



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; and)	
	)	Civil Division
WILLIAM KENNEY and JOSEPH V. ("JAY"))	
PATERNO, former football coaches at	)	Docket No. 2013-2082
Pennsylvania State University,)	
Plaintiffs,	)	Discovery Motion
	)	Filed on Behalf of the Plaintiffs
v.)	
)	
NATIONAL COLLEGIATE ATHLETIC	)	Counsel of Record:
ASSOCIATION ("NCAA");	)	Thomas J. Weber
	)	GOLDBERG KATZMAN, P.C.
MARK EMMERT, individually and as	)	4250 Crums Mill Road, Suite 301
President of the NCAA; and	)	P.O. Box 6991
	)	Harrisburg, PA 17112
EDWARD RAY, individually and as former	)	Telephone: (717) 234-4161
Chairman of the Executive Committee of the	)	Email: tjw@goldbergkatzman.com
NCAA,)	
	)	Wick Sollers (admitted <i>pro hac vice</i>)
Defendants.	)	L. Joseph Loveland (admitted <i>pro hac vice</i>)
)	Patricia L. Maher (admitted <i>pro hac vice</i>)
)	Ashley C. Parrish (admitted <i>pro hac vice</i>)
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CENTRE COUNTY, PA

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PATERNO, former football coaches at)	Docket No. 2013-2082
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Plaintiffs,)	
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v.)	Counsel of Record:
)	Thomas J. Weber
NATIONAL COLLEGIATE ATHLETIC)	GOLDBERG KATZMAN, P.C.
ASSOCIATION ("NCAA");)	4250 Crums Mill Road, Suite 301
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EDWARD RAY, individually and as former)	
Chairman of the Executive Committee of the)	Wick Sollers (admitted <i>pro hac vice</i>)
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)	

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO OVERRULE DEFENDANT
NCAA'S OBJECTIONS TO ISSUANCE OF DOCUMENT SUBPOENA TO THIRD
PARTY PENNSYLVANIA STATE UNIVERSITY**

Plaintiffs hereby submit the following reply in support of their motion to overrule the NCAA's objections to Plaintiffs' proposed subpoena to third-party The Pennsylvania State University ("Penn State").

Plaintiffs' subpoena is not untimely. The NCAA's timeliness objection to Plaintiffs' proposed subpoena to Penn State is based on a May 16, 2016 Order that by its terms was applicable for 45 days, and has been superseded by the Second Revised Scheduling Order which does not include the restrictions the NCAA urges. Opp. at 2. The NCAA contends the Second Revised Scheduling Order, notwithstanding its clear language, does not mean what it says, and instead "the parties' understanding" was that no discovery would be permitted outside of the topics permitted in the May 16 Order. But the parties themselves submitted the Second Revised Scheduling Order to the Court, and the purported "understanding" is not memorialized in that Order or anywhere else. See Ex. K,¹ Joint Motion for Entry of Second Revised Scheduling Order.

To distract from its baseless argument, the NCAA contends that Plaintiffs' proposed subpoena reflects an effort by Plaintiffs to pursue discovery that it failed to obtain previously. This clearly is not the case. Plaintiffs served the notice of intent to issue the subpoena to Penn State for documents related to the repeal of the Consent Decree because of the NCAA's recalcitrance in producing documents responsive to the Court's September 19, 2016 Order. See Ex. H, Notice of Intent to Serve Subpoena on Penn State.

The NCAA's production was deficient. In an effort to defend the clear deficiencies in its production, the NCAA argues that the Court's September 19 order "*narrowed Plaintiffs' original request* to exclude lawyer-to-lawyer communications." Opp. at 4 (emphasis added). But that is demonstrably false. The Order provides as follows:

- 2) Plaintiffs' Motion to Compel Production of Documents Related to Repeal of Consent Decree by Defendant National Collegiate Athletic Association is GRANTED in part.

