

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;

AL CLEMENS, member of
the Board of Trustees of Pennsylvania State
University; and

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

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President
of the NCAA;

And

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

Defendants,

And

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

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CLERK OF COURT
PROthonARY
CENTRE COUNTY, PA

) Civil Division

) Docket No. 2013-2082

) **SUPPLEMENTAL RESPONSE OF**
) **THE ESTATE OF JOSEPH PATERNO**
) **TO MOTION FOR STAY PENDING**
) **APPEAL AND FOR PROTECTIVE**
) **ORDER BY NON-PARTY PEPPER**
) **HAMILTON LLP**

) Filed on Behalf of the Plaintiffs

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**SUPPLEMENTAL RESPONSE OF THE ESTATE OF JOSEPH PATERNO TO
MOTION FOR STAY PENDING APPEAL AND FOR PROTECTIVE ORDER BY
NON-PARTY PEPPER HAMILTON LLP**

The plaintiff Estate of Joseph Paterno submits this Supplemental Response to the Motion of Non-Party Pepper Hamilton LLP for a Stay Pending Appeal by defendant the Pennsylvania State University (“Penn State”) of certain aspects of this Court’s September 11, 2014 Opinion and Order on the Estate’s motion to overrule Penn State’s objections to a subpoena to be issued to non-party Pepper Hamilton LLP (“Pepper Hamilton”).

The Court held in its September 11 Order that the following documents are *not* privileged: (1) source documents provided by Penn State to the Freeh firm; (2) non-source documents created by Penn State or the Freeh firm; and (3) communications between Penn State and the Freeh firm. Order at 20-21. Order at 20, citing *Com. v. Mrozek*, 441 Pa. Super. 425, 428, 657 A.2d 997, 998 (1995). The Court also held that documents — source or non-source — provided by the Freeh Group to third parties (such as the NCAA or the Big Ten) are not privileged because any applicable privilege was waived. Order at 21-22.

Pepper Hamilton asserts that it has standing to seek a stay of the Court’s September 11 Order because in the absence of a stay, it would be required to produce documents responsive to a subpoena served by the Estate that it deems covered by the attorney-client privilege and work product doctrine. According to Pepper Hamilton, it would be harmed by producing those documents because it would violate its ethical obligations to Penn State. But that argument is obviously circular. The Court’s Order held that the documents at issue are NOT privileged. As a result, producing the documents cannot possibly violate Pepper Hamilton’s ethical obligations to Penn State.

A lawyer is required to comply with court orders, and a client's objections, real or theoretical, cannot prevent a lawyer from complying with *that* ethical obligation. *See* Model Rule of Prof'l Conduct 1.6(b)(6) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary. . . to comply with other law or a court order[.]"). As courts have recognized, "[a] client generally cannot require his or her attorney to violate a district court order to protect his or her privilege. An attorney, after asserting all non-frivolous objections to producing client confidences, may ethically comply with a court order requiring production." *In re Grand Jury*, 705 F.3d 133, 165 (3d Cir. 2012) (Vanaskie, J., concurring in part and dissenting in part). *See also In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 202 (5th Cir. 1981) (stating that an attorney may ethically reveal client confidences pursuant to a court order).

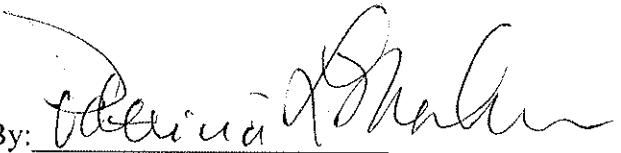
Pepper Hamilton also argues that producing the documents requested by the subpoena will expose it to charges that *it* has waived the applicable privilege. But Pepper Hamilton could not waive the privilege with respect to documents that the Court has already determined do not meet the standards for protection under the attorney-client privilege, or as to which any applicable privilege was already waived by sharing the documents with third parties. Production of non-privileged documents does not result in a waiver of the privilege. *Nationwide Mutual Ins. Co. v. Fleming*, 924 A.2d 1259, 1268 (Superior Ct. 2007) (waiver of attorney-client privilege cannot be based on disclosure of non-privileged documents).

Finally, Pepper Hamilton's motion puts the cart before the horse with respect to its work product objections. Pepper Hamilton has not yet responded to the subpoena, and there has been no ruling on its work product objections, as opposed to the privilege objections by Penn State. Once Pepper Hamilton asserts its work product objections, if the Estate challenges the objections

the Court will have an opportunity to rule on the propriety of those objections based on the factual record presented. Accordingly, Pepper Hamilton should respond to the subpoena and assert its objections rather than seeking an order relieving it of the need to do so.

For the foregoing reasons, the Estate respectfully requests that the Court deny third party Pepper Hamilton's Motion For Stay Pending Appeal And For Protective Order.

Date: November 3, 2014

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **SUPPLEMENTAL RESPONSE OF THE ESTATE OF JOSEPH PATERNO TO MOTION FOR STAY PENDING APPEAL AND FOR PROTECTIVE ORDER BY NON-PARTY PEPPER HAMILTON LLP** was served this 3rd day of November, 2014 by first class mail and email to the following:

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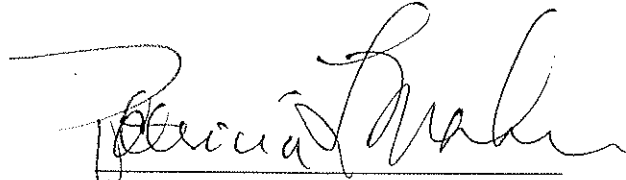
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A handwritten signature in black ink, appearing to read "Thomas J. Weber", written over a horizontal line.

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