IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JANE DOE 6, JANE DOE 7, JANE DOE 8, JANE DOE 9, AND JANE DOE 10	§	Cause No. 6:16-cv-173-RP-JCM
	§	JURY TRIAL DEMANDED
Plaintiffs,	§	
vs.	§	
BAYLOR UNIVERSITY	§	
Defendant.	§	

PLAINTIFFS' MOTION TO COMPEL PEPPER HAMILTON MATERIALS

TO THE HONORABLE ROBERT PITTMAN:

COME NOW JANE DOES 1-10, Plaintiffs herein, who move to compel Defendant Baylor University ("Baylor") to produce all materials provided to or produced by Pepper Hamilton ("PH") and in support thereof would respectfully show unto the Honorable Court as follows:

Introduction

It has become apparent through Baylor's responses to discovery, and during conversations between counsel, that Court guidance is necessary regarding whether and to what extent the file materials regarding the Pepper Hamilton investigation will be required to be produced. Because this issue touches on Requests for Production[1], expected areas of inquiry of witnesses and third-party discovery, Plaintiffs desire to seek Court direction on the scope of Pepper Hamilton discovery that will be permitted.[2]

[1] For example, Baylor has refused to provide Pepper Hamilton documents in response to Plaintiffs' Requests for Production 9-11 and 13-19.

[2] Baylor has raised objection to producing documents concerning the PH investigation and findings. Plaintiffs issued a third party subpoena to PH which was met with a laundry list of objections by PH's counsel. The Court's

Background

In September 2015, the Baylor University Board of Regents hired the Pepper Hamilton law firm in order to "conduct a thorough and independent external investigation" of the University's handling of alleged sexual assault cases.[3] The initial agreement with PH provided:

> Scope of Engagement
>
> Our engagement is to conduct an independent and external review of Baylor University's institutional responses to Title IX and related compliance issues through the lens of specific cases. Our acceptance of this engagement does not involve undertaking to represent you or your interest in any matter other than that described in this paragraph.

See Pepper Hamilton Letter Agreement, October 5, 2015, pp.1-2, attached as Exhibit A.[4]

According to a later statement by Interim President David Garland, Pepper Hamilton attorneys had a free reign to conduct their investigation:

> "Pepper Hamilton, our external investigators, had the freedom to follow the facts where they led and to determine those facts without any interference by University administration or the Board. Pepper Hamilton's report was impartial and objective, and they did not hold back in their assessment. This firm was selected by our Board of Regents for its credibility and expertise in investigations of sexual violence. We fully trust the validity of its investigation. They had access to all requested documents and any Baylor employee they requested to interview. They independently reached out to and heard from brave survivors who assisted the investigation by sharing their experiences."[5]

Baylor was careful to claim that the "investigators" were given access to a multitude of sources of information:

> Pepper had unfettered access to Baylor faculty, staff and administration. Pepper also spoke with students who have been impacted by interpersonal violence. Pepper

ruling on PH materials as between Plaintiffs and Defendant will provide Plaintiffs necessary guidance to aid discovery conferences with counsel for PH as well. Plaintiffs' counsel will provide PH's attorney with this motion in the event they wish to be heard at this stage in lieu of later briefing on the third-party subpoena.

[3] http://www.baylor.edu/mediacommunications/news.php?action=story&story=159611

[4] The exhibits were redacted by Baylor when produced to Plaintiff. There is no justification for the redactions and Plaintiffs have requested the documents be produced without redaction. Clearly the amounts paid to PH are relevant to the value and quality of their conclusions and the scope of their investigation. Baylor has produced none of PH's monthly statements. Plaintiffs request all of the PH materials be turned over without redaction.

[5] https://www.baylor.edu/president/news.php?action=story&story=170293

> Hamilton examined more than a million pieces of information – from correspondence to interviews to reports.[6]

Responding under oath to questions in a March 2017 Texas Senate hearing, Garland confirmed that the materials provided to PH included emails, texts and case files from the Judicial Affairs and Title IX offices.[7]

While taking credit for the "independent investigation" PH was hired to undertake and while patting itself on the back for all the information being handed over to PH, Baylor must have developed a concern that the findings were going to be damning to Baylor's Title IX compliance, because on February 10, 2016, Baylor attempted to sweep its "independent investigation" under attorney client protection by signing an after-the-fact amendment to October 5, 2015 engagement agreement. This time, the parties agreed that they wanted to "clarify the terms of [their] engagement." *See* Pepper Hamilton Letter Agreement, February 10, 2016, pp.1-2, attached as Exhibit B. Speaking in the past tense, the clarification notes that PH was hired "by a special committee of the Board of Regents, which we understand is acting on behalf of Baylor University, to provide legal advice and guidance to the University in connection with the independent and external review identified above and other matters...." *Id.* The letter goes on to add other language attempting to convert the relationship from one of an independent investigation to legal representation.

