueary and Paterno constitutes the Clery Crime of sexual assault.

Based on the facts uncovered by the Special Investigative Counsel, Paterno, Curley and McQueary were obligated as CSAs to report this incident to the University Police Department for inclusion in Clery Act statistics and for determining whether a timely warning should be issued to the University community. The Special Investigative Counsel found no indication that Paterno, Curley and McQueary met their responsibilities as CSAs by reporting, or ensuring that someone reported, this incident to the University Police Department. As a result, no timely warning could have been issued to the University community and the incident was not included in the University's Clery Crime statistics for 2001.[662]

McQueary, Paterno and Curley did report the incident to Schultz who, as SVP-FB, was ultimately in charge of the University Police Department. However, Schultz was not a law enforcement officer and was not the person designated to receive Clery Crime reports or to collect Clery Crime statistics for the University.[aaa] Arguably, as the most senior leaders of the University, Schultz and Spanier should have ensured compliance with the Clery Act regarding this incident. There is no record that Spanier or Schultz reported, or designated someone to report, the incident to the University Police Department, which should have caused the incident to be included in the

[aaa] 34 C.F.R. § 668.46(b)(2) requires the University to include in its ASR a statement setting forth to whom individuals should report crimes. The University's ASR for 2001 did not contain any such statement; however, it generally states that the police department investigates crimes.

University's Clery Crime statistics and may have triggered the issuance of a timely warning to the University community.

V. Improvements in Clery Act Compliance Since November 2011

After the criminal charges against Sandusky, Curley and Schultz became known, the University assessed its implementation and compliance with the Clery Act. Notwithstanding an investigation begun on November 9, 2011 by the Department of Education concerning the same issues,[bbb] the University moved forward by hiring a reputable national consultant to conduct this assessment. The consultant's study identified several shortcomings in the University's Clery Act procedures, including those cited above.[663]

On January 19, 2012, the Special Investigative Counsel recommended several actions relative to compliance with the Clery Act's training and reporting requirements. As described in Chapter 10 of this report, some of the recommended actions were already in place and the others have now been implemented or are underway, [664] including the appointment of a full-time Clery Compliance Officer on March 26, 2012.

[bbb]As of the date of this report, the Department of Education's investigation is ongoing.

CHAPTER 10
RECOMMENDATIONS FOR UNIVERSITY GOVERNANCE, ADMINISTRATION, AND THE PROTECTION OF CHILDREN IN UNIVERSITY FACILITIES AND PROGRAMS

The failure of President Graham B. Spanier ("Spanier"), Senior Vice President – Finance and Business ("SVP-FB") Gary C. Schultz ("Schultz"), Head Football Coach Joseph V. Paterno ("Paterno") and Athletic Director ("AD") Timothy M. Curley ("Curley") to protect children by allowing Gerald A. Sandusky ("Sandusky") unrestricted and uncontrolled access to Pennsylvania State University ("Penn State" or "University") facilities reveals numerous individual failings, but it also reveals weaknesses of the University's culture, governance, administration, compliance policies and procedures for protecting children. It is critical for institutions and organizations that provide programs and facilities for children to institute and adhere to practices that have been found to be effective in reducing the risk of abuse. Equally important is the need for the leaders of those institutions and organizations to govern in ways that reflect the ethics and values of those entities.

The Special Investigative Counsel provided several recommendations to the Board and the University in January 2012 to address exigent needs to reform policies and procedures, particularly those involving upcoming activities, such as summer camps. Before, but especially since November 2011, the Board and University administrators have reviewed, modified, or added relevant policies, guidelines, practices and procedures relating to the protection of children and University governance. Consistent with the recommendations in this report, members of the Board, University administrators, faculty and staff have:

- Strengthened security measures and policies to safeguard minors, students and others associated with the University and its Outreach programs.
- Improved the organization and procedures of the Board to better identify, report, and address issues of significance to the University and members of its community.

- Increased compliance with The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) ("Clery Act") training, information collection and reporting requirements.
- Encouraged prompt reporting of incidents of abuse and sexual misconduct.
- Conducted abuse-awareness training for many University areas, including its top leadership.
- Provided better oversight and governance of the University's educational, research and athletic compliance programs.

One of the most challenging tasks confronting the University community – and possibly the most important step in ensuring that the other recommended reforms are effectively sustained, and that public confidence in the University and its leadership is restored – is an open, honest, and thorough examination of the culture that underlies the failure of Penn State's most powerful leaders to respond appropriately to Sandusky's crimes.

The following recommendations are intended to assist University administrators, faculty, staff and the Board, in improving how they govern and provide protection for children in University facilities and programs. These recommendations relate to the University's administrative structure, policies and procedures and the Office of General Counsel; the responsibilities and operations of the Board; the identification of risk; compliance with federal and state statutes and reporting misconduct; the integration of the Athletic Department into the greater University community; the oversight, policies and procedures of the University's Police Department; and the management of programs for non-student minors and access to University facilities. In addition, recommendations are included that will assist the University in monitoring change and measuring future improvement. [ddd]

[ddd]Recommendations accompanied by an asterisk are being implemented or have been completed as of June 2012.

1.0 – Penn State Culture

The University is a major employer, landholder and investor in State College, and its administrators, staff, faculty and many of its Board members have strong ties to the local community. Certain aspects of the community culture are laudable, such as its collegiality, high standards of educational excellence and research, and respect for the environment. However, there is an over-emphasis on "The Penn State Way" as an approach to decision-making, a resistance to seeking outside perspectives, and an excessive focus on athletics that can, if not recognized, negatively impact the University's reputation as a progressive institution.

