IN THE

Superior Court of Pennsylvania

NO. 1709 MDA 2014

GEORGE SCOTT PATERNO, as duly appointed representative of the ESTATE and FAMILY of JOSEPH PATERNO; RYAN McCOMBIE, ANTHONY LUBRANO, AL CLEMENS, and ADAM TALIAFERRO, members of the Board of Trustees of Pennsylvania State University; PETER BORDI, TERRY ENGELDER, SPENCER NILES, and JOHN O'DONNELL, members of the faculty of Pennsylvania State University; WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University; and ANTHONY ADAMS, GERALD CADOGAN, SHAMAR FINNEY, JUSTIN KURPEIKIS, RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI, ANWAR PHILLIPS, and MICHAEL ROBINSON, former football players of Pennsylvania State University,

Plaintiffs-Appellees,

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

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant-Appellant.

Appeal from the September 11, 2014 Order of the Court of Common Pleas of Centre County, No. 2013-2082 (Leete, J.)

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF APPELLANT THE PENNSYLVANIA STATE UNIVERSITY

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INTRODUCTION AND STATEMENT OF INTEREST

This case presents significant questions regarding the ability of organizations – including universities, corporations, non-profit associations, *etc.* – to conduct internal investigations into alleged misconduct. Corporations and other organizations depend on internal investigations to identify and address allegations of wrongdoing and to ensure compliance with complex laws and regulatory obligations. In this case, the Court of Common Pleas held that the attorney-client and work product privileges did not apply to an internal investigation into the Jerry Sandusky scandal conducted by outside counsel for The Pennsylvania State University and that even if they did, those privileges were waived for materials related to the investigation. Unless reversed, the court's rulings below will impede the ability of organizations and their counsel to rely on the attorney-client privilege and the work product doctrine in internal investigations and to rigorously preserve those protections in ensuing litigation in the Commonwealth.

The Association of Corporate Counsel ("ACC") and its three chapters serving members in Pennsylvania, namely, the Greater Philadelphia/Delaware Valley Chapter, the Central Pennsylvania Chapter

and the Western Pennsylvania Chapter, have a strong interest in this case.[1] ACC and its chapters represent the perspective of in-house lawyers who advise corporate clients on the full range of legal issues that arise in the course of day-to-day business. ACC has over 35,000 members who are in-house lawyers employed by more than 10,000 organizations – including numerous universities – throughout the United States and in other countries. The entities that ACC's members represent vary greatly in size, sector, and geographic region, and include public and private corporations, public entities, partnerships, trusts, non-profits, and other types of organizations. The vast majority of ACC members work for national or multinational companies that bring them regularly in contact with interests, employees, and facilities in Pennsylvania. ACC has over 1,600 members located in the Commonwealth, almost all of whom are represented by one of ACC's three chapters in the region.

[1] The Greater Philadelphia/Delaware Valley Chapter serves the Greater Philadelphia region, the Lehigh Valley, Southern New Jersey and Delaware. The chapter represents the professional and business interests of over 1,400 members, who practice in the legal departments of more than 400 organizations. The Central Pennsylvania Chapter's members work for entities throughout the Central Pennsylvania region, including the cities of Harrisburg, Lancaster and York. The Western Pennsylvania Chapter primarily serves the Pittsburgh region. Through a wide range of chapter-sponsored events, these three chapters provide programming, professional development and networking opportunities for in-house attorneys located in Pennsylvania.

For more than 30 years, ACC has advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of in-house counsel. In particular, ACC has worked hard to ensure that a robust privilege applies to a client's confidential communications with in-house lawyers, as the Supreme Court recognized in *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). ACC has appeared as *amicus curiae* to support the attorney-client privilege in many cases in the federal and state courts, including the Pennsylvania courts.