A few months after the second engagement letter, Baylor released its summary of the results of the Pepper Hamilton investigation on May 26, 2016.[8] The Regents apparently decided

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[6] Baylor University Board of Regents Announces Leadership Changes and Extensive Corrective Actions Following Findings of External Investigation." May 26, 2016.
http://www.baylor.edu/mediacommunications/news.php?action=story&story=170207

[7] Texas State Senate Committee on Higher Education, March 29, 2017. SB 1092, 85th Regular Session.
http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=12025

[8] https://www.usatoday.com/story/sports/ncaaf/big12/2016/05/26/baylor-investigation-pepper-hamilton-report-sexual-assault/84979090/

to receive a Power-Point presentation from PH in lieu of a written report. Ever since, Baylor has continued to take the public position that PH was engaged to perform and give the results of an independent investigation.[9]

As recently as March 29, 2017, Baylor's interim President testified under oath to the Texas Senate Higher Education Committee that Pepper Hamilton was hired as investigators. *See* Texas State Senate Committee on Higher Education, March 29, 2017. SB 1092, 85th Regular Session. http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=12025. Dr. Garland, in response to detailed questioning by Senator West, testified that Pepper Hamilton was hired as investigators and not legal advisors. *Id.* at 2:03:12-2-2:05:30.

Now, Baylor asserts that Pepper Hamilton was really just acting as its attorneys and legal advisors and therefore it withholds all of the information in Pepper Hamilton's files. The Court should reject this litigation position and order disclosure.

Argument

I. Baylor Must Produce All Materials Concerning the Pepper Hamilton Investigation.

With the exception of an unjustifiably redacted engagement letter, Baylor has refused to respond meaningfully to Plaintiffs' requests for documents related to the Pepper Hamilton report.[10] In addition to making numerous boilerplate objections about relevance, privacy, and burdens addressed above, Baylor repeatedly asserts both the attorney-client privilege and work-product

[9] *See, e.g.*, http://www.chron.com/sports/college/article/Big-12-withhold-25-percent-Baylor-s-future-revenue-10917323.php

[10] Plaintiffs have also served a subpoena on Pepper Hamilton for these materials which was similarly met with objections and no documents have been provided. Once the Court rules on the production requirements for Pepper Hamilton materials, Plaintiffs hope that other boilerplate objections by Pepper Hamilton can be resolved after counsel confers but until the parties are assured that production will be required, such discussions are fruitless. Plaintiffs will maintain however that Baylor and Pepper Hamilton should be required to produce their files in order to ensure that the full scope of what the Court orders has been handed over.

doctrine. Only the morning this motion was due did Baylor turn over a privilege log and even it only logs the materials by category.

"A party asserting the privilege bears the burden of proving the privilege is applicable." *Advanced Tech. Incubator, Inc. v. Sharp Corp.*, 263 F.R.D. 395, 397 (W.D. Tex. 2009). Because it is clear from the engagement letter and Baylor's actions and statements concerning the Pepper Hamilton investigation that no attorney-client privilege applies to Pepper Hamilton's relationship with Baylor University, the entirety of the materials in Pepper Hamilton's files concerning Baylor must be handed over.

Plainly, Baylor was not seeking legal advice from Pepper Hamilton. The engagement agreement makes that much clear. In any event, it is obvious PH was not providing legal advice, it was providing an independent investigation to head off the public relations quagmire the school found itself in. A communication between the parties must be for the primary purpose of soliciting legal, rather than business, advice in order to be privileged. *See United States v. Davis*, 636 F.2d 1028, 1044 (5th Cir. 1981) (when attorney "not acting in a legal capacity…records of such transactions are not privileged").