¹ Exhibits A, E, F, G, H, K, N, and O, which are cited in this brief, were filed with Plaintiff's January 11, 2017 Motion.

- a. The NCAA shall produce the following:
 - i. All communications regarding the repeal of the Consent Decree made between NCAA's board members and administrations; and
 - ii. All communications regarding the repeal of the Consent Decree made between the NCAA and the Pennsylvania State University.
- b. The NCAA shall provide a privilege log delineating any documents which are withheld on grounds of privilege.

Not only is there no reference in the order to lawyer-to-lawyer communications, at the hearing on Plaintiffs' motion the Court expressed skepticism as to why the NCAA's lawyers would *not* be covered by the request, noting "there is a process when one orders discovery for that to be asserted," i.e., by asserting privilege where applicable. *See* Ex. E, Aug. 19, 2016 Hearing Tr. at 104. Moreover, the Order reflects the Court's position on asserting privilege. That is, a log should be created delineating which documents are withheld on grounds of privilege. But the NCAA is not just ignoring this part of the Order. It appears to be going a step further by reading into the Order restrictions that are not there, *see* Opp. at 4 ("The September 19 order is plain and clear; only communications between the NCAA and its board members or Penn State need be produced, not communications among their outside litigation counsel."), and withholding communications with other parties' counsel that are not privileged. This is an interpretation that is directly at odds with a position that the NCAA has taken throughout this case.

Plaintiffs' request for documents related to the repeal of the Consent Decree applies to the NCAA's counsel. The NCAA's position on its response to the September 19 Order is not supported by the terms of that Order, and it is contrary to the position the NCAA advocated with respect to its document requests directed to Plaintiffs. The NCAA contends that Plaintiffs were

amenable to interpreting the NCAA's requests for documents related to the *Critique* of the Freeh Report as applying to Plaintiffs' counsel. In fact, the record is clear that the NCAA pressed this position *without agreement* by Plaintiffs through the summer and fall of 2015. Ex. P, July 6, 2015 Email from S. Gragert to Plaintiffs' counsel ("We believe materials related to those efforts would be responsive to the document requests served on the Estate, which seek materials held by the Estate and its agents (including lawyers) as such, separate requests direct to King & Spalding should not be necessary."); Ex. Q, Oct. 29, 2016 Letter from B. Kowalski to P. Maher (memorializing the NCAA's understanding that "[t]he Estate will not produce documents or communications responsive to the NCAA's requests concerning the *Critique*" based on privilege).

Ultimately, the NCAA filed a motion to compel Plaintiffs to produce documents underlying the *Critique* on December 30, 2015. In support of its position, the NCAA argued that its requests, which defined the Estate to include its agents and attorneys, encompassed documents in possession of Plaintiffs' counsel. *See* Ex. O. at 7, n.6. The NCAA's motion to compel would have been unnecessary if the parties had reached agreement months earlier as the NCAA's counsel now asserts. *See* Gragert Decl. at 2, ¶3.

When the Court granted the NCAA's motion to compel production of *Critique* documents without specifying whether it encompassed documents in the possession of Plaintiffs' counsel, the NCAA continued to insist that the order required such production because the NCAA had included Plaintiffs' agents and attorneys in the definitions applicable to its requests. Ex. R, Apr. 11, 2016 Email from B. Kowalski to P. Maher (referring to multiple requests from the NCAA's counsel that Plaintiffs' counsel confirm "whether [King & Spalding] will produce

any and all documents ‘related to the Critique and its Independent Analyses,’ including any and all such documents maintained by King & Spalding.”).