ACC is deeply concerned about the precedent in this case for both ACC's local members and their clients in Pennsylvania, as well as its national and international membership and their clients doing business in the Commonwealth. If allowed to stand, the decision will significantly impair the ability of counsel—both in-house and outside attorneys – to investigate alleged employee wrongdoing, provide the legal advice necessary to guide their clients' behavior, and promote compliance with the law. ACC respectfully urges this Court to reverse the decision below and make clear that confidential communications between organizational clients and their attorneys in the course of internal investigations are fully protected by the

attorney-client privilege and the work product doctrine in the Commonwealth.[2]

ARGUMENT

I. THE COURT OF COMMON PLEAS' RULING THAT MATERIALS RELATED TO THE FREEH INVESTIGATION ARE NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE WILL SEVERELY HAMPER THE ABILITY OF IN-HOUSE COUNSEL TO CONDUCT EFFECTIVE INTERNAL INVESTIGATIONS AND OBTAIN THE INFORMATION NECESSARY TO RENDER SOUND LEGAL ADVICE

A. The Purposes Of The Attorney-Client Privilege Apply Fully To Confidential Communications Between Employees And Counsel Made To Assist Internal Investigations Into Alleged Misconduct

As the Pennsylvania Supreme Court has repeatedly observed, the attorney-client privilege "is deeply rooted in our common law" and is "the most revered of our common law privileges." *Levy v. Senate of Pa.*, 619 Pa. 586, 65 A.3d 361, 368 (2013) (citation omitted). The privilege is "rooted in the imperative need for confidence and trust" within the attorney-client relationship. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (citation omitted); *Estate of Kofsky,* 487 Pa. 473, 481, 409 A.2d 1358, 1362 (1979). The privilege is "inextricably linked to the very integrity and accuracy of the fact finding process," *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978),

[2] Although this brief typically refers to "corporate" clients, its analysis applies equally to any type of artificial entity, including public and private corporations, public entities, partnerships, trusts, non-profits, associations, and other types of organizations.

and is "essential to the just and orderly operation of our legal system." *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997)

At bottom, the privilege is based on the recognition that "sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client." *Upjohn,* 449 U.S. at 389. "The central principle is that a client may be reluctant to disclose to his lawyer all facts necessary to obtain informed legal advice, if the communication may later be exposed to public scrutiny." *In re Thirty–Third Statewide Investigating Grand Jury*, 86 A.3d 204, 216 (Pa. 2014) (citation omitted). By ensuring confidentiality, the privilege enables clients to provide the information necessary for their attorneys effectively to represent them. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation") (citing *Upjohn*, 449 U.S. at 389); *In re Search Warrant B–21778*, 513 Pa. 429, 441, 521 A.2d 422, 428 (1987) ("Its necessity obtains in the objective of promoting the most open disclosure in order to enhance the attorney's effectiveness in protecting and advancing his client's interests."); *National Railroad Passenger Corp. v. Fowler*, 788 A.2d 1053, 1064 (Pa. Cmwlth. 2001) (the privilege is intended "to foster candid communications between legal

counsel and the client so that counsel can provide legal advice based upon the most complete information possible from the client") (citation omitted).

The privilege not only helps clients obtain higher quality legal assistance, but "promote[s] broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389; *accord Gillard v. AIG Ins. Co.*, 609 Pa. 65, 70 n.1, 15 A.3d 44, 54 n.10 (2011). In particular, the privilege encourages compliance with the law. *See Sandra T.E. v. S. Berwyn Sch. Dist. 100,* 600 F.3d 612, 621 (7th Cir. 2009) ("Confidential legal advising promotes the public interest 'by advising clients to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities.'") (citation omitted); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036-37 (2d Cir. 1984) ("The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law.").

As the Supreme Court observed in *Upjohn*, the privilege's goal of fostering compliance with the law is particularly important for organizational clients. "In light of the vast and complicated array of

regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,' particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (*quoting* Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Law. 901, 913 (1969)). Thus, a narrow construction of the privilege would not only "make[] it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392.

The need to protect open communication between organizations and their counsel is more critical today than ever before. We live in a time when legislatures and regulators, not to mention the public generally, place increasing emphasis on accountability and compliance with both the letter and the spirit of the law. Corporations and other organizations, including universities, are subject to an ever-increasing array of criminal, securities, tax, labor, financial, health care, environmental, trade and other laws and regulations.

