



215 S. WASHINGTON SQUARE, SUITE 200
LANSING, MI 48933-1816
TELEPHONE: (517) 371-1730
FACSIMILE: (844) 670-6009
<http://www.dickinsonwright.com>

ROBERT P. YOUNG
RYoung@dickinsonwright.com
(517) 487-4780

General
Dept of Attorney General
MAY - 1 2018
State Operations Division
RECEIVED

April 20, 2018

VIA E-MAIL AND U.S. MAIL

William A. Forsyth
Independent Special Counsel
State of Michigan
Department of the Attorney General
P.O. Box 30212
Lansing, Michigan 48909

Re: Information Request to Michigan State University

Dear Mr. Forsyth:

I am in receipt of your letter dated April 11, 2018. First, I am disappointed that you chose to write such a letter rather than picking up the phone and calling me. I thought I made clear when we met that I was committed to cooperating with your investigation and wanted a direct relationship with you so we could avoid and resolve problems. Instead, you chose to issue an accusatory letter.

That said, after serving 18 years on the Michigan Supreme Court I had thought it unlikely that I would be surprised by any legal argument. But your assertions that protecting the University's attorney-client privileged communications is "legally unsound," constitutes a "refusal to cooperate," and is a repudiation of the Michigan State University Trustees' "fiduciary duty to the public" are shocking because they are predicated on a fundamentally flawed understanding of the law and a serious lack of respect for why the attorney-client privilege is such a hallowed American legal right.

The fact is we are and have been cooperating. To date, MSU has produced 46,245 documents to your office. Of these, only 256 documents have been fully withheld as privileged, and another 176 have been produced partially redacted for privileged communications: **fewer than one percent**. More important, at your request we have provided you with a "privilege log" listing every document that we consider protected by the attorney-client privilege.

Additionally, in order to facilitate your investigation, on February 15, 2018, MSU counsel, Patrick Fitzgerald, Scott Eldridge, and Amy Van Gelder, met in person with you, Chief Deputy Attorney General Laura Moody, and Assistant Attorney General Christina

William A. Forsyth
April 20, 2018
Page 2

Grossi at the office of the Attorney General. MSU counsel Al Hogan participated by phone. During that meeting, Mr. Fitzgerald explained the scope of Skadden Arps' and Miller Canfield's representation of MSU, including the parameters of the defense team's privileged internal review of University documents and interviews of University employees. Mr. Fitzgerald offered to orally proffer non-privileged facts learned during the review to your team so as not to waive the privilege. *Significantly, your office has so far declined that offer.*

Nearly *all* of the entries on MSU's privilege log post-date September 1, 2016, and thus are communications made *after* Nassar's misconduct was exposed and when MSU was anticipating or subject to active litigation. (More than 250 "Nassar" plaintiffs have filed lawsuits.) Indeed, only five of the entries on the log pre-date September 2016 (three of these documents were fully withheld, and two were produced redacted). Even a cursory review of the log reveals that the overwhelming majority of documents withheld or redacted are legal defense communications.

In any event, attempting to invade the University's privilege, whether related to the Nassar litigation or not, is wholly improper and not supported by law. You claim that our assertion of these privileges—which are virtually sacrosanct in the American legal system—is somehow "inconsistent" with the MSU Board of Trustees' public commitment to cooperate with your ongoing investigation and "legally unsound." Because you are an experienced, long-serving prosecutor, I know that *you* know that this is incorrect.

You certainly understand that the attorney-client privilege creates a privacy between attorney and client that is integral to the proper functioning of the legal system. The United States Supreme Court has explained that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Invoking this privilege is not an admission of wrongdoing, and it is not designed to interfere with investigations. Rather, according to the Supreme Court, the privilege serves the important purpose "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* ("The privilege recognizes that sound legal advice or advocacy serves public ends . . ."). Thus, contrary to your suggestion that the University has "run afoul of [its] legal duties" to the public, preservation of the attorney-client privilege serves the public interest. Absent very limited circumstances not applicable here, the attorney-client privilege does not yield to a governmental investigation.

Thus waiver of the privilege is not a prerequisite to cooperation; rather, the disclosure of *facts* is what is needed to advance legitimate law enforcement interests. The United States Department of Justice has expressly recognized this and directed its prosecutors *not to even ask* for attorney-client communications or attorney work product.

William A. Forsyth
 April 20, 2018
 Page 3

See U.S. Attorneys' Manual § 9-28.710; see also *id.* § 9-28.720 ("Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable . . . is disclosure of the relevant facts.").

Moreover, as I am sure you are well aware, a party cannot selectively waive privileges to government agencies during an investigation but continue to assert those privileges as to others. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002). The law is clear that a voluntary waiver of the University's attorney-client privilege to you would effect a general waiver of the privilege, including in the pending civil litigation. For the Board of Trustees to do this would be irresponsible and set a dangerous precedent that would chill candor between the Trustees, University personnel, and the University's lawyers. For this reason, we also must decline your invitation to volunteer our privileged communications for third-party review.

By properly asserting privilege, the University is not attempting to "thwart clearly established public policy," as you contend. To the contrary, this State's clearly established public policy *protects* the privileges of public institutions. For example, information and records subject to the attorney-client privilege are protected from disclosure under Michigan's Freedom of Information Act. MCL 15.243(1)(h). Similarly, the Open Meetings Act allows a public body to meet in a closed session to discuss attorney-client communications. See MCL 15.268(h); see also *Open Meetings Act Handbook*, Attorney General Bill Schuette, at 11 (acknowledging same). The University, like any other public institution, enjoys these protections.

Notably, the Office of Attorney General, of which you are a part, equally benefits from the attorney-client privilege. It has certainly invoked it countless times. See, e.g., *McCartney v Attorney General*, 231 Mich. App. 722; 587 N.W.2d 824 (1998) (where Attorney General invoked attorney-client privilege while refusing to produce letters from the Governor's office seeking legal advice). Instead of recognizing this established body of law, your letter rather stunningly relies on the entirely inapplicable decision in *Branum v. State*, 5 Mich. App. 134 (1966), which did not address attorney-client privilege issues *at all*.

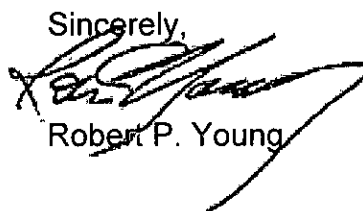
I also disagree with your assertion that the privilege log we provided at your request is somehow deficient. Even though it is questionable whether such a log was even required, the University voluntarily and timely produced it to you, and it includes all of the information customarily provided. Nevertheless, we are willing to discuss the matter with you so that you can better understand any individual log entries, including the role of Tracy Leahy, who was temporarily assigned to the Office of the General Counsel during the fall of 2016.

William A. Forsyth
April 20, 2018
Page 4

In short, the University's assertion of privilege is not improper. *Rather, your suggestion that MSU waive its privilege is what is improper.* We have not shielded any relevant facts from you. To the contrary, we have gone to great lengths to provide you with all facts, including producing voluminous amounts of information to your office on a weekly basis, providing a privilege log, offering oral proffers, making witnesses available, timely responding to all your questions, and adjusting production priorities at your request. And, as I previously assured you, we will continue to cooperate in earnest through the conclusion of this matter.

Let's stop this silly exchange of letters. Please give me a call if you would like to discuss this in more detail.

Sincerely,



Robert P. Young

RPY:Imp