Based on the foregoing record, in the words of the NCAA’s counsel, “what we have here in our view is a goose and gander situation.” Ex. S, Mar. 11, 2016 Hearing Tr. at 4. The NCAA has consistently taken the position that *its* document requests to Plaintiffs for documents underlying the *Critique* included any documents held by King & Spalding. The NCAA repeatedly asserted its entitlement to documents in King & Spalding’s possession based on a document request that did not expressly refer to the parties’ counsel, but included “attorneys” in the definition of the Estate. *See* Ex. R, The National Collegiate Athletic Association’s First Request for Production of Documents to George Scott Paterno, as Duly Appointed Representative of the Estate and Family of Joseph Paterno. The March 29, 2016 Order granting the NCAA’s motion did not specifically state that it encompassed documents of Plaintiffs’ counsel. Yet, Plaintiffs ultimately produced a large volume of such documents to the NCAA. *See* Ex. N, Young Decl.

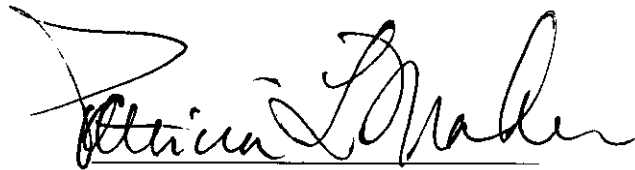
Plaintiffs’ request to the NCAA for documents related to the repeal of the Consent Decree similarly included the NCAA’s agents and attorneys in the definitions, rather than the specific request at issue. *See* Ex. F, Plaintiffs’ Third Request for Production of Documents to the NCAA. And the Order granting Plaintiffs’ motion to compel made no reference to counsel for the responding party. Just as Plaintiffs complied with the NCAA’s requests by producing documents in possession of its counsel, the NCAA is now in the position of the gander and cannot dodge its obligation to comply fully with the Court’s order by arguing that Plaintiffs were amenable to its own preferred interpretation.

The NCAA argues that there is a difference because the documents underlying the *Critique* do not relate to King & Spalding's actions in this litigation. But the documents relating the repeal of the Consent Decree do not relate to the NCAA's counsel's actions in this litigation either. The repeal of the Consent Decree was effected as part of the resolution the *Corman* litigation two years ago. *See* Ex. A.

* * *

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' January 9, 2017 Motion, overrule the NCAA's objections to service of a document subpoena to Penn State, and enter an Order of the form submitted with Plaintiffs' January 9, 2017 Motion, allowing Penn State 20 days from the date of service of the subpoena to comply with the document subpoena.

Dated: January 17, 2017

A handwritten signature in black ink, appearing to read "Thomas J. Weber", written over a horizontal line.

Thomas J. Weber
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Wick Sollers
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Ashley C. Parrish
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO OVERRULE DEFENDANT NCAA'S OBJECTIONS TO ISSUANCE OF DOCUMENT SUBPOENA TO THIRD PARTY PENNSYLVANIA STATE UNIVERSITY** this 17th day of January, 2017 by first class mail and email to the following:

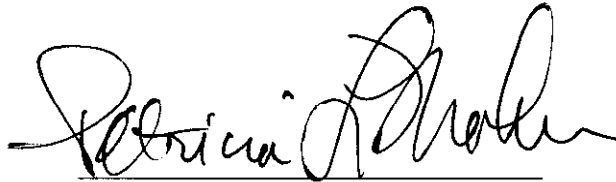
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A handwritten signature in black ink, appearing to read "Patricia L. Maher". The signature is fluid and cursive, with the first name "Patricia" being more prominent than the last name "Maher".

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Counsel for Plaintiffs

Exhibit P

From: Sarah.Gragert@lw.com
Sent: Monday, July 06, 2015 3:10 PM
To: Maher, Trish; Doran, Samuel
Cc: Brian.Kowalski@lw.com; Drew.Wisniewski@lw.com
Subject: Paterno v. NCAA

Trish,

I'm writing to follow up on our call from a few weeks ago. As we noted, it would seem that King & Spalding likely has non-privileged documents arising from its work on behalf of the Paterno family related to interactions with the Freeh Firm, public critiques of the Freeh Report, and possibly also communications with the Pennsylvania Attorney General's Office. These efforts appear to be independent of the firm's handling of this litigation, the latter of which would, of course, be privileged. We believe materials related to those efforts would be responsive to the document requests served on the Estate, which seek materials held by the Estate and its agents (including lawyers); as such, separate requests directed to King & Spalding should not be necessary.

