

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

John Doe MC-1,

Plaintiff,

v.

The University of Michigan,
the Regents of the University of
Michigan,

Defendants.

Case No. 2:20-cv-10568-VAR-EAS

Hon. Victoria A. Roberts
Magistrate Judge Elizabeth A. Stafford

**EMERGENCY MOTION FOR
RECONSIDERATION AND CLARIFICATION
OF THE COURT'S ORDER DATED JUNE 24, 2020**

For the reasons set forth in the accompanying brief, Defendants the University of Michigan and the Regents of the University of Michigan (“the University”) hereby move for emergency reconsideration and clarification of the Court’s Order Following June 23, 2020 Status Conference. (*See* ECF No. 54 at PageID.1209.)

Pursuant to Local Rule 7.1, on June 26, 2020, Counsel for the University sent an email to all counsel of record for Plaintiffs with a request for concurrence, and if not obtained, a proposal to confer regarding this Motion over the phone. Counsel for the University conferred over the phone—and did not obtain concurrence—with Counsel for John Doe (Case No. 2:20-cv-10629) and Counsel for John Does MC (e.g., Case No. 20-10568). Counsel for Chuck Christian, et al. (Case No. 20-11294) replied that he concurred with Counsel for John Doe and John Does MC. The University therefore could not “obtain concurrence in the relief sought” with those parties. E.D. Mich. LCivR 7.1(a)(2)(A). Counsel for John Does TF (Case No. 20-11170) did not respond, and the University therefore was “unable to conduct a conference” with those parties. E.D. Mich. LCivR 7.1(a)(2)(B).

Consistent with this Court’s Order Establishing Master Case, the University is filing this Motion only on the “Master Case” docket in *Doe MC-I v. The University of Michigan, et al.*, Case No. 20-10568. (ECF No. 34 at PageID.381.)

Dated: June 26, 2020

Respectfully submitted,

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**BRIEF IN SUPPORT OF
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CONCISE STATEMENT OF ISSUES PRESENTED

In response to Plaintiffs’ assertions during a status conference regarding the independent investigation being conducted by the law firm Wilmer Cutler Pickering Hale and Dorr LLP (“WilmerHale”), this Court issued a broad injunction requiring the University “to immediately cease all direct communications with potential class members with potential claims against the defendants.” (ECF No. 54 at PageID.1211.) The Court also ordered “Jones Day to make the necessary arrangements to involve WilmerHale and the University of Michigan President in the Court’s next status conference,” which this Court “intends to hold . . . within the next two weeks.”

The University wishes to respond to the Court’s concerns, and endeavor to do so in this Motion and by way of the attached declaration from WilmerHale. But respectfully, it would be improper to require non-party WilmerHale to attend a court conference. In addition, the Court’s injunction prohibiting the University from communicating with any potential class members—which both interferes with the important work of the independent investigation and implicates wholly unrelated and routine communications between the University and its alumni—is unlawful. And the Court’s order requiring the University’s President to be “involved” runs afoul of binding precedent.

Under these circumstances, should the Court reconsider and vacate its order in relevant part?

Defendants answer “Yes.”

Plaintiffs answer “No.”

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Mich. R. of Prof'l Conduct 4.2(a)

Gulf Oil v. Bernard, 452 U.S. 89 (1981)

In re Univ. of Mich., 936 F.3d 460 (6th Cir. 2019)

INTRODUCTION

These cases involve allegations that University of Michigan alumni were sexually assaulted many years ago by Robert Anderson, a former University doctor who died in 2008. The University unequivocally condemns Anderson's misconduct. And, although Plaintiffs' legal claims against the University are barred by the statute of limitations and the University's sovereign immunity, the University is committed *both* to providing relief to the alumni Anderson harmed *and* to taking concrete steps to ensure that something like this cannot happen again.

In service of those goals and prior to the initiation of this litigation, the University engaged independent outside counsel—initially one law firm that was later replaced by WilmerHale—to conduct an independent investigation. In the meantime, a number of plaintiffs have brought claims against the University. The parties have stipulated to the appointment of a mediator, whom the University hopes will be able to assist the parties in reaching a fair, effective resolution of these claims. To allow the mediation process time to unfold, the parties have agreed to stay discovery and briefing deadlines for the time being.