In particular, America's 6,000 colleges and universities face a tidal wave of regulation. Indeed, a newly-released report noted that "the number

of federal requirements placed on colleges and universities grew by 56 percent between 1997 and 2012."[3] With respect to requirements involving just the federal Department of Education alone, the report found that the Higher Education Act "contains roughly 1,000 pages of statutory language; the associated rules in the Code of Federal Regulations add another 1,000 pages."[4] "[T]hese regulations are overly complex and present difficult compliance challenges."[5] Moreover, colleges and universities are also confronted with myriad state and local regulatory requirements as well.

In order to comply with this panoply of regulations, organizations and their employees must be able to communicate fully and candidly with their attorneys. The attorney-client privilege is especially critical in the context of confidential investigations into potential misconduct, which corporate and university attorneys supervise on almost a daily basis. A robust privilege protecting communications in internal investigations is necessary to enable employees to provide information to corporate and university attorneys without the fear that their communications will later be exposed to public

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[3] "Recalibrating Regulation of Colleges and Universities – Report of the Task Force on Federal Regulation of Higher Education" at p. 7 (Feb. 2015), available at: http://www.help.senate.gove/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

[4] *Id.* at p. 10.

[5] *Id.* at p. 12.

scrutiny. Without protection of the privilege, employees will be less willing to disclose the facts necessary for counsel to provide effective legal advice and ensure adherence to the law.

Importantly, application of the attorney-client privilege to internal investigations does not obstruct the truth-finding process. Only *communications* between employees and attorneys are protected; adversaries may discover the facts through depositions and other means of discovery. Indeed, the privilege in fact promotes the truth by encouraging forthright communication by employees, thereby enabling organizations to take action to ameliorate wrongs that might otherwise be left undiscovered and unaddressed. If internal investigation materials are freely discoverable, companies, universities and other organizations will be less likely to conduct such investigations in the first place, and those that they do conduct likely will be less thorough. *See Upjohn*, 449 U.S. at 392 n.2 (without the privilege, "the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken").

Accordingly, to achieve its central purposes, the attorney-client privilege should be construed broadly in the context of internal investigations relating to alleged misconduct– whether conducted by in-house or outside counsel.

B. *So Long As A Significant Purpose Of An Internal Investigation By Counsel Is A Legal One, The Investigation Should Be Protected By The Attorney-Client Privilege*

The lower court held that the investigation into the Sandusky allegations by the law firm of former FBI Director Louis Freeh was not protected by the attorney-client privilege because the engagement was not for "a purpose of securing either an opinion of law, legal services, or assistance in a legal matter." (Op. p. 20, citing *Commonwealth v. Mrozek*, 441 Pa.Super. 425, 428, 657 A.2d 997, 998 (1995)). That conclusion is manifestly wrong.

At the time of the Freeh firm's investigation, Penn State was facing substantial potential legal liability as a result of both existing and threatened litigation stemming from the Sandusky allegations. The Office of the Pennsylvania Attorney General had publicly disclosed a grand jury presentment indicating that several of the University's high-ranking executives were facing allegations that they had violated the law. The presentment prompted the Department of Education to begin a review of the University's compliance with federal crime reporting obligations. And the first of many of Sandusky's victims filed a civil suit against Penn State in state court.

To investigate the allegations of wrongdoing and ensure the University's compliance with the law, Penn State retained the Freeh firm to advise it as outside legal counsel and investigate the allegations of child sexual abuse against Sandusky and the alleged failure of University personnel to report that abuse to the appropriate police and governmental authorities. The Freeh firm conducted a lengthy and comprehensive investigation of the allegations, collecting over 3.5 million documents and conducting over 430 interviews of University personnel and other knowledgeable individuals. The information was gathered and analyzed under an express agreement that it was subject to the attorney-client privilege and the work product doctrine.