For example, it would seem that King & Spalding should have the following types of non-privileged information:

- Request number 2 seeks "[a]ll Documents Concerning the Freeh Report," and Requests numbers 4-7 requests materials pertaining to King & Spalding's critique of the Freeh Report as well as the work of Fred Berlin, Dick Thornburgh, and Jim Clemente in critiquing the Freeh Report (collectively, the "critiques"). These requests would encompass drafts, working papers, and communications concerning the critiques, criticisms or commentary about the critiques, documents and testimony reviewed in connection with the King & Spalding's February 2013 critique (see paragraph 3 of page (ii) of that critique), engagement letters with King & Spalding, Berlin, Thornburgh, and Clemente, and compensation records for preparing the critiques.
- We have seen documents indicating that King & Spalding communicated with the Freeh firm on behalf of the Paterno family. Those communications would be responsive to Request number 3, which seeks communications with, and documents concerning, Louis Freeh and those working with him.
- A variety of requests ask for materials containing information related to the underlying Sandusky scandal (e.g., numbers 8-10). Page (ii) of the February 2013 Critique references "interviews, including of Coach Paterno before his death" – interview notes, memoranda, and recordings of those interviews would be responsive to these discovery requests.

Could you please advise if the Estate intends to search for and produce these materials in response to the NCAA's document requests sent to the Estate?

Regards,
Sarah

Sarah M. Gragert

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Exhibit Q

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LATHAM & WATKINS LLP

October 29, 2015

VIA EMAIL

Patricia L. Maher
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Washington, DC 20006

FIRM / AFFILIATE OFFICES

Abu Dhabi	Milan
Barcelona	Moscow
Beijing	Munich
Boston	New Jersey
Brussels	New York
Century City	Orange County
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Dubai	Riyadh
Düsseldorf	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.

Re: Paterno, et al. v. NCAA, et al., Civ.
No. 2013-2082

Dear Trish:

We write regarding Plaintiffs' position with regard to the NCAA's discovery requests related to the *Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno* (the "*Critique*") and its constituent independent analyses. We have had a number of discussions on this topic, including, among others, telephonic meet and confer discussions on July 10, 2015 and September 18, 2015. The purpose of this letter is to memorialize our understanding of Plaintiffs' position with regard to this issue.

Specifically, we have discussed the NCAA's discovery requests (both documents and depositions), and anticipated discovery, from: (1) Fred Berlin and James Clemente for materials related to their independent analyses of the Freeh Report, which were part of the *Critique*; (2) K&L Gates regarding Dick Thornburgh's analysis of the Freeh Report, which is also part of the *Critique*; and (3) the Estate concerning the *Critique* and its constituent independent analyses, including a deposition of the *Critique's* author. Each item is addressed below.

As we understand it, Plaintiffs' position with regard to discovery of Fred Berlin and James Clemente is as follows:

- Berlin and Clemente are now consulting experts for Plaintiffs.
- As such, Berlin and Clemente will provide no discovery to the NCAA concerning their independent analyses, on the basis that Pennsylvania Rule of Civil Procedure 4003.5 does not permit such discovery.
- If Plaintiffs decide to designate Berlin and Clemente as testifying experts, the NCAA would be allowed only that discovery pursuant to Rule 4003.5. (You have subsequently clarified that such discovery will not include expert depositions.)