On June 23, 2020, the Court held a routine status conference, during which some of the plaintiffs' counsel raised issues concerning WilmerHale's investigation that had not been addressed with the University or the Court in advance of the conference. In particular, some counsel expressed concern about an email sent by

the University to alumni, encouraging them to come forward with any information about Anderson's misconduct and to participate in the independent investigation.

The ensuing discussion yielded some confusion regarding the relationship between the WilmerHale investigation and this litigation, as well as allegations from some of the plaintiffs' counsel that the University may have improperly communicated with their clients. And it resulted in this Court's issuance of an Order that appears to (1) require WilmerHale—a non-party without authority to act on behalf of the University in this litigation—to participate in court proceedings; (2) bar the University from communicating with its alumni; and (3) require the University's President, Mark Schlissel, to appear in court. (*See* ECF No. 54 at PageID.1210–11.)

The University recognizes that the Court acted without the benefit of a factual record or legal briefing, and that it may not have been the Court's intention to sweep so broadly. Respectfully, however, these aspects of the Order lack any basis in fact or law and far exceed the bounds of this Court's discretion.

- **WilmerHale's Independent Investigation:** WilmerHale has provided the University with a declaration, attached as Exhibit A to this filing, "to provide the Court with information about the independent investigation [it] has been engaged to conduct by the Board of Regents of the University of Michigan into allegations of sexual misconduct by Dr. Robert E. Anderson. (*See* Ex. 1, Decl. of Bruce M. Berman ("WH Decl.") ¶ 3.) That declaration (which was not reviewed or edited by the University or its litigation counsel prior to its provision to the University) details, in WilmerHale's own words, the scope of the Firm's work, its independence from this litigation and from

the University with respect to control of the investigation, and its contacts with Plaintiffs and potential plaintiffs to date. The University hopes that the declaration and the attached engagement letter fully answer this Court's questions regarding the independent investigation, which is being conducted consistent with established best practices and the results of which will be released to the University and the public simultaneously. To maintain the independence of that investigation, however, it would be inappropriate to require WilmerHale—a non-party to this lawsuit—to appear at a status conference.

- **The Communication Ban:** There was nothing unlawful or inappropriate about the University's correspondence with its alumni. Such correspondence was not improper ex parte communication because (1) it was made by a party, not a lawyer; and (2) it was not made to individuals known to be represented by counsel. Moreover, the Court's broad ban is irreconcilable with the Supreme Court's ruling in *Gulf Oil* that, in the limited circumstances where they are appropriate, restrictions on communications between parties and potential class members must be as narrow as possible, can only be "justified by a likelihood of serious abuses," and must be "based on a clear record and specific findings." *Gulf Oil v. Bernard*, 452 U.S. 89, 101 (1981). As a consequence of the Court's Order, WilmerHale's important work with Anderson's victims has been halted. (See WH Decl. ¶ 25.) And victims who wish to come forward and tell their story are unable to do so. The Order's text has also called into question routine communications between the University and its alumni in any number of capacities and for any number of reasons.
- **President Schlissel:** As the Sixth Circuit recently held, a district court abuses its discretion by ordering the University's President, a state official, to personally attend a pre-trial conference. *In re Univ. of Mich.*, 936 F.3d 460, 464 (6th Cir. 2019) (granting the University's petition for a writ of mandamus). This issue was not discussed at the status conference, the Order is somewhat ambiguous, and the Court may not have intended to require President Schlissel's personal participation in a status conference. But if that were the Order's intended meaning, it is irreconcilable with that binding precedent and outside the bounds of this Court's discretion.

For these reasons, as explained in more detail below, the University hereby moves for clarification and reconsideration of these three aspects of its Order. Because the Order is presently causing serious, irreparable harm, the University seeks relief as soon as reasonably practicable.