Even were the relationship between Baylor and PH of the nature of an attorney-client, Baylor chose to waive such protections when it repeatedly released findings and information from its communications with PH. As a general rule, where a privileged communication is disclosed to a party outside the attorney-client relationship, the privileged is waived. *See Nguyen v. Excel Corp.*, 197 F.3d 200, 206-7 (5th Cir. 1999) (holding that a party "selectively disclosed portions of a privileged confidential communication", thereby implicitly waiving the privilege.) "[V]voluntary disclosure of information which is inconsistent with the confidential nature of the attorney client relationship waives the privilege." *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th

Cir.1993) The Fifth Circuit has further held that disclosing an attorney's advice or communications in testimony waives the entirety of the privilege. *See U.S. v. Hardy*, 421 Fed. Appx. 450, 454-55 (5th Cir. 2011).

"The party asserting the attorney-client privilege must prove that the confidentiality of the communications have been preserved." *United States v. Citgo Petroleum Corp.*, No. C–06–563, 2007 WL 1125792, at *2 (S.D.Tex. Apr. 16, 2007) (citing *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir.1982)). Waiver is a fact-specific question that should be assessed on a case-by-case basis. *Alldread*, 988 F.2d at 1434. To determine whether privilege has been waived, courts do not rely on the communicator's subjective intent, but rather whether, considered objectively, the disclosure was both voluntary and in substantial disregard of confidentiality. *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989).

Baylor chose to structure its relationship with PH as one of an independent investigator and it only attempted to revise the relationship as the time for Pepper Hamilton's findings and conclusions to become public came near. Then, when PH presented its findings, Baylor chose to release at least two documents that described, in detail, the findings. In the Regents' findings (attached as Exhibit C), the relationship with PH is again described as the "independent" and "external" investigation by Pepper Hamilton. Numerous details, conclusions and facts developed or produced by PH are disclosed. The other document (attached as Exhibit D), is on Pepper Hamilton letterhead, and it lays out 105 recommendations made by the law firm as a result of its investigation. If Pepper Hamilton was hired to give legal advice, the publication of such details of its opinions, advice and recommendations for future steps clearly waived any such protection.

Events since the publication of the two documents which some refer to as the Pepper Hamilton Report, further exhibit a waiver by Baylor and Pepper Hamilton of any claimed

protection of these files. Baylor recently (February 2, 2017) filed an answer to state court libel case filed by Colin Shillinglaw, former Baylor Assistant Athletics Director for Football Operations. *See* Exhibit E. In its answer, Baylor again uses public disclosure of Pepper Hamilton's work product and communications as a sword against litigation and makes so many disclosures of Pepper Hamilton derived material, one cannot keep track. For example, Baylor discloses that PH evidently did not receive cooperation from some coaches. *Id*. at p. 4. The state court answer states, "Pepper Hamilton presented findings that horrified and stunned the Board of Regents." *Id.* at p. 5. The pleading goes on to outline what all PH received, including allegedly 52 laptops, 62 mobile devices, email messages, text and voice messages, and on and on. *Id.* at pp. 10-11. One after another, Baylor states in its pleading, "Pepper Hamilton advised the Board..," "The law firm warned..," Pepper Hamilton informed the Board..," "Pepper Hamilton disclosed..," and Pepper Hamilton discussed...." Each and every one of these in-court statements constitute a waiver of any existing privilege. *U.S. v. Hardy*, 421 Fed. Appx. 450, 454-55 (5th Cir. 2011), mandates a finding of waiver, if any privilege existed at all.

Finally, Baylor's interim President has testified under oath that Baylor has given the State of Texas investigators "all they have asked for" and that they have turned over Pepper Hamilton's notes to the NCAA. *See* Texas State Senate Committee on Higher Education, March 29, 2017. SB 1092, 85th Regular Session. http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=12025 at 2:04:03-2-2:05:22.

Whatever has been handed over to a government agency, whether or not the product of a client's attorneys, is no longer privileged. *See Permian Corp. v United States*, 665 F.2d 1214 (D.C. Cir. 1981) (holding that that a full waiver of the attorney-client privilege occurred when a

corporation disclosed confidential information to the Securities and Exchange Commission (SEC) at its request) *cited in Sharyland Water Supply Corp. v. Block,* 755 F.2d 397, 399 (5th Cir. 1985). Certainly Pepper Hamilton's materials that were turned over to the NCAA, a non-government investigator, are not privileged.