Given that the Freeh firm's investigation was conducted for the purpose of investigating allegations of illegal conduct, helping assess potential legal liability and ensuring compliance with the law, it was plainly for "a purpose of securing . . . assistance in a legal matter." *Commonwealth v. Mrozek*, 657 A.2d at 998. As such, it falls squarely within the protection of the attorney-client privilege. *See Upjohn*, 449 U.S. at 392 (privilege protects communications in attorney-supervised internal investigations conducted to investigate alleged wrongdoing and "ensure [a corporation's] compliance with the law"); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754,

757 (D.C. Cir. 2014) ("*KBR*") (internal investigation into allegations of fraud was privileged because it was undertaken "to gather facts and ensure compliance with the law after being informed of potential misconduct"); *In re General Motors LLC Ignition Switch Litig.*, No. 14–MD–2543 (JMF), 2015 WL 221057, at *5 (S.D.N.Y. Jan. 15, 2015) (privilege protected internal investigation into company's ignition switch defect and the delays in recalling the affected vehicles because the investigation was conducted "'as part of [the company's] request for legal advice' in light of possible misconduct and accompanying governmental investigations and civil litigation").[6]

To the extent that the decision below is based on the view that providing legal assistance was not the sole or primary reason for the Freeh investigation, it is fundamentally flawed. As recent cases have explained, the primary purpose test "does not require a showing that obtaining or providing legal advice was the sole purpose of an internal investigation or that the

[6] In holding otherwise, the lower court relied chiefly on the fact that the "scope of engagement" section of the Freeh firm's engagement letter did not specifically state that the purpose of the investigation was to provide legal assistance. (Op. p. 20). As Penn State demonstrates in its brief, however, the engagement letter as a whole makes that purpose clear. Thus, the November 18, 2011 engagement letter specifically states that the Freeh firm "has been engaged to serve as independent, external legal counsel" and that "[t]he work and advice which is provided to the [Penn State] Task Force under this engagement . . . is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges."

communications at issue 'would not have been made 'but for' the fact that legal advice was sought.'" *In re General Motors*, 2015 WL 221057, at *7 (citing *KBR*, 756 F.3d at 759). "[T]he primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." *KBR*, 756 F.3d at 759. "So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation." *Id.* at 758-59; *see also In re General Motors*, 2015 WL 221057, at *7 (adopting *KBR*'s significant purpose test and explaining that "[r]are is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes").

Salient public policy considerations support the "significant purpose" approach. As the D.C. Circuit has observed, a narrower standard would make businesses "less likely to disclose facts to their attorneys and to seek legal advice, which would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'" *KBR*, 756 F.3d at 759 (citing *Upjohn*, 449 U.S. at 392); *accord In re General Motors*, 2015 WL 221057, at *7. A narrower standard would also effectively "eradicate the attorney-client privilege for internal investigations conducted by businesses that are

required by law to maintain compliance programs, which is now the case in a significant swath of American industry." *KBR*, 756 F.3d at 759.

This Court should reverse the ruling below and make clear that attorney-supervised investigations into potential misconduct by employees are protected by the attorney-client privilege so long as obtaining or providing legal advice was a "significant purpose" of the investigation. Any other standard will seriously interfere with the ability of companies, universities and other organizations that do business in the Commonwealth to conduct internal investigations of wrongdoing and ensure compliance with the law. Failure to apply the privilege to the internal investigation in this case will have the additional untoward result of causing considerable uncertainty as to whether a court will find a particular investigation protected. As the U.S. Supreme Court has explained, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.*, 449 U.S. at 393. Similarly, the Pennsylvania Supreme Court emphasized as follows in *Gillard*:

> [I]t is our own considered judgment, like that of the United States Supreme Court, that – if open communication is to be facilitated – a broader range derivative protection is implicated. *See Upjohn*, 449 U.S. at 394-95, 101 S. Ct. at 685. In this regard, we agree with those courts which have recognized the difficulty in unraveling attorney advice from client input and stressed the need for greater certainty to

> encourage the desired frankness . . . .Indeed, we believe it would be imprudent to establish a general rule to require the disclosure of communications which likely would not exist (at least in their present form) but for the participants' understanding that the interchange was to remain private.