University administration and the Board should consider taking the following actions to create a values- and ethics-centered community where everyone is engaged in placing the needs of children above the needs of adults; and to create an environment where everyone who sees or suspects child abuse will feel empowered to report the abuse.

1.1 Organize a Penn State-led effort to vigorously examine and understand the Penn State culture in order to: 1) reinforce the commitment of all University members to protect children; 2) create a stronger sense of accountability among the University's leadership; 3) establish values and ethics-based decision making and adherence to the Penn State Principles as the standard for all University faculty, staff and students; 4) promote an environment of increased transparency into the management of the University; and 5) ensure a sustained integration of the Intercollegiate Athletics program into the broader Penn State community.

This effort should include the participation of representatives from the Special Faculty Committee on University Governance; Penn State's Coalition on Intercollegiate Athletics; Penn State's Rock Ethics Institute; students, alumni, faculty and staff; as well as representatives from peer institutions with experience in reviewing and improving institutional culture in academic settings.

1.2	Appoint a University Ethics Officer to provide advice and counsel to the President and the Board of Trustees on ethics issues and adherence to the Penn State Principles; develop and provide, in conjunction with the Rock Ethics Center, leadership and ethics training modules for all areas of the University; and coordinate ethics initiatives with the University's Chief Compliance Officer.* (See also Recommendation 4.0)
	1.2.1 Establish an "Ethics Council" to assist the Ethics Officer in providing advice and counsel to the President and the Board on ethical issues and training.
	1.2.2 Finalize and approve the proposed modifications to the Institutional Conflict of Interest Policy; identify the senior administrative and faculty positions to which the policy should apply, and implement the policy throughout the University.
1.3	Conduct open and inclusive searches for new employees and provide professional training for employees who undertake new responsibilities.
1.4	Continue to benchmark the University's practices and policies with other similarly situated institutions, focus on continuous improvement and make administrative, operational or personnel changes when warranted.
1.5	Communicate regularly with University students, faculty, staff, alumni and the community regarding significant University policies and issues through a variety of methods and media.
1.6	Emphasize and practice openness and transparency at all levels and within all areas of the University.

2.0 – Administration and General Counsel: Structure, Policies and Procedures

In various ways the University's administrative structure, the absence or poor enforcement of policies relating to the protection of children and employee misconduct,[eee] and the lack of emphasis on values and ethics-based action created an

[eee]The University has policies for investigating employee misconduct: HR-78 created in 1974, and HR-70, created in 2005; and a whistleblower policy, AD67 created in 2010.

environment in which Spanier, Schultz, Paterno and Curley were able to make decisions to avoid the consequences of bad publicity. Standard personnel practices were ignored or undermined by the lack of centralized control over the human resources functions of various departments – most particularly, the Athletic Department.

University administrators, faculty, staff and the Board should consider taking the following actions to create an atmosphere of values and ethics-based decision making.

2.1	Review organizational structures and make adjustments for greater efficiency and effectiveness.
2.1.1	**Evaluate the span of control of the University President and make adjustments as necessary to ensure that the President's duties are realistic and capable of the President's oversight and control.**
2.1.2	**Evaluate the span of control and responsibility of the Senior Vice President – Finance and Business ("SVP-FB") and make adjustments as necessary to ensure that the SVP-FB's duties are realistic and capable of the SVP-FB's oversight and control.**
2.1.3	**Upgrade the position of the Associate Vice President for Human Resources to a Vice President position reporting directly to the University President.**
2.1.4	**Evaluate the size, composition and procedures of the President's Council and make adjustments as necessary.**
2.2	Review administrative processes and procedures and make adjustments for greater efficiency and effectiveness.
2.2.1	**Separate the University's Office of Human Resources ("OHR") from the University's Finance and Business organization.**
2.2.2	**Assign all human resources ("HR") policy making responsibilities to the OHR and limit the ability of individual departments and campuses to disregard the University's human resources policies and rules.**

2.2.3	Centralize HR functions, where feasible, such as background checks, hiring, promotions, terminations, on-board orientation and management training, while recognizing the unique requirements of University components and Commonwealth campuses, and their need for measured autonomy.*
2.2.4	Designate the Vice President for Human Resources ("VP-HR") as the hiring authority for HR representatives throughout the University and establish a "dotted-line" reporting relationship between the HR representatives and the VP-HR similar to that used in the Finance and Audit areas.
2.2.5	Develop job descriptions for all new key leadership positions and incumbent positions if none exist.
2.2.6	Evaluate the size of the OHR staff, benchmark its human capital capacity against public universities of similar size and scope of responsibility, and modify as necessary.
2.2.7	Adopt a Human Resource Information/Capital Management System ("HRIS/HCM") with sufficient growth capacity for use at University Park and all Commonwealth campuses.
2.2.8	Engage external HR professionals to assist in the development of the University's next performance management system.
2.2.9	Provide the OHR with complete access to executive compensation information and utilize the OHR, in conjunction with the University Budget Office, to benchmark and advise the administration and the Board of Trustees on matters of executive compensation.
2.2.10	Develop a mechanism to provide and track all employee training mandated by state and federal law and University policies.
2.2.11	Update, standardize, centralize, and monitor background check procedures.*
2.2.12	Require updated background checks for employees, contractors and volunteers at least every five years.*