II. Strictly in the Alternative, All Materials Concerning the Pepper Hamilton Investigation Must be Produced and Only Work Product and Client Communications Withheld and Logged.

In Baylor's own words, PH had "unfettered access to Baylor faculty, staff and administration. Pepper also spoke with students who have been impacted by interpersonal violence. Pepper Hamilton examined more than a million pieces of information – from correspondence to interviews to reports." Whatever the character of the relationship between PH and Baylor, all of the materials received or included in PH's file that are not client communications and/or work- product, need to be produced. "[B]lanket claims of privilege are disfavored." *Nguyen v. Excel Corp.,* 197 F.3d 200, 206 n. 16 (5th Cir.1999). Therefore, Baylor must produce a bates numbered privilege log (not one by category) and specify what types of documents it is withholding pursuant to the privilege and produce all other responsive documents.

Even if the attorney-client privilege applies to attorney-client communications between Pepper Hamilton and Baylor, it clearly does not apply to many of the documents PH reviewed, including documents or materials provided to Pepper Hamilton for purposes of its investigation and notes or summaries of interviews with third party witnesses. Baylor has indicated that it is withholding "all notes of interviews and any summaries of notes." Response to RFP No. 16. This is plainly impermissible. Notes and summaries of interviews of third party witnesses are not communications with clients and therefore are not covered by the privilege. *United States v. Robinson,* 121 F.3d 971, 974 (5th Cir.1997) ("The party asserting that communication is protected

by the privilege must prove: (1) that he made a confidential communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing a legal opinion or legal services, or assistance in some legal proceeding."). The privilege would not extend to the laundry list of computers, mobile devices, emails and other materials provided to PH that are described in the Shillinglaw state court answer.

In order to ensure fair and full discovery, "the work product doctrine must be strictly construed." *S.E.C. v. Microtune, Inc.*, 258 F.R.D. 310, 318 (N.D. Tex. 2009). Further, "the burden is on the party who seeks work product protection to show that the materials at issue were prepared by its representative in anticipation of litigation or for trial." Baylor cannot meet that burden here. Documents are only protected by the work product doctrine if protection if "the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *Electronic Data Systems Corp. v. Steingraber*, 2003 WL 21653414 at *4 (E.D.Tex. Jul. 9, 2003), *quoting United States v. Davis*, 636 F.2d 1028, 1039 (5th Cir.1981). Therefore, the privilege does not protect documents and other communications simply because they result from an attorney-client relationship, if they did. *Microtune, Inc.*, 258 F.R.D. at 315.

Pepper Hamilton was retained by Baylor University to conduct an independent investigation for public purposes, not to respond to any specific threat of litigation. Indeed, Plaintiffs are aware of no litigation concerning this subject matter until well after the Regents received PH's oral report. Pepper Hamilton, to Plaintiffs' knowledge, is playing no role in the defense of the litigation pending against Baylor. Baylor would have, and did, engage in this investigation, spurred by public pressure, regardless of litigation. *See Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 477 (N.D. Tex. 2004) ("If the document would have been created without regard to whether litigation was expected to ensue, it was made in the ordinary course of

business and not in anticipation of litigation."). In fact, nowhere in Pepper Hamilton's original engagement letter is there any mention of any possible future litigation for which the law firm was conducting its work. Indeed, such potential legal services, anything other than "an independent and external review" were specifically disclaimed in the initial retention letter. Pepper Hamilton's investigation and report was completed before this litigation was filed. The engagement letter expressly disclaims any other relationship between the parties.

In the unlikely event the Court concludes there was an attorney client relationship between Baylor and Pepper Hamilton, the Court should order the production of all materials Pepper Hamilton received from Baylor other than the client communications and work-product created in expectation of litigation. Those materials withheld should be logged by bates number and produced.

Conclusion

For the foregoing reasons, Plaintiffs request an order to compel.

Respectfully submitted,

/s/ Chad W. Dunn
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been filed by ECF and sent to counsel of record via electronic notification on May 24, 2017.

/s/Chad W. Dunn
CHAD W. DUNN

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel have conferred extensively on the issues raised in this motion. Counsel have conducted no fewer than three group conference calls and have exchanged numerous written correspondence. It is apparent that the parties require Court guidance on this issues raised in this motion.

/s/Chad W. Dunn
CHAD W. DUNN