609 Pa. at 86, 15 A.3d at 57.

C. *Extrajudicial Disclosure Of A Privileged Communication Does Not And Should Not Automatically Waive The Attorney-Client Privilege For Communications On The Same Subject Matter*

The decision below also undermines the attorney-client privilege to the extent the court held that the privilege for communications relating to the Freeh investigation was waived. Specifically, the trial court concluded that Penn State may have waived the protection of the attorney-client privilege because, according to the plaintiffs, "the Freeh Firm was communicating with third parties during the investigation – specifically, The Big Ten Athletic Conference and the NCAA." (Op. p. 21). According to the court, "any documents shared with the Big Ten or NCAA. . .would constitute a subject-matter waiver." (Op. p. 22). As Penn State explains in its brief on appeal, the court's conclusion is without basis because the record is devoid of evidence that the Freeh firm shared even one otherwise privileged document with either the NCAA or the Big Ten.

What is more, although the lower court did not specifically rule on the issue, there is no basis for the plaintiffs' position (which they can be

expected to argue on appeal) that the public disclosure of the Freeh firm's investigation report waived the privilege for underlying materials relating to the report.

In light of the significant purposes served by the attorney-client privilege, the party seeking disclosure bears the burden to show that "the privilege has been waived." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1266 (Pa. Super. 2007), *aff'd on other grounds by an equally divided Court*, 605 Pa. 468, 992 A.2d 65 (2010); *accord Bagwell v. Pennsylvania Dept. of Educ.*, 103 A.3d 409, 420 (Pa. Cmwlth. 2014) ("when waiver is the focus of a dispute, the burden is shifted to the party asserting waiver").

Although there is little Pennsylvania case law on the issue, it is generally well established that disclosure of a privileged communication does not waive privilege with respect to undisclosed communications unless the privilege holder intentionally seeks to use the privilege as both a sword and a shield to gain advantage vis-à-vis another party in litigation. Thus, subject matter waiver "is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." Fed.R.Evid. 502 Advisory Committee Notes; *see also Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa.

2003) ("when one party intentionally discloses privileged material with the aim, in whole or in part, of furthering that party's case, the party waives its attorney-client privilege with respect to the subject-matter of the disclosed communications"); *In re Commercial Financial Services, Inc.*, 247 B.R. 828, 848 (Bkrtcy. N.D. Okla. 2000) ("The doctrine of subject matter waiver is narrowly construed and should only be employed when unfairness (i.e., tactical or strategic advantage) is implicated -- otherwise, the doctrine of subject matter waiver serves no useful purpose") (citing cases).[7]

Courts generally agree that where a privilege holder discloses a privileged communication extrajudicially – that is, outside of litigation – and does not affirmatively rely on that communication in litigation, fairness does

[7] Importantly, the rule that public disclosure alone does not result in subject matter waiver protects the ability of attorneys to make public filings of documents without waiving all underlying privileged communications. *See Smith v. Unilife Corp.*, 2015 WL 667432, at *3 (E.D. Pa. Feb. 13, 2015) (noting that most courts have found that "'when a final product is disclosed to the public, the underlying privilege attached to drafts of the final product remains intact'") (citing *Roth v. Aon Corp.*, 254 F.R.D. 538, 541 (N.D. Ill. 2009)); *Wells Fargo & Co. v. United States*, 2013 WL 2444639, at *41 (D. Minn. Jun. 4, 2013) ("the disclosure of a final draft of a document does not erase attorney-client privileges that attached to earlier versions of the document") (citations omitted); *Herd ex rel. Herd v. Asarco Inc.*, 2002 WL 34584902, at *2 (N.D. Okla. Apr. 26, 2002) (a "request for discovery of all drafts of documents which were ultimately disclosed to the public in final form impinges on the attorney-client privilege" because "[t]he drafting process is often the type of communication at the core of the attorney-client privilege" and "often involves deciding what positions to assert and what information should or should not be revealed along with the reasons for these decisions"); *Slaven v. Great Am. Ins. Co.*, 2015 WL 1247431 (N.D. Ill. Mar. 18, 2015) (drafts are protected work product because they "represent[] a step in the lawyers' evaluation of the legal problem under consideration and how best to handle it") (citing cases).

not require a waiver of other undisclosed communications on the same subject matter. As the Second Circuit explained in the *von Bulow* case,

> where, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed. Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential. The cat is let out of the bag, so to speak. But related matters not so disclosed remain confidential. Although it is true that disclosures in the public arena may be "one-sided" or "misleading", so long as such disclosures are and remain extrajudicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court—even if selective—create no risk of legal prejudice until put at issue in the litigation by the privilege-holder.

