

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

THE NATIONAL ASSOCIATION OF)
BOARDS OF PHARMACY,)
)
Plaintiff,)
)
v.)
)
THE BOARD OF REGENTS OF THE)
UNIVERSITY SYSTEM OF GEORGIA)
and FLYNN WARREN, JR.,)
)
Defendants.)
_____)

CIVIL ACTION NO.: 3:07-CV-84 (CDL)

**THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF
GEORGIA’S RESPONSE TO NATIONAL ASSOCIATION
OF BOARDS OF PHARMACY’S MOTION FOR THE
DETERMINATION OF THE PRIVILEGED STATUS OF CERTAIN DOCUMENTS**

Subject to and without waiving its objections to the jurisdiction of this Court and its claim of immunity under the Eleventh Amendment to the United States Constitution, including those set forth in its prior-pending Motion to Dismiss for Lack of Subject Matter Jurisdiction, and to all other objections and defenses that Defendant may raise in responsive pleadings in this case, Defendant The Board of Regents of the University System of Georgia (“The Board of Regents”), responds to Plaintiff National Association of Boards of Pharmacy’s (“NABP”) Motion for the Determination of the Privileged Status of Certain Documents (“Motion for Determination of Privilege”). The Board of Regents asserts that the two documents at issue are privileged pursuant to the attorney client privilege and work product doctrine, and Mr. Warren and The Board of Regents have not waived their claims as to attorney client privilege and work product. It is respectfully suggested that the Court should determine that Documents A & B are

protected by the attorney client privilege and work product doctrine and order the NABP to return or destroy them and make no use or disclosure of them.

FACTS

On August 3, 2007, Plaintiff NABP filed this suit and a motion for a seizure and impoundment of materials that allegedly violated its copyright and which were located at the University of Georgia College of Pharmacy and on Mr. Flynn Warren's office and home computers. On the same day, the Court granted an order giving NABP the right to seize and impound materials containing its copyrighted questions and things related to its copyrighted questions.

During the seizure, NABP through its lawyers, including Rodgers Lunsford, seized two documents from Mr. Warren's computers that have been submitted as Document A and B for the Court's review and determination of whether they are privileged. Document A is a February 22, 1995 correspondence from Mr. Warren to Ms. Susan Jones and Document B is an undated document from Mr. Warren to Ms. Patricia Guilday. At the time of Mr. Warren's correspondence, Ms. Jones was an attorney and Associate Vice President for Legal Affairs of the University of Georgia. Ms. Guilday was an attorney and an Assistant Attorney General of the State of Georgia. See Declaration of Arthur Leed ¶ 3.

After learning of the seizure of Documents A and B and before Mr. Warren had his own counsel, The Board of Regents immediately sent a letter to counsel for NABP informing counsel that Documents A and B were privileged attorney client communications, requesting that Documents A and B be returned, and stating that "[n]either Mr. Warren nor The Board of Regents has waived any privileges that they may have with regard to communications that were

included in the materials that you seized.” See Attachment to Plaintiff’s Motion for Determination of Privilege, August 12, 2007 Letter from Alan E. Lubel to Rodgers Lunsford.

The circumstances surrounding Mr. Warren’s reasons for sending Document A and B are important to the issues of attorney client and work product privilege. On September 27, 1994, NABP sent a letter to Mr. Warren demanding that he cease and desist all alleged infringement of NABP’s copyrights. See Declaration of Arthur Leed ¶ 3, Exhibit A. At the time, Mr. Warren was an employee of the College of Pharmacy of the University of Georgia, which is a unit of the University System of Georgia operated by The Board of Regents. The letter threatened legal action against Mr. Warren if he did not cease use of NABP copyrighted materials in his NABPLEX review course. *Id.* On October 10, 1994, Ms. Susan Jones, an attorney and then Associate Vice President for Legal Affairs of the University of Georgia responded on behalf of Mr. Warren to the letter from the NABP’s attorney. *Id.*, Exhibit B.

As documented by the following exchange of letters, The Board of Regents obtained the services of Ms. Guilday as counsel to represent Mr. Warren and the University of Georgia in response to NABP’s threat of litigation. First, on January 27, 1995 Ms. Bryndis W. Roberts, then the Vice President for Legal Affairs of the University of Georgia wrote to Ms. Elizabeth Neely, then the Associate Vice Chancellor for Legal Affairs of the Board of Regents of the University System of Georgia and asked for assistance from the Board of Regents to protect the interest of the University of Georgia in response to the NABP’s threat to seek damages for alleged infringement of copyright. *Id.*, Exhibit C.¹ Then, by letter of February 3, 1995 from Associate Vice Chancellor Neely of the Board of Regents to then Attorney General of the State of Georgia Michael Bowers, the Georgia Board of Regents requested representation from the

¹ Because these communications are themselves privileged, The Board of Regents seeks leave of the Court to submit Exhibits C and D in camera.