	2.2.13 Audit periodically the effectiveness of background check procedures and the University's self-reporting system for employees.*
	2.2.14 Update computer-use policies and regularly inform employees of the University's expectations and employee responsibilities with regard to electronic data and materials.
	2.2.15 Develop a procedure to ensure that the University immediately retrieves keys and access cards from unauthorized persons.*
2.3	Complete the development of the University's Office of General Counsel ("OGC").
	2.3.1 Develop a mission statement for the OGC that clearly defines the General Counsel's responsibilities and reporting obligations to the University and the Board of Trustees.
	2.3.2 Select and hire a permanent General Counsel ("GC").*
	2.3.3 Expand the GC's office staff to provide broader coverage of routine legal issues including employment law.
	2.3.4 Appropriate sufficient budget to the OGC to hire specialized outside counsel when needed.
2.4	Advertise all senior executive positions externally and engage educational search experts to broaden the talent pools for senior executive positions.*
2.5	Integrate faculty and staff from different disciplines and areas in University-wide professional development/leadership training to increase their exposure to other University personnel, programs, challenges and solutions.*
2.6	Implement consistent, state-of-the art records management and retention procedures.
2.7	Provide sufficient support and oversight of the Office of Student Affairs to make certain that all students follow the same standards of conduct.*

2.8	Designate an individual, administrative entity or committee to approve and review all new and modified University policies.
2.8.1	**Develop guidelines for creating, standardizing, approving, reviewing and updating University policies.**
2.8.2	**Review periodically all University policies for relevance, utility and necessity, and modify or rescind as appropriate.**

3.0 – Board of Trustees: Responsibilities and Operations

Spanier and other University leaders failed to report timely and sufficiently the incidents of child sexual abuse against Sandusky to the Board of Trustees in 1998, 2001 and 2011. Nonetheless, the Board's over-confidence in Spanier's abilities, and its failure to conduct oversight and responsible inquiry of Spanier and senior University officials, hindered the Board's ability to deal properly with the most profound crisis ever confronted by the University.

The Board should consider taking the following actions to increase public confidence and transparency, realign and refocus its responsibilities and operations, improve internal and external communications and strengthen its practices and procedures.

3.1	Review the administrative and governance issues raised in this report, particularly with regard to the structure, composition, eligibility requirements and term limits of the Board, the need to include more members who are not associated with the University, and the role of the Emeriti. In conducting this review, the Board should seek the opinions of members of the Penn State community, as well as governance and higher education experts not affiliated with the University. The Board should make public the results and recommendations generated from the review.
3.2	Review, develop and adopt an ethics/conflict of interest policy for the Board that includes guidelines for conflict management and a commitment to transparency regarding significant issues.

	3.2.1 Include training on ethics and oversight responsibilities in the current regulatory environment in Board member orientation.
	3.2.2 Require full and public disclosure by Board members of financial relationships between themselves and their businesses and the University.
3.3	Implement the Board's proposals for revised committee structures to include a committee on Risk, Compliance, Legal and Audit and subcommittees for Audit and Legal matters; and a subcommittee for Human Resources as part of the Committee on Finance, Business and Capital Planning.*[fff]
	3.3.1 Rotate Committee Chairs every five years or sooner.
3.4	Increase and improve the channels of communication between the Board and University administrators.
	3.4.1 Ensure that the University President, General Counsel and relevant members of senior staff thoroughly and forthrightly brief the Board of Trustees at each meeting on significant issues facing the University.*
	3.4.2 Require regular Risk Management, Compliance and Internal Audit reports to the Board on assessment of risks, pending investigations, compliance with federal and state regulations as well as on measures in place to mitigate those risks.
	3.4.3 Require that the SVP-FB, the GC and/or their designee to provide timely briefings to the Board on potential problem areas such as unusual severance or termination payments, Faculty and staff Emeriti appointments, settlement agreements, government inquiries, important litigation and whistleblower complaints.
	3.4.4 Use the Board's Executive Session/Question Period with the President to make relevant and reasonable inquiry into substantive matters and to facilitate sound decision-making.

[fff] Exhibit 10-A, Pennsylvania State University Board of Trustees, Organizational Chart.

	3.4.5 Review annually the University's *Return of Organization's Exempt from Income Tax Form (990)*, Clery Act reports, and the compensation and performance of senior executives and leaders.*
	3.4.6 Conduct an informational seminar for the Board and senior administrators on Clery Act compliance and reporting procedures.
	3.4.7 Continue to provide all Board members with regular reports of local, national and academic media coverage of the University.*
3.5	Increase and improve the channels of communication between the Board and the University community.
	3.5.1 Establish and enforce rules regarding public and press statements made by Board members and Emeriti regarding confidential University matters.
	3.5.2 Increase and publicize the ways in which individuals can convey messages and concerns to Board members.
	3.5.2.1 Provide Board members with individual University email addresses and make them known to the public.
	3.5.2.2 Use common social media communications tools to communicate with the public on various Board matters.
3.6	Develop a critical incident management plan, including training and exercises, for the Board and University administrators.
3.7	Continue to conduct and publicize periodic internal and external self-assessments of Board performance.*

4.0 – Compliance: Risk and Reporting Misconduct

The University's incomplete implementation of the Clery Act was a contributing factor in the failure to report the 2001 child sexual abuse committed by Sandusky. A strong compliance function, much like exists in the University's financial area, should encourage individuals to report misconduct more readily in the future. A regularized risk identification and management system is as prudent and consistent with best business practices.

University administrators and the Board should consider taking the following actions to ensure compliance with the multiple laws, regulations, rules and mandates that effect its operations, risk management and national reputation.