STANDARD OF REVIEW

The Court's review should be de novo because it issued the prior Order without the benefit of briefing. *See Hailey v. Trombley*, No. 19-CV-10866, 2020 WL 3250215, at *1 (E.D. Mich. June 16, 2020). More broadly, reconsideration is appropriate "if the movant demonstrates a palpable defect by which the court and the parties have been misled and shows that correcting the defect will lead to a different disposition of the case." *Bowens v. Terris*, No. 2:15-CV-10203, 2015 WL 3441531, at *1 (E.D. Mich. May 28, 2015) (citing *DirecTV, Inc. v. Karpinsky*, 274 F. Supp. 2d 918, 921 (E.D. Mich. 2003)); *see also* E.D. Mich. LCivR 7.1(h).

ARGUMENT

I. THE INDEPENDENT INVESTIGATION

When an organization confronts allegations of past misconduct, the best way to find the truth—and prevent such misconduct from occurring again—is often to engage an independent third-party to investigate. Commentators generally agree that "[p]rudent governance, as well as common sense, dictates that [an entity] launch an internal investigation once it becomes aware of the possibility of wrongdoing by

any of its employees, managers and/or agents.” Alan S. Gutterman, Business Transactions Sols. § 224:2 (July 2020). “The credibility, and thus usefulness of the investigation,” however, “depends on the credibility of the investigators, which, in turn, depends on their independence.” Am. Law Inst., Internal Investigations, SG091-ALI-ABA 91 (May 2002).

Consistent with those “emerging view of best practices,” the University—like many other institutions facing allegations of misconduct—retained experienced independent counsel to conduct an internal investigation of Anderson’s misconduct. *See, e.g.*, Debevoise & Plimpton LLP, Report on the Investigation of Dr. Reginald Archibald 18 & n.21 (May 23, 2019), *available at* <https://tinyurl.com/y92w58au>; *see also, e.g.*, The Ohio State University, Office of University Compliance and Integrity, “Strauss Investigation,” *available at* <https://compliance.osu.edu/strauss-investigation.html>. The independent investigation into Anderson’s misconduct began in January 2020 and was publicly announced in February, before any lawsuits were filed. (*See* WH Decl. ¶ 5.) On March 21, 2020, WilmerHale replaced the firm that had been previously conducting that investigation. (*See id.* ¶ 7; *see also* Ex. 1-A, WH Decl. (“Engagement Letter”).)¹

¹ The Order stated that President Schlissel “announced an independent investigation into allegations of sexual assault” on June 16. As just described, however, the investigation had been ongoing for months.

At the June 23, 2020 status conference, questions were raised about the WilmerHale investigation and its relevance to the claims before the Court. The University appreciates the Court's desire to understand the investigation and WilmerHale's independence. But Jones Day has had no direct contact with or authority to contact WilmerHale in connection with this matter. (*See* WH Decl. ¶ 12 (“WilmerHale has taken care to maintain its independence from any litigation relating to Dr. Anderson’s alleged conduct. To that end, we have had no contact with the University’s outside litigation counsel, including Jones Day, about the investigation WilmerHale is conducting or about any litigation against the University relating to Dr. Anderson.”).)

WilmerHale, however, has “reviewed the Court’s Order Following June 23, 2020 Status Conference, Dkt. 54, and the transcript of the June 23, 2020 video status conference, Dkt. 57.” (*Id.* ¶ 2.) And WilmerHale has provided the University with a declaration, attached as Exhibit A to this filing, that “provide[s] the Court with information about the independent investigation WilmerHale has been engaged to conduct.” (*Id.* ¶ 3.) “No draft of th[e] Declaration [was] reviewed or edited by the Board of Regents, the University, the University’s litigation counsel Jones Day, or any other representative or agent of the University of Michigan.” (*Id.* ¶ 4.)

The declaration sets forth the purposes of the independent investigation:

The Board of Regents commissioned the independent investigation for three principal purposes: (a) to make a full and fair accounting to former patients of Dr. Anderson, the University community of students, faculty, staff, alumni, donors, and supporters, and the broader public concerning Dr. Anderson's conduct; (b) to make a full and fair accounting of whether the University knew or should have known of any misconduct by Dr. Anderson, whether appropriate actions were taken, and, if not, why not; and (c) to inform the University's consideration of measures that should be taken in the future so that misconduct such as Dr. Anderson is alleged to have committed does not happen again.