In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987) (holding that extrajudicial disclosure of privileged communications by an attorney for Claus von Bulow did not waive the privilege for all communications on the same subject matter).[8]

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[8] *See also Goss Intern. Americas, Inc. v. MAN Roland, Inc.*, 2006 WL 1575546, at *2 (D.N.H. 2006) ("'[w]here 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); *Oxyn Telecomm. Inc. v. Onse Telecom*, 2003 U.S. Dist. LEXIS 2671, at *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.") (italics in original); *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 1994 WL 392280, at *4 (S.D. N.Y. 1994), *on reargument*, 1994 WL 510048 (S.D. N.Y. 1994) (an "extrajudicial" disclosure of privileged communications should not be converted into an "intrajudicial" one by the mere expedient of counsel taking the deposition of the one making the disclosure and having him repeat under oath the out-of-court disclosures); *Stratagem Dev. Corp. v. Heron Intern. N.V.*, 1993 WL 6216, at *3 (S.D. N.Y. 1993), *aff'd*, 153 F.R.D. 535 (S.D. N.Y. 1994) ("[A]s long as the privileged communications are not affirmatively utilized in

(continued...)

Accordingly, an extrajudicial disclosure of an internal investigation report does not and should not waive the privilege with respect to underlying materials where, as here, the privilege holder does not attempt to use the report to its advantage in litigation. In this case, Penn State consented to the public disclosure of the Freeh report without reviewing it first, and before the onset of this litigation, and is not attempting to use it to the disadvantage of the plaintiffs in this litigation. Thus, there is absolutely no basis to conclude that the public release of the report rendered "fair game" every document the Freeh firm reviewed, considered, or created in the course of its investigation – including any drafts of the report and any communications with Penn State regarding the internal investigation.[9]

This result is directly supported by the Supreme Court's holding in *Upjohn,* which held that communications between employees and a company's counsel relating to an internal investigation into potentially illegal foreign payments were protected from disclosure, even though the

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(...continued)
litigation, the waiver does not extend beyond those communications actually shared with third parties."); *In re Consolidated Litig. Concerning Int'l Harvester's Disposition of Wisconsin Steel*, 1987 WL 20408, at *6 (N.D. Ill. 1987) ("Disclosure to a non-litigant, unlike selective disclosure in the context of a lawsuit, generally leaves an adverse party in no worse position than he was without the disclosure, and so raises no fairness issue.").

[9] Similarly, even if the Freeh firm had shared privileged communications with the NCAA and the Big Ten (which it did not), subject-matter waiver would be inappropriate because the plaintiffs have not shown that any disclosures were made to achieve a tactical advantage for Penn State in this litigation.

report itself had been produced to the government. *See* 449 U.S. at 392-96; *see also In re Feldberg*, 862 F.2d 622, 629 (7th Cir. 1988) ("A corporation prepares and publishes an internal report about "questionable payments" abroad; we know from *Upjohn Co.* that it does not follow that the government has access to the interviews underlying the published report."); *In re General Motors*, 2015 WL 221057, at *11 (disclosure of report of an outside attorney's internal investigation into GM's handling of a defective ignition switch did not waive privilege with respect to underlying interview materials where GM "neither offensively used the Valukas Report in litigation nor made a selective or misleading presentation that is unfair to adversaries in this litigation, or any other"; "[p]ut simply, this case does not present the unusual and rare circumstances in which fairness requires a judicial finding of waiver with respect to related, protected information"); *In re Woolworth Corp. Sec. Class Action Litig.*, No. 94 CIV 2217(RO), 1996 WL 306576, at *2 (S.D.N.Y. June 7, 1996) (publication of report prepared by outside counsel describing findings of investigation did not waive attorney-client privilege); *United States v. Lipshy*, 492 F. Supp. 35, 43-44 (N.D. Tex. 1979) (disclosures in reports to IRS and SEC did not waive privilege with respect to all details underlying investigative report); *In re Grand Jury Subpoena*, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979)

(disclosure of independent counsel's report to SEC, grand jury and IRS did not waive privilege with respect to underlying documentation).