4.1	Establish and select an individual for a position of "Chief Compliance Officer,"* The Chief Compliance Officer should:
4.1.1	**Head an independent office equivalent to the Office of Internal Audit.**
4.1.2	**Chair a Compliance Council.**
4.1.3	**Coordinate compliance functions in a manner similar to the Office of Internal Audit.**
4.1.4	**Have similar access to, and a reporting relationship with the Board, as does the Internal Auditor.**
4.1.5	**Coordinate the Chief Compliance Officer's responsibilities with the Office of General Counsel, the Director of Risk Management and the Director of Internal Audit.**
4.1.6	**Direct further review of any incidents or risks reported to the Compliance Officer.**
4.2	Assign full-time responsibility for Clery Act compliance to an individual within the University Police Department and provide the individual with sufficient resources and personnel to meet Clery Act regulations.*
	The individual responsible for Clery Act compliance should:

4.2.1	**Establish a University policy for the implementation of the Clery Act.**
4.2.2	**Create a master list of names of those persons with Clery Act reporting responsibilities, notify them annually of the Clery Act responsibilities and publish the list to the University community.**
4.2.3	**Require, monitor and track training, and periodic retraining for Campus Security Authorities ("CSAs") on Clery Act compliance.**
4.2.4	**Provide information to the OHR on Clery Act responsibilities, reporting suspicious activity to CSAs and whistleblower protection for inclusion in the general training for all employees.**
4.2.5	**Coordinate timely notices of incidents and threat warnings with the Vice President for Student Affairs, the Chief Compliance Officer and the General Counsel.**
4.2.6	**Review annual Clery Act reports with the President's Council, the Board of Trustees and the Compliance Officer.**
4.2.7	**Coordinate Clery Act training and compliance with responsible officials at the Commonwealth campuses.**
4.2.8	**Arrange for periodic internal and external audits of Clery Act compliance.**
4.3	Update regularly and prioritize the University's list of institutional risks; determine the appropriate implementation and audit schedule for those risks; and present the results to the Board.
4.4	Send a communication to all University students, faculty and staff at the beginning of each academic term: that encourages the reporting of misconduct; describes the channels for direct or anonymous reporting; and the University's whistleblower policy and protection from retaliation.
4.5	Publicize the employee misconduct hotline regularly and prominently throughout the University on a variety of platforms including social media networks and the webpages of individual University components.*

5.0 – Athletic Department: Integration and Compliance

For the past several decades, the University's Athletic Department was permitted to become a closed community. There was little personnel turnover or hiring from outside the University and strong internal loyalty. The football program, in particular, opted out of most of the University's Clery Act, sexual abuse awareness and summer camp procedures training. The Athletic Department was perceived by many in the Penn State community as "an island," where staff members lived by their own rules.

University administrators and the Board of Trustees should consider taking the following actions to more fully involve the Athletic Department within the broader University community; provide relevant training and support to the Athletic Department staff to ensure compliance with external regulations and University policies; and maintain a safe environment for those who use the University's recreational facilities, especially children.

5.1	Revise the organizational structure of the Athletic Department to clearly define lines of authority, responsibilities and reporting relationships.
5.2	Evaluate security and access protocols for athletic, recreational and camp facilities and modify as necessary to provide reasonable protections for those using the facilities.*
5.3	Conduct national searches for candidates for key positions, including head coaches and Associate Athletic Director(s) and above.
5.4	Integrate, where feasible, academic support staff, programs and locations for student-athletes.*
5.5	Provide the University's Athletic Compliance Office with additional staff and adequate resources to meet its many responsibilities.*
5.5.1	**Benchmark against peer institutions to determine an appropriate staffing level for the office.**
5.5.2	**Establish an effective reporting relationship with the University Compliance Officer.**

5.5.3	**Realign the compliance-related responsibilities of Athletic Department staff members to ensure that the Athletic Compliance Office has oversight of the entire program.**
5.5.4	**Ensure that new hires and incumbent compliance personnel have requisite working knowledge of the NCAA, Big Ten Conference and University rules.**
5.6	Ensure that Athletic Department employees comply with University-wide training mandates.
5.6.1	**Provide and track initial and on-going training for athletic staff in matters of leadership, ethics, the Penn State Principles and standards of conduct, abuse awareness, and reporting misconduct pursuant to the Clery Act and University policy.**
5.6.2	**Include Athletic Department employees in management training programs provided to other University managers.**

6.0 – University Police Department: Oversight, Policies and Procedures

The University Police Department promptly responded to the 1998 complaint about Sandusky's conduct, but the sensitivity of the investigation and the need to report on its progress to a senior administrator could have compromised the extent of its inquiry. The independence of the University's law enforcement function is essential to providing unbiased service and protection to the University community. The University Police Department's recent restructuring and additional training for its employees is an important step in the continuous improvement of the Department.

The University Police Department and/or University administrators should consider taking the following additional actions to improve the functions and oversight of the University's law enforcement services:

6.1	Arrange for an external examination of the University Police Department's structure, organization, policies and procedures through a professionally recognized accreditation body, [sss] with a particular emphasis on the University Police Department's training for and qualifications of sex abuse investigators.*
6.2	Review the organizational placement of the University Police Department in the University's Finance and Business area in conjunction with the review of the span of control of the SVP-FB. (See Section 2.0)
6.3	Provide the Vice President/Director of Public Safety with sufficient administrative authority and resources to operate effectively and independently.
6.4	Review records management procedures and controls and revise where needed.*
6.4.1	**Establish a policy to ensure that all police reports alleging criminal conduct by Penn State students, faculty and staff are reported to the OHR.[hhh]**
6.4.2	**Establish or reinforce protocols to assign a timely incident number and proper offense classification to all complaints received.[iii]***
6.4.3	**Include the final disposition of each complaint in the original or follow-up report (e.g., founded, unfounded, exceptionally cleared).**
6.5	Establish a policy to request assistance from other law enforcement agencies in sensitive or extraordinary cases or where a conflict of interest may exist.