With regard to discovery of K&L Gates, we understand Plaintiffs' position to be as follows:

- Mr. Thornburgh is not a consulting expert and you have not designated him as a testifying expert.
- Plaintiffs will object to discovery from Mr. Thornburgh to the extent it calls for materials that you believe are protected by the attorney-client privilege or work product doctrine.
- Plaintiffs will not object to a deposition of Mr. Thornburgh.
- If Plaintiffs later decide to designate Mr. Thornburgh as a testifying expert, you will allow only the discovery available under Rule 4003.5.

After review of the recent production of 65 documents from K&L Gates, it appears that the Estate's assertion of privilege will preclude production of the underlying work papers, communications, drafts, internal documents related to the public report, and other materials. K&L Gates informed us that the Estate instructed them to withhold the "majority" of responsive documents based on privilege.

Regarding the NCAA's requests concerning the *Critique* itself, Plaintiffs take the following position:

- You understood that the NCAA's document requests to the Estate include materials that may be in the possession of the Estate's attorneys or agents, including King & Spalding LLP. You also noted that the Estate recently produced certain communications on behalf of King & Spalding, which primarily included communications between Wick Sollers and third parties.¹
- The authors of the *Critique* (attorneys at King & Spalding) are not, and will not be, experts in the case.
- The Estate will not produce documents or communications responsive to the NCAA's requests concerning the *Critique* on the basis that these materials are protected under the attorney-client privilege or work product doctrine, with the exception of the materials the Estate produced on August 11, 2015 involving communications with third parties.
- We noted that the *Critique* publicly discloses certain materials, such as notes from Wick Sollers' interview of Joe Paterno and communications

¹ The majority of documents in the Estate's August 11, 2015 production were communications between King & Spalding and Penn State, unrelated to the *Critique*, with the exception of the Berlin and Clemente engagement letters.

with counsel for Messrs. Curley and Schultz. The Estate will confirm whether such materials exist. However, you indicated that, even if these documents exist, the Estate considers these documents to be protected from discovery by the attorney-client privilege and/or work product doctrine.

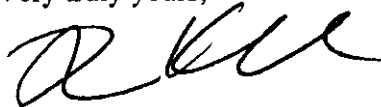
We have expressed our disagreement with Plaintiffs' privilege and work product assertions described above and their interpretation of Pennsylvania Rule 4003.5. Among other concerns, we have noted the apparent inconsistency between Plaintiffs' privilege assertions here and their posture towards discovery of materials related to the Freeh investigation and final report. Nonetheless, Plaintiffs have indicated their intention to stand by their privilege assertions.

* * *

Finally, as you know, the Pennsylvania Rules of Civil Procedure required that Plaintiffs produce a privilege log of any withheld responsive materials thirty days after service of the document requests, which would have been in June 2014. *See* Pa.R.C.P. 4009.12(b)(2). The NCAA has requested a log of these documents on numerous occasions, and you agreed to produce one in July of this year. To date, Plaintiffs have not provided any log. Please let us know when we can expect to receive a privilege and redaction log.

We appreciate your time and cooperation in attempting to work through these issues. Please promptly let us know if we have misunderstood or misstated any of the Plaintiffs' positions.

Very truly yours,



Brian E. Kowalski
for LATHAM & WATKINS LLP

Exhibit R

From: Brian.Kowalski@lw.com
Sent: Monday, April 11, 2016 5:34 PM
To: Maher, Trish
Cc: Sollers, Wick; Loveland, Joe; Crawford, Drew; Young, Barrett;
EVERETT.JOHNSON@LW.com; Sarah.Gragert@lw.com; tscott@killiangephart.com
Subject: Paterno v. NCAA

Trish –

I wanted to follow up on our discussion of Friday, April 8, 2016 about your production of documents covered by Judge Leete's March 29, 2016 order, which held that "any and all privilege Plaintiffs held in the documents related to the *Critique* and its Independent Analyses have been waived." Order at 8. We have asked you to confirm on multiple occasions whether you will produce any and all documents "related to the *Critique* and its Independent Analyses," including any and all such documents maintained by King & Spalding. To date, you have not confirmed that you will do so, and instead your responses to our requests for confirmation have been vague and equivocal.