The plaintiffs' global subject-matter view is not only contrary to law, but if adopted by the courts, would have significant adverse policy repercussions. There are often good reasons for privilege holders to disclose the conclusions of an investigation to the government or other third parties, *e.g.*, to report violations of the law, facilitate settlement, and/or obtain reduced sanctions. If companies know that disclosure of an investigation report will automatically waive all materials and communications relating to the report, they will be less likely to release reports, thereby disserving the companies' stakeholders as well as the public. In addition, an expansive subject matter waiver rule could deter companies from conducting comprehensive investigations in the first place, thereby impairing companies' ability to obtain the full and informed legal advice they need to comply with the law. *See In re Woolworth Corp. Sec. Class Action Litig.*, 1996 WL 306576, at *2 ("[a] finding that publication of an internal investigative report constitutes waiver might well discourage corporations from taking the responsible step of employing outside counsel to conduct an investigation when wrongdoing is suspected. The failure to obtain the advice of outside counsel in the face of potential violations of law could only

be detrimental to shareholders[.]"). Thus, the far-reaching conception of subject matter waiver proposed by the plaintiffs would significantly erode the benefits of the attorney-client privilege in the context of internal investigations.

II. THE COURT OF COMMON PLEAS ERRED IN DENYING WORK PRODUCT PROTECTION

The lower court's opinion is equally destructive of another critical protection afforded by the law to communications and other materials created by lawyers in the course of representing their clients: the work product doctrine. In Pennsylvania, the attorney work product doctrine provides, essentially, that "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research, or legal theories." Pa.R.Civ.P. 4003.3. The protection against the discovery of opinion work product is designed to shelter "the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Lepley v. Lycoming County Court of Common Pleas*, 481 Pa. 565, 573, 393 A.2d 306, 310 (1978) (*quoting United States v. Nobles*, 422 U.S. 225, 238 (1975)). "The work-product privilege enables attorneys to prepare cases without any risk that their own work will be used against their

clients." *Kolar v. Preferred Unlimited Inc.*, 14 Pa.D.&C. 5th 166, 169 (Phila. Com. Pl. Jun. 22, 2010) (citations and quotation marks omitted).

As an initial matter, the trial court erred in concluding that Penn State lacks "standing" to assert the protection of the attorney work product doctrine on its attorneys' behalf. It is well settled that the right to assert work product protection belongs to both the client and the attorney. *See, e.g., In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979); *In re Grand Jury (OO-2H)*, 211 F.Supp.2d 555, 561 n.6 (M.D. Pa. 2001); *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir.1986); *U.S. v. Ramos-Gonzalez*, No. 07–0318 (PG), 2010 WL 4181674, at *6 (D.P.R. Oct. 25, 2010). That makes sense because work product is typically performed for the benefit of the client; accordingly, the client, as well as the attorney, should have a right to claim protection for the work. As the Third Circuit has explained,

> It is not realistic to hold that it is only the attorney who has an interest in his work product or that the principal purpose of the privilege to foster and protect proper preparation of a case is not also of deep concern to the client, the person paying for that work. To the extent a client's interest may be affected, he, too, may assert the work product privilege.

In re Grand Jury Proceedings (FMC Corp.), 604 F.2d at 801; *see also Koch v. Specialized Care Servs., Inc.*, 437 F.Supp.2d 362, 372 n. 12 (D. Md. 2005)

("both the client and the attorney have an interest in work-product materials and have standing to assert the protection").