[sss]The University Police Department has engaged the Pennsylvania State Police Chiefs Association to conduct an external review. For a more expansive review, the University should utilize an organization that has extensive experience in reviewing and accrediting college and university police departments, such as the Commission on the Accreditation on Law Enforcement ("CALEA").

[hhh]Notifications regarding students, faculty and staff who are confirmed suspects of allegations of criminal conduct are made to the OHR as a standard practice, but there is no departmental policy to confirm or guide the practice.

[iii]The University Police Department has established an automatic system to assign timely incident numbers and eliminated the "Administrative" category of offenses.

6.6	Implement consistent law enforcement standards and practices, through regular training at all Penn State campuses.
6.7	Review and update, with the GC, the current policies pertaining to the investigation of various categories of offenses involving Penn State employees.
6.8	Provide specialized training to investigators in the area of sexual abuse of children.

7.0 – Management of University Programs for Children and Access to University Facilities

Over the years, University policies regarding programs for non-student minors were inconsistently implemented throughout the University. Enforcement of those policies was uneven and uncoordinated and, as a result, Sandusky was allowed to conduct football camps at University Park and three Commonwealth campuses without any direct oversight by University officials. The University's background check process also was arbitrarily applied and on-site supervision at camps was sometimes provided by staff members who had not been fully vetted.

University administrators and the Board of Trustees should consider taking the following actions to create a safer environment for children involved in University programs, activities, and who use its facilities. University administrators must provide better oversight of staff members responsible for youth programs and increase abuse awareness through training of responsible adults.

7.1	Increase the physical security and access procedures in areas frequented by children or used in camps and programs for children.*
7.2	Require and provide abuse awareness and mandatory reporter training to all University leaders, including faculty, coaches and other staff, volunteers and interns.[iii]

[iii] On June 6, 2012, the University implemented AD72, *Reporting Suspected Child Abuse*, requiring all University personnel to report incidents or allegations of suspected abuse or be subject to disciplinary action, up to, and including, dismissal.

7.2.1	**Consolidate the responsibility for abuse awareness training and mandatory reporting in the OHR and coordinate an abuse awareness training program throughout the University's campuses.***
7.3	Consolidate oversight of the University's policies and procedures for programs involving non-student minors in the OHR and appoint a coordinator to oversee the implementation of those policies. The Coordinator should have sufficient authority to:
7.3.1	**Develop and maintain an inventory of all University programs for children.***
7.3.2	**Update, revise or create policies for unaccompanied children at University facilities, housing and University programs.***
7.3.3	**Enforce all policies relating to non-student minors involved in University programs at all Penn State campuses.**
7.3.4	**Assist the University's camp and youth program administrators in ensuring that staff and volunteers are appropriately supervised.**
7.3.5	**Provide information to parents of non-student minors involved in University programs regarding the University's safety protocols and reporting mechanisms for suspicious or improper activity.**

8.0 – Monitoring Change and Measuring Improvement

The Pennsylvania State University has taken several significant steps to improve its governance and more adequately protect the hundreds of thousands of children who use its facilities and participate in its programs every year. However, restoring confidence in the University's leadership and the Board will require greater effort over a prolonged period of time. As the institution moves forward, it is incumbent upon its leaders to monitor those changes, make adjustments as necessary and communicate their progress to the Penn State community as well as to the public.

University administrators and the Board of Trustees should consider taking the following actions to ensure that their initiatives to prevent and respond to incidents of sexual abuse of children and to improve University governance are duly enforced, monitored, measured and modified as needed:

8.1	Designate an internal monitor or coordinator to oversee the implementation of recommendations initiated, or adopted, by the Board and/or the University administration. The monitor/coordinator would:
	8.1.1 Chair a panel of the individuals responsible for developing and implementing these and other approved recommendations and for establishing realistic milestones.
	8.1.2 Select a practical and diverse number of members of the University community and solicit input from the larger University community, to provide insights and recommendations to the monitor. (See Recommendation 1.0)
	8.1.3 Report actions and accomplishments regularly to the Board of Trustees and University administration.*
8.2	Provide the monitor, or the Chief Compliance Officer, with the authority and resources to hire appropriate external evaluators/compliance auditors to certify that milestones for implementation of these recommendations are being met.
8.3	Conduct a review of the University's progress 12 months from the acceptance of this report using internal and external examiners and provide the findings to University administrators, the Board and the public.
8.4	Conduct a second review of the University's progress 24 months from the acceptance of this report using internal and external examiners and provide the findings to University administrators, the Board and the public.