(*Id.* ¶ 11.) It further explains that “[t]he University has directed WilmerHale to follow the facts wherever they lead, without regard to any pending or future litigation against the University.” (*Id.*)

As set forth in the declaration and the attached engagement letter, “[t]he investigation was structured from the outset so as to maximize WilmerHale's independence.” (*Id.* ¶ 8.) The engagement letter provides that “[*n*]either the Board nor any University employee will conduct, direct, or otherwise manage or influence [WilmerHale's] independent investigation in any manner, and any participation in the investigation by the University will be at [WilmerHale's] request.” (Ex. 1-A, Engagement Letter at 1 (emphasis added).) And it further states that WilmerHale has “*sole* discretion to employ investigative resources, techniques, and processes that [it] deem[s] appropriate in order to conduct and complete [its] independent investigation and to make [its] report regarding the allegations about Dr. Anderson,

subject to the University’s relevant policies and procedures.” (*Id.* at 2 (emphasis added).)

“As set forth in the Engagement Letter, WilmerHale undertook to ‘issue a nonprivileged public report about the results of our independent investigation . . . in a manner that protects the anonymity and privacy of complainants and witnesses.’” (WH Decl. ¶ 9 (quoting Engagement Letter at 2).) And “[t]he University agreed to receive WilmerHale’s report ‘only upon its public release.’” (*Id.* (quoting Engagement Letter at 3).)

“As a further measure designed to preserve WilmerHale’s independence, WilmerHale and the University agreed that WilmerHale would “not undertake any matters to defend any potential claims that are related to the allegations about Dr. Anderson,” nor would it “advise the University on the defense of any actions brought by plaintiffs alleging that they were harmed by Dr. Anderson.” (*Id.* ¶ 10 (quoting Engagement Letter 2–3).) And “WilmerHale has taken care to maintain its independence from any litigation relating to Dr. Anderson’s alleged conduct.” (*Id.* ¶ 12.)

To that end, [WilmerHale has] had no contact with the University’s outside litigation counsel, including Jones Day, about the investigation WilmerHale is conducting or about any litigation against the University relating to Dr. Anderson. [It has] not coordinated, either directly or indirectly, with the University’s outside litigation counsel, and [it] will continue to refrain from any such contacts, either directly or through the University. As contemplated by the Engagement Letter, [WilmerHale has] not shared with the University

the identity of Dr. Anderson's former patients with whom [it has] had contact or any information those individuals have provided to [it] from which their identity could be inferred.

(*Id.*)

The University hopes that the information WilmerHale has provided in the attached declaration has answered the Court's questions regarding the independent investigation. Again, the University has committed to publicly releasing WilmerHale's final report.² In the meantime, and particularly given that discovery has been stayed, it is not appropriate for this Court to bring WilmerHale—who is *not* a party to these lawsuits and does *not* represent the University in connection with this litigation—into Court. Indeed, dragging WilmerHale into this litigation threatens the very independence its investigation was designed to provide. The University thus requests that the Court reconsider its order with regard to WilmerHale or otherwise permit the University to provide any further necessary clarifications regarding WilmerHale's role in writing.

² Although the report itself will be public, the underlying work product that is part of the independent investigation is privileged and not subject to use in these proceedings by any party. *See, e.g., Sandra T.E. v. South Berwyn Sch. Dist. 100*, 600 F.3d 612, 618–21 (7th Cir. 2010); *In re Allen*, 106 F.3d 582, 604-05 (4th Cir. 1997); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 531 (S.D.N.Y. 2015).

II. COMMUNICATIONS WITH POTENTIAL PLAINTIFFS

The University further requests prompt reconsideration of the Court's "no communication" order, which effectively enjoins the University, has ground the important work of the internal investigation to a halt, and is operating as a prior restraint on speech. The Plaintiffs' injection of that issue into the status conference without prior notice to the University or the Court was procedurally improper; the University's communication with its alumni was entirely appropriate; and the Court exceeded its discretion by issuing a broad communication ban with no basis in fact or law.