Attorney General's office in response to the threats of litigation from NABP and requested that the Attorney General's office act to protect the legal interests of the Board of Regents, the University of Georgia and Mr. Flynn Warren. *Id.*, Exhibit D. The February 3, 1995 letter to the Attorney General requesting representation specifically stated that Susan Jones, the Associate Vice President for Legal Affairs of the University of Georgia, would be the University System's contact person for this matter. *Id.* The records also show that Ms. Patricia Guilday, Assistant Attorney General of the State of Georgia, was assigned to this matter and called Ms. Jones on February 13, 2005 to discuss the Flynn Warren issues and the threat of litigation by the NABP. *Id.* From that point on Assistant Attorney General Patricia Guilday was involved representing the Board of Regents, the University of Georgia and Mr. Warren, and Ms. Jones assisted Ms. Guilday in gathering information to defend against any claims by the NABP and to negotiate an agreement with the NABP. *Id.* In this regard, on February 28, 1995, Ms. Jones sent to Assistant Attorney General Guilday the February 22, 1995 letter (Document A) that Mr. Warren had sent to Ms. Jones. *Id.* at ¶ 4.

ARGUMENT AND LAW

A. NABP's removal of the two documents at issue here was improper under the Court seizure order of August 3, 2007

Under the Court's Order of August 3, 2007, NABP was not authorized to seize Documents A and B. The Court's order of August 3, 2007 did not permit NABP to seize documents that are work product and subject to the attorney client privilege. Moreover, the Court's order included terms permitting NABP to seize only documents containing NABP's copyrighted questions or documents that related to NABP's copyrighted questions. Document A

and B do not contain copyrighted questions, and it is questionable whether Documents A and B even relate to the copyrighted questions.

B. Attorney client privilege protects the documents at issue

Documents A and B were confidential communications between Mr. Warren and his counsel for the purpose of receiving legal services and assistance in defense of the claim asserted by NABP and thus are protected by attorney client privilege. They also are communications to the Assistant Attorney General, counsel for Mr. Warren's employer. In the Eleventh Circuit, the following elements must be proven in order to claim the attorney-client privilege at the federal level:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
- (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Proceedings 88-9, 899 F.2d 1039, 1042 (11th Cir. 1990)). The burden is on the party claiming the privilege to establish those facts that constitute the essential elements of the privileged relationship. *Abdallah v. Coca-Cola Co.*, 2000 U.S. Dist. LEXIS 21025, *10 (N.D. Ga. Jan. 25, 2000).

All of the elements of attorney client privilege apply to Documents A and B. First, Mr. Warren was communicating to his attorneys Ms. Guilday and Ms. Jones, who were members of the State Bar of Georgia. Second, Ms. Jones was assisting Ms. Guilday in her representation of

Mr. Warren, the University of Georgia, and The Board of Regents. Third, Documents A and B were for the purpose of defending Mr. Warren against NABP's threat of litigation. More specifically, Documents A and B relate to efforts to resolve the matter so that NABP would release Mr. Warren, University of Georgia, and The Board of Regents from any of its threatened claims. Documents A and B were not communicated to any strangers and were not for the purpose of committing a crime or tort. Fourth, Mr. Warren has consistently claimed privilege since learning of the seizure of the documents. Additionally, Mr. Warren has taken no action to waive his privilege. *See* Section D, *infra*.

C. The documents at issue are protected work product

Documents A and B are also protected work product. The work product doctrine protects documents and other items that a party or its representative prepares in anticipation of litigation or for trial from the discovery processes of the other party. Fed. R. Civ. Pro. 26(b)(3). *See also Shipes v. BIC Corp.*, 154 F.R.D. 301, 304-05 (M.D. Ga. 1994). To determine whether a document is protected by the work product doctrine, the court must examine whether, because of the prospect of litigation, the document was prepared by the party or its representative. *Shipes*, 154 F.R.D. at 305 (citing 8 Wright & Miller, Federal Practice and Procedure § 2024 at 198.) "A party's representative includes its attorney, insurer, employee, or other agent, so long as they were working on behalf of the party and preparing the document with the prospect of litigation in mind." *Id.* In *Shipes*, the court found both that statements about pending claims disclosed by a party's employees to its insurance carrier and statements from the party's employees to its counsel were protected. *Id.*

The purpose of the work product doctrine is that "it is essential that a lawyer work with a certain degree of privacy' and that proper preparation of a client's case demands that he assemble

information, decide what he considers to be relevant, prepare his legal theories and plan his strategy without needless interference.” *In re Theragenics Corp. Secs. Litig.*, 205 F.R.D. 631, 633, 2002 U.S. Dist. LEXIS 6708 at *8 (N.D. Ga. 2002) (citing *Hickman v. Taylor*, 329 U.S. 495, 511) 91 L. Ed. 451, 67 S. Ct. 385 (1947)).

The party seeking work product documents may obtain them “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. Pro. 26(b)(3). Documents with the mental impression and opinions of an attorney are absolutely protected. *Home Depot U.S.A., Inc. v. G&S Investors/Willow Park, L.P.*, 2001 U.S. Dist. Lexis 26168 at *12 (N.D. Ga. Sept. 27, 2001).