The court below further erred to the extent it rejected Penn State's work product claim on the ground that "in Pennsylvania, the work product protection is not available unless the requests are made in connection with the litigation for which the material was prepared" and the scope of the engagement of the Freeh firm "did not contemplate legal advice or legal services in conjunction with the case at bar." (Op. pp. 22-23). The trial court may have backed away from this ruling, noting in a later opinion that it had concluded merely that Penn State lacks standing to assert the protection of the work product doctrine. But to the extent the court ruled that "the work product protection is not available unless the requests are made in connection with the litigation for which the material was prepared" (Op. p. 22), that conclusion fails as a matter of law.

In Pennsylvania, work product protection does and should apply even if the client or the attorney did not anticipate the filing of any litigation. As courts have noted, the language of Rule 4003.3 "contains no condition precedent of 'anticipated litigation' for the doctrine to attach." *Bagwell*, 103 A.3d at 416 (citing *Sedat Inc. v. Dep't of Envtl. Res.*, 163 Pa. Commw. 29, 33, 641 A.2d 1243, 1245 (1994)). Thus, "materials prepared in anticipation

of litigation" merely "constitute[] an example of the doctrine's coverage." *Bagwell*, 103 A.3d at 417. "Materials do not need to be prepared in anticipation of litigation for work-product privilege to attach." *Id.*; *see also Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C. 4th 23, 30 (Allegheny C. P. 1996) (noting that Rule 4003.3 "does not refer to information prepared in anticipation of litigation"); *Sedat*, 641 A.2d at 1244-45 (ruling that case summaries "prepared for the use of other agency lawyers without reference to any specific anticipated litigation" is subject to work product protection; the rule's protection of an attorney's mental impressions "is unqualified").

Even if Rule 4003.3 did contain an anticipation of litigation requirement (which it does not), there would be sound policy reasons not to limit work product protection to the specific case for which the material was prepared. Work product should be protected so long as it is generated in anticipation of *any* litigation – not just the particular litigation in which it is sought. *See In re Grand Jury (OO-2H)*, 211 F.Supp.2d 555, 560-61 (M.D. Pa. 2001) (holding that work product remains protected even after the termination of the litigation for which it was prepared). That policy is consistent with the work product rule's purpose of affording attorneys the privacy they need to think, plan, weigh facts and evidence, candidly evaluate a client's litigation strategy case, and prepare legal theories without fear of

disclosure to adversaries. That policy applies so long as the work is performed in anticipation of *any* litigation.

In this case, there is no question that the materials at issue are protected work product, as the plaintiffs are demanding production of all materials relating to the Freeh investigation – including mental impressions, conclusions, opinions and legal theories of the Freeh firm and lawyers' interview notes of 430 individuals. Because the Freeh investigation was conducted in anticipation of both pending and future litigation relating to the Sandusky allegations, work product protection applies even if the Pennsylvania rule contains an anticipation of litigation requirement.[10]

CONCLUSION

The decision below places the attorney-client privilege and work product protection in jeopardy for scores of internal investigations performed by counsel for corporate, university and other organizational clients to detect and root out illegal conduct. To ensure that internal

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[10] Although the lower court did not reach the question, for the same reasons the fairness doctrine does not support subject matter waiver of the attorney-client privilege in this case, it does not support subject matter waiver of work product protection either. Indeed, courts have properly recognized that subject matter waiver should *never* apply to opinion work product. *See In re Commercial Financial Services, Inc.*, 247 B.R. at 850 ("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) (noting that subject matter waiver does not apply to "opinion" documents covered by the work product rule).

investigations are subject to the full protections of the attorney-client privilege and work product doctrine in the Commonwealth, the ruling below should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App.P. 2135(d), I hereby certify that the foregoing Brief complies with the 14,000 word limit prescribed by Pa.R.App.P. 2135(a)(1).

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CERTIFICATE OF SERVICE

I, Burt M. Rublin, one of the attorneys for Amicus Curiae Association of Corporate Counsel, hereby certify that I caused two copies of the foregoing Brief of Amicus Curiae to be served upon the following counsel of record by U.S. mail, first class, postage prepaid, and also through this Court's electronic filing system this 10th day of April, 2015:

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