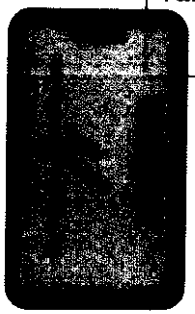
ENDNOTES

[1] Presentment of Statewide Grand Jury, November 4, 2011.
[2] http://034fccc.netsolhost.com/WordPress/.
[3] Sally Jenkins, "Joe Paterno's Last Interview," *The Washington Post* (1-14-12).
[4] [-] Interview (7-6-12).
[5] http://www.budget.psu.edu/FactBook/StudentDynamic/UGGREnrollSummary.aspx?YearCode=2011Enr&FBPlusInd=N.
[6] http://www.budget.psu.edu/factbook/StateAppropriation/TtlOperBudget1112.asp.
[7] http://www.psu.edu/Trustees/pdf/march2012agendafppappendix2.12.pdf; http://www.controller.psu.edu/Divisions/ControllersOffice/docs/FinStmts/2011FinStmts.pdf.
[8] Penn State is accredited by The Middle States Commission on Higher Education, which contacted the University about concerns relating to the Sandusky investigation on November 11, 2011. The University responded in its *Informational Report to the Middle States Commission on Higher Education* on December 21, 2011.
[9] http://www.research.psu.edu/about/documents/strategicplan.pdf.
[10] Standing Orders of the Penn State Board of Trustees, Order IX(1)(b)(1).
[11] Standing Orders of the Penn State Board of Trustees, Order IX(1)(b)(2).
[12] http://www.psu.edu/ur/about/administration.html.
[13] http://president.psu.edu/.
[14] http://www.psu.edu/provost/provost.htm.
[15] http://president.psu/edu/biography.
[16] http://www.psu.edu/provost/provost.htm.
[17] [-] Interview (6-12-12).
[18] [-] Interview (6-12-12).
[19] [-] Interview (6-12-12).
[20] Board of Trustees Minutes of Meeting at 7 (1-22-10).
[21] http://www.psu.edu/ur/about/administration.html.
[22] Although not further described here, the Office of Research Programs manages the University's Conflict of Interest policies.
[23] See Chapter 8, *Federal and State Child Sexual Abuse Reporting Requirements.*
[24] http://www.police.psu.edu/aboutus/.
[25] http://www.police.psu.edu/cleryact/documents/116593_PolicySafety_Up.pdf.
[26] [-] Interview (4-9-12); [-] Interview (2-29-12).
[27] http://www.psu.edu/ur/archives/intercom_1998/May21/partings.html.
[28] *See* Organizational Chart for the Pennsylvania State University Administrative Organization, http://www.psu.edu/provost/assets/President_organizational_chart%2008.pdf.
[29] [-] Interview (2-29-12); [-] Interview (2-1-12).
[30] *See* Organizational Chart for the Pennsylvania State University Administrative Organization, http://www.psu.edu/provost/assets/President_organizational_chart%2008.pdf. [-] Interview (3-1-12).
[31] Office of Human Resources website, http://ohr.psu.edu/; [-] Interview (1-4-12).
[32] *See* Organizational Chart for the Pennsylvania State University Administrative Organization, http://www.psu.edu/provost/assets/President_organizational_chart%2008.pdf.
[33] [-] Interview (12-8-11).
[34] [-] Interview (12-15-11).
[35] [-] Interview (4-11-12).

ESTATE OF JOSEPH PATERNO v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.
COURT OF COMMON PLEAS OF CENTRE COUNTY NO. 2013-2082

CATEGORIES OF DOCUMENTS IN THE FILES OF FREEH, SPORKIN & SULLIVAN/FGIS/PEPPER HAMILTON FOR WHICH PEPPER/PENN STATE ASSERT A PRIVILEGE

		Attorney-Client Privilege	**Attorney Work Product**	**Privilege(s) Waived?**
1.	Documents containing internal discussions among members of the "Freeh Team" (Freeh Sporkin & Sullivan, Freeh Group International Solutions, Pepper Hamilton) re: interim recommendations provided to PSU in February 2012		X	
2a.	Drafts of the Freeh Report or individual chapters thereof		X	
2b.	Documents containing internal discussions among members of the Freeh Team re: draft chapters, possible findings, possible recommendations		X	
3a.	Drafts of chapters/sections that were not included in the final Freeh Report		X	
3b.	Documents containing internal discussions among members of the Freeh Team re: (3a)		X	
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		X	
5.	Legal research memoranda, including discussion or analysis in preparation for drafting		X	
6.	Documents containing internal discussions among members of the Freeh Team re: the plan for the investigation / the progress thereof		X	
7a.	Memos of interviews cited in the Freeh Report – **then-current PSU employees, trustees, emeritus trustees**	X	X	



		Attorney-Client Privilege	Attorney Work Product	Privilege(s) Waived?
7b.	Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: (7a)		X	
8a.	Memos of interviews cited in the Freeh Report – **all others**		X	
8b.	Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: (8a)		X	
9a.	Memos of interviews **not** cited in the Freeh Report – **then-current PSU employees, trustees, emeritus trustees**	X	X	
9b.	Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: (9a)		X	
10a.	Memos of interviews **not** cited in the Freeh Report – **all others**		X	
10b.	Drafts, documents containing internal discussions among members of the Freeh Team, comments, summaries re: (10a)		X	
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	X		
11b.	Documents containing internal discussions among members of the Freeh Team re: (11a)		X	
12a.	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	X		

		Attorney-Client Privilege	Attorney Work Product	Privilege(s) Waived?
12b.	Documents containing internal discussions among members of the Freeh Team re: (12a)		X	
13.	Documents containing internal discussions among members of the Freeh Team re: communications with third parties (*e.g.*, OAG, NCAA, Big Ten)		X	
14.	Source documents that are independently privileged (*e.g.*, communications with C. Baldwin, F. Guadagnino, McQuaide Blasko lawyers that are privileged regardless of whether the Freeh Team was providing legal advice to PSU in an attorney-client relationship)	X	X	