As I explained on Friday, given the impending deadline for fact discovery, we hope you understand that it is critical for us to receive clear and unequivocal confirmation that you will abide by the March 29 Order and produce any and all documents related to the *Critique* and its Independent Analyses, including any and all documents maintained by King & Spalding, and that you will do so promptly. In the absence of such clarity, we will have no choice but to seek a conference call with Judge Leete, on an emergency basis, to resolve the issue this week.

Please let me know if you would like to discuss.

Regards,

Brian

Brian E. Kowalski

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Latham & Watkins LLP

Exhibit S

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

ESTATE OF JOSEPH : NO. 2013-2082
PATERNO; WILLIAM KENNY AND
JOSEPH ("JAY") PATERNO,
FORMER FOOTBALL COACHES AT
PENNSYLVANIA STATE UNIVERSITY

VS.

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

Transcript of Proceedings

Before: John B. Leete, Judge Specially Presiding
56th Judicial District

Date: March 11, 2016

Place: Centre County Courthouse
Courtroom Annex
108 South Allegheny Street
Bellefonte, Pa 16823

Notes by: Elise A. Sturges
Official Court Reporter
Room 208, Centre County Courthouse

Bellefonte, Pa 16823

814 355-6734 or fax 814 548-1158

1 Appearances:

2

3 For Plaintiffs:

4 Thomas J. Weber, Esquire

5 Patricia L. Maher, Esquire

6 Ashley C. Parrish, Esquire

7

8

9 For Defendants NCAA, Emmert & Ray:

10 Everett Johnson, Esquire

11 Brian E. Kowalski, Esquire

12 Sarah M. Gragert, Esquire

13 Robert J. Daniels, Esquire

14

15

16

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1 P R O C E E D I N G S

2 The Court: Ladies and gentlemen, it's
3 nice to see you all this morning. I do
4 appreciate the kind offer that some of you made
5 to travel to Coudersport, Pennsylvania, my home
6 base. That was a very gracious offer. Some of
7 you may not have liked that. If you think
8 Bellefonte is out in the country we could give
9 you another dimension if you were to come to
10 Potter County. So probably for you collectively
11 this is probably a much more convenient venue.

12 I did have a request here as we go into
13 the matter of the Paterno Estate v. The NCAA, et
14 al, at 2082 of 13. We did have a request to take
15 one matter first here for the convenience of some
16 of the counsel and I certainly have no problem
17 with that and as I recall that was the NCAA's
18 Motion to Compel documents from the estate and to
19 overrule objections.

20 So if everyone can live with that we
21 will take that issue first here today.

22 Mr. Johnson: Thank you, Your Honor.
23 Everett Johnson, Latham & Watkins on behalf of
24 the NCAA. First of all, thank you for
25 accommodating our schedule and moving the date of

1 today's hearing.

2 The NCAA's Motion to Compel concerns
3 materials related to a document entitled Critique
4 of the Freeh Report, which was published to the
5 public in February of 2013, was authored by the
6 law firm of King & Spalding, the Paterno Family's
7 attorneys, and contains within it reports of
8 three other individuals.

9 The Court: That was the Governor
10 Thornburgh and two other individuals as I recall.

11 Mr. Johnson: That's exactly right, Your
12 Honor, and what we have here in our view is a
13 goose and gander situation. So let me start with
14 the goose, which is the Freeh report. Your Honor
15 previously held in this case and it's been the
16 subject of a number of subsequent motions to
17 enforce the Court's Order that the materials
18 related to the Freeh Report, which was published
19 in July of 2012, were not protected by the
20 attorney/client or any other privileges.

21 The Court: And I believe some of those
22 issues are currently up on appeal?

23 Mr. Johnson: That's correct, Your
24 Honor, although as Your Honor knows the -- both
25 the Pepper Hamilton Firm and Penn State have