Documents A and B are protected from disclosure under the work product doctrine because the statements were prepared by a party, Mr. Warren, and because he prepared them in anticipation of litigation. After NABP threatened litigation if Mr. Warren did not cease his alleged copyright infringement of NABP’s materials, Mr. Warren sent Documents A and B to either Ms. Jones or Ms. Guilday.

Both Ms. Guilday and Ms. Jones were Mr. Warren’s representatives. Ms. Guilday was the Assistant Attorney General representing Mr. Warren, the University of Georgia, and The Board of Regents, and Ms. Jones was assisting Ms. Guilday in this representation. See Declaration of Arthur Leed ¶¶ 3 & 4. Further, Ms. Jones was also an attorney and employee of the University of Georgia and was acting on behalf of Mr. Warren. See Declaration of Arthur Leed ¶¶ 3 & 4. Mr. Warren relied on the fact that both Ms. Jones and Ms. Guilday were his legal representatives as noted in Documents A and B by thanking each of them for the time and effort(s) expended on his behalf.

Documents A and B are also work product of the University of Georgia and/or The Board of Regents. Ms. Guilday and Ms. Jones were not only Mr. Warren's counsel but both were also employees and/or representatives of The Board of Regents and the University of Georgia. Ms. Jones and Ms. Guilday were working together to respond to the claims asserted by NABP and to resolve the matter for the University of Georgia and The Board of Regents as well as Mr. Warren.

The Court's August 3, 2007 order did not allow the seizure of work product protected documents. Documents A and B are both attorney client privileged documents and work product protected documents. If, for the sake of argument, the court found that the documents were only work product protected documents and not attorney client privileged, then the NABP would have to show under Federal Rule of Civil Procedure 26(b)(3) a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." No such showing has been made.

D. Mr. Warren and The Board of Regents have not waived their work product or attorney client privilege.

Mr. Warren and The Board of Regents have not waived their work product or attorney client privilege and have maintained their claims of work product immunity and attorney client privilege throughout this litigation. *See* Declaration of Arthur Leed ¶ 5.

Two significant points support Mr. Warren and The Board of Regents' claims that they did not waive attorney client privilege or work product through disclosure of the documents: 1) in a Notice to the Court on September 21, 2007, the NABP has agreed not to contend that anything about the seizure of documents constitutes a waiver of privilege and 2) involuntary disclosure of documents cannot give rise to waiver. "While voluntary or even inadvertent

disclosure of documents may result a waiver of privilege, involuntary or compelled disclosure does not give rise to a waiver.” *In re Parmalat Sec. Litig.*, Case no. 04 MD 1653 (LAK) (HBP), 2006 U.S. Dist. LEXIS 88629 at *28 (S.D.N.Y. December 1, 2006). *See also Chubb Integrated Sys. v. National Bank of Washington*, 103 F.R.D. 52, 63 n.2 (D.D.C. 1984)(“Voluntary disclosure means the documents were not judicially compelled.”).

Even outside of the fact that Mr. Warren and The Board of Regents did not waive attorney client privilege or work product protection during disclosure of the documents, Mr. Warren and The Board of Regents have not done anything to support a waiver claim after the documents were produced. Instead, Mr. Warren and The Board of Regents have vigorously maintained attorney client privilege and work product protection since Mr. Warren and The Board of Regents discovered that NABP took the documents from Mr. Warren during the seizure. *See Motion for Determination of Privilege, Attachment 1.*

CONCLUSION

Under Federal Rule of Civil Procedure 26(b)(5)(B), NABP had a choice to either return, sequester, or destroy Documents A and B or ask the Court for determination of whether the documents were work product or attorney client privileged. For the foregoing alternative reasons, the Board of Regents respectfully requests that the Court determine that Documents A and B are protected from disclosure under the attorney client privilege and work product doctrine and order NABP to return or destroy Documents A and B and to make no use or disclosure of Documents A and B.

Respectfully submitted this 16th day of October, 2007.

THURBERT E. BAKER
Attorney General
Georgia Bar No. 033887

RAY LERER
Deputy Attorney General
Georgia Bar No. 446962

DENISE E. WHITING-PACK
Senior Assistant Attorney General
Georgia Bar No. 558559

MARY JO VOLKERT
Assistant Attorney General
Georgia Bar No. 728755

/s/ Alan E. Lubel
ALAN E. LUBEL
Special Assistant Attorney General
Georgia Bar No. 460625

JEFFREY MORGAN
Georgia Bar No. 522667

KEVIN A. MAXIM
Georgia Bar No. 478580

JULIE A. TENNYSON
Georgia Bar No. 702177

TROUTMAN SANDERS LLP
600 Peachtree St., Suite 5200
Atlanta, Georgia 30308
Phone: 404-885-3000
Fax: 404-962-6621

Attorneys for Defendant The Board of Regents of the
University System of Georgia