ESTATE OF JOSEPH PATERNO v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.
COURT OF COMMON PLEAS OF CENTRE COUNTY NO. 2013-2082

CATEGORIES OF DOCUMENTS IN THE FILES OF FREEH, SPORKIN & SULLIVAN/FGIS/PEPPER HAMILTON FOR WHICH PEPPER/PENN STATE EITHER DO NOT CLAIM A PRIVILEGE OR AGREE THAT THE PRIVILEGE HAS BEEN WAIVED

15. Interim recommendations the Freeh Team provided to Penn State in February 2012

16. The Final Freeh Report

17. As noted in the Freeh Report, Penn State waived the otherwise applicable attorney-client privilege, and authorized the Freeh Firm to waive the protections of the attorney work product doctrine, so that the Report could be released to the public. The endnotes to the Freeh Report cite, *inter alia,* notes of certain interviews, albeit without reference to the name of the person interviewed. Penn State has in its possession redacted versions of those notes, which contain the name/title of the interviewee and the content referenced or quoted in the Report. Because, as discussed *supra,* Penn State waived privilege with respect to the Freeh Report itself, and because those particular passages from those interview notes could reasonably be construed as being integral to the Report itself, Penn State and Pepper Hamilton are prepared to waive privilege with respect to those redacted notes, and will produce them. In so doing, neither Penn State nor Pepper Hamilton intends to waive the protections of the attorney work product doctrine or the attorney-client privilege (as applicable) as to the remaining content of those interview notes or as to any other privileged or protected materials.

18. Press release/prepared remarks given by L. Freeh in announcing the publication of the Freeh Report

19. Lists of persons interviewed by the Freeh Team

20. Communications between members of the Freeh Team and third parties (*e.g.*, OAG, NCAA, Big Ten)

21. Documents containing internal discussions among members of the Freeh Team re: logistics/scheduling/other non-substantive communications

22. Communications between members of the Freeh Team and members of Penn State's BOT/SITF that are not within the scope of 42 Pa. C.S. § 5928

23. Communications between members of the Freeh Team and other attorneys for PSU that are not within the scope of 42 Pa. C.S. § 5928

24. Source documents that are not "independently privileged" (as described in category 14 *supra*)

25. Public documents (*e.g.*, articles, material pulled from internet)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1 M.D. 2013

JAKE CORMAN, in his official capacity as Senator from the 34th Senatorial District of Pennsylvania and Chair of the Senate Committee on Appropriations; and ROBERT M. McCORD, in his official capacity as Treasurer of the Commonwealth of Pennsylvania,

Plaintiffs,

v.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant.

v.

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

_____X

** REVISED **

Thursday, November 20, 2014

9:01 a.m.

Deposition of Donald Remy

Job No: 86979

Reported by: Randi Garcia

Thursday, November 20, 2014

9:01 a.m.

Deposition of DONALD REMY, ESQUIRE taken by Plaintiff, at the offices of Latham & Watkins, LLP, 555 Eleventh Street, NW, Washington, D.C., before Randi J. Garcia, Registered Professional Reporter, and Notary Public in and for the District of Columbia, beginning at approximately 9:01 a.m., when were present on behalf of the respective parties:

A P P E A R A N C E S:
ATTORNEYS FOR PLAINTIFF.
CONRAD O'BRIEN
BY: MATTHEW HAVERSTICK, ESQ
MARK SEIBERLING, ESQ
ANDREW KABNICK GARDEN, ESQ
1500 Market Street
Philadelphia, PA 19102

ATTORNEYS FOR NCAA.
LATHAM & WATKINS
BY: EVERETT JOHNSON, ESQ
BRIAN KOWALSKI, ESQ
SARAH GRAGERT, ESQ
555 Eleventh Street, N.W.
Washington, D.C. 20004

and -
SCOTT BEARBY
ASSOCIATE GENERAL COUNSEL NCAA
P.O. BOX 6222
Indianapolis, IN 46206

and -
KILLIAN & GEPHART
BY: THOMAS SCOTT, ESQ
218 Pine Street
Harrisburg, PA 17108

///

(Continued)

ATTORNEYS FOR PENN STATE.

REED SMITH

BY: DONNA DOBLICK, ESQ

225 Fifth Avenue

Pittsburgh, PA 15222

Also Present:

Kevin M. McKenna, Esquire

I N D E X

can provide you data and information to understand how we traditionally examine those types of issues." 12:23:20 12:23:22 12:23:25

Q Freeh Group, as best as you recall, solicited from you your assistance -- your, NCAA's assistance -- in educating Freeh Group on NCAA bylaws issues? 12:23:29 12:23:32 12:23:34 12:23:39

A I don't recall whose idea it was. I don't recall if it was our idea, if it was their idea, if it was part of our original thought process about how we would engage. 12:23:42 12:23:44 12:23:46 12:23:49

But the Freeh Group said, "Okay. We can receive that information that might be helpful to us." 12:23:52 12:23:55 12:23:57

Q Was the idea of NCAA participation in witness interviews -- shadowing, as you call it -- rejected? 12:23:59 12:24:04 12:24:07

A It did not happen. 12:24:09

Q Did any of the elements that you have described as typical, in your internal investigative process in which NCAA participates, get folded into the interaction between Freeh Group and NCAA? 12:24:13 12:24:17 12:24:21 12:24:23 12:24:27

A Status updates. 12:24:31

Q We'll talk about those. 12:24:32

Sharing of documents? 12:24:34

A We gave them educational information. 12:24:38

They never shared any documents with us, that I 12:24:40

recall of. 12:24:42

Q Did they ever give you the substance of 12:24:43

any documents, even if they didn't show you the 12:24:44

documents themselves? 12:24:47

A Not that I recall. 12:24:48

Q Did they ever give you, to your 12:24:50

recollection, summaries of interviews? 12:24:53

A No. No. 12:24:56

Q No interview notes? 12:24:58

A No. 12:24:59

Q How about during status updates? Any 12:25:04

type of preliminary results? 12:25:09

A No. 12:25:12

Q Were the discussions, in what we'll soon 12:25:13

talk about are the weekly phone calls, about 12:25:18

Freeh Group's assessment of potential NCAA 12:25:25

violations? 12:25:29

A Not that I recall, no. 12:25:29

Q Assessments of Freeh Group's opinion on 12:25:32

whether there was a lack of institutional 12:25:34

control at Penn State? 12:25:35

A No. I mean, let me do it this way. 12:25:37

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

- - -

JAKE CORMAN, in his official capacity as Senator from the 34th Senatorial District of Pennsylvania and Chair of the Senate Committee on Appropriations; and ROBERT M. McCORD, in his official capacity as Treasurer of the Commonwealth of Pennsylvania	:	NO. 1 M.D. 2013
Plaintiffs,	:	
vs.	:	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	:	
Defendant,	:	
vs.	:	
PENNSYLVANIA STATE UNIVERSITY,	:	
Defendant.	:	

- - -

December 17, 2014

- - -

Oral deposition of OMAR MCNEILL, taken at the offices of Proctor Heyman LLP, 300 Delaware Avenue, Wilmington, Delaware 19103, beginning at 1:00 p.m., before LINDA ROSSI RIOS, a Federally Approved RPR, CCR and Notary Public.

- - -

Job No. 88377

A P P E A R A N C E S :

For Plaintiff

CONRAD O'BRIEN
BY: MATTHEW HAVERSTICK, ESQUIRE
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Philadelphia, PA 19102

For Defendant, NCAA

LATHAM & WATKINS
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For Defendant, Penn State

REED SMITH
BY: DONNA DOBLICK, ESQUIRE
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For the Witness:

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Philadelphia, PA 19103

A L S O P R E S E N T :

KEVIN M. McKENNA, ESQUIRE

JORDAN MUMMERT, Videographer

- - -

discussion of the Big Ten. And that's the extent of my recollection. 13:48:07 13:48:12

Q. What was the attorney-client privilege issue that you discussed? What was the concern? 13:48:14 13:48:16 13:48:19

A. That we, by sharing information with the NCAA, would violate the attorney-client privilege that was owned by our client. 13:48:20 13:48:23 13:48:28 13:48:30

Q. Was there a decision reached on whether information could be shared with the NCAA? 13:48:30 13:48:32 13:48:34

A. During that meeting, I don't think that there were any decisions made. I think that -- I do recall that we left the meeting with sort of a follow up for us to sort of consider what we could do, if anything. I do recall saying we have to go back to our client and we might have set a firm date for us to get back, but I don't recall that. 13:48:35 13:48:39 13:48:43 13:48:49 13:48:53 13:48:56 13:48:59 13:49:02 13:49:05

Q. Ultimately was there a decision about whether you could communicate information to NCAA and Big Ten? 13:49:05 13:49:07 13:49:10

A. Yes. 13:49:12

Q. And what was the decision? 13:49:12

A. The decision was that at the direction of the task force and with permission of the task force, could provide general updates to the NCAA, but we couldn't go into anything that, again, would in any way undermine the privilege. We couldn't share information with them that would in any way be deemed attorney work product. And we agreed that we would have regular calls, and I think that was the sum and substance. 13:49:14 13:49:18 13:49:21 13:49:24 13:49:26 13:49:29 13:49:32 13:49:34 13:49:42 13:49:47

Q. Tell me about the independence issue discussed, what was the conversation about on that topic? 13:49:49 13:49:52 13:49:55

A. I don't remember the details. I know generally it was, as I mentioned earlier, Freeh, Sporkin & Sullivan was brought in to do an independent investigation and we would not do anything that would in any way suggest otherwise. 13:49:56 13:49:59 13:50:02 13:50:05 13:50:08 13:50:13

Q. Now, at this point was one of the charges of Freeh, Sporkin & Sullivan to review whether Penn State had violated any NCAA bylaws? 13:50:13 13:50:16 13:50:19 13:50:23

A. If you're talking about, when 13:50:24

recall about the nature of those communications? 16:03:36 16:03:38

A. Certainly to anyone that was an employee of the university we provided the typical Upjohn warnings, if you will, for those who are familiar with those, essentially letting them know that the investigation was being conducted at the request of the university under the privilege that the university had the right to maintain or waive at any time and, therefore, they were to act accordingly. 16:03:38 16:03:40 16:03:50 16:03:51 16:03:52 16:03:55 16:03:57 16:03:59 16:04:02 16:04:06

Q. To the best of your knowledge, did anybody from the university ever authorize the Freeh firm or the Freeh Group to waive the attorney-client privilege? 16:04:06 16:04:08 16:04:10 16:04:13

A. They certainly permitted us to make the report public. But beyond that, no. 16:04:15 16:04:20

Q. To the best of your knowledge, did the Freeh firm ever waive the protections of the attorney work product doctrine? 16:04:22 16:04:28 16:04:31

A. No. 16:04:33

MS. DOBLICK: I have no further questions. 16:04:49 16:04:51