A. Procedural Posture

As a threshold matter, Plaintiffs' counsel did not request a "meet and confer" to discuss their objections to the University's alumni communication, nor did they file a motion or brief the issue. Instead, they raised their objections to the communication for the first time in open court and requested that the Court take action. That is not the way to conduct any litigation, much less litigation as delicate and complex as this. *Cf., e.g.,* Fed. Judicial Ctr., Sample Mass Tort Case-Management Order, Annotated Manual on Complex Litigation § 40.52, at 776 (David F. Herr ed., 4th ed. 2004) ("To avoid unnecessary litigation concerning motions, including motions relating to discovery disputes, counsel are directed to meet and confer before filing a motion. In any motion filed, counsel for the moving

party must certify that a good-faith effort was made to resolve the dispute.”); E.D. Mich. LCivR 7.1.

As a consequence of Plaintiffs’ tactics, the Court did not have the benefit of the relevant facts or the governing law when it ordered the University to “immediately cease all direct communications with potential class members with potential claims.” (See ECF No. 54 at PageID.1211.) If those conversations (and, if necessary, briefing) had taken place, it would have been apparent that the University’s communication with its alumni was entirely proper—both under the rules governing communications with represented parties and under Federal Rule of Civil Procedure 23.

B. There Was No Improper Contact with Represented Parties.

First, as a matter of black letter law, a *party* communicating with another *party*—the most that happened in the alumni communications—is not an ex parte communication. (See Ex. 1-B, WH Decl. (Letter from W. Manuel (Apr. 7, 2020); Ex. 1-C, WH Decl. (Letter from M. Schlissel (June 16, 2020).) The relevant ethical rule says: “In representing a client, a *lawyer* shall not communicate about the subject of the representation with a person whom the lawyer knows to be represented in the matter by another lawyer[.]” Mich. R. of Prof’l Conduct 4.2(a) (emphasis added). The comments to that rule make crystal clear that “*parties* to a matter may communicate directly with each other.” Mich. R. of Prof’l Conduct 4.2 cmt.

(emphasis added). That alone means there was no ex parte communication whatsoever, and Plaintiffs' counsels' representations to the Court that ex parte communications occurred were simply false. (*See* ECF No. 57 at PageID.1295, Hearing Transcript 27:7–8; 28:14–16; 41:22–42:11.)

Second and separately, the rule prohibits only communications “with a person whom the lawyer *knows to be represented* in the matter by another lawyer.” Mich. R. of Prof'l Conduct 4.2(a) (emphasis added). Because the University does not yet know Plaintiffs' identities—an issue on which the parties hope to reach agreement in short order—it cannot possibly know whether the alumni it contacted are “represented in the matter by” a “lawyer.” Accordingly, the rule does not apply.³

In any event, WilmerHale's declaration confirms that they have made every effort to communicate with represented Plaintiffs through their attorneys—including all of the Plaintiffs' firms that attended the status hearing before the Court—and that, prior to the status conference, those attorneys have not objected to those communications:

³ The Court's Order is made more problematic because, as Defendants noted at the status conference, and although the parties are working to resolve the issue, there are currently significant due process and jurisdictional problems with all but one case before the Court because the Court and Defendants still do not know who the plaintiffs are in those cases. *See, e.g., Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 637 (6th Cir. 2005) (explaining that “[f]ailure to seek permission to proceed under a pseudonym is fatal to an anonymous plaintiff's case” because “the federal courts lack jurisdiction over the unnamed parties” (quotation omitted)).

Within about a week after WilmerHale was retained by the Board of Regents, [it] began making extensive efforts to contact counsel for Dr. Anderson's former patients at more than twenty different law firms, including every law firm appearing on behalf of Plaintiffs at the June 23, 2020 video status conference before this Court, see Dkt. 57 at 2-3. [Its] purposes in reaching out to counsel for Dr. Anderson's former patients were to introduce [the Firm], provide information about the independent investigation [it was] conducting, and ask if their clients would consider being interviewed In every conversation [WilmerHale] initiated [it] made clear that [it] would welcome the participation of counsel for Dr. Anderson's former patients in any interviews [it] conducted of their clients. One law firm has made more than a dozen of its clients available for interviews with WilmerHale and attended every one of those interviews. Several other firms have indicated that they, too, would consider making their interested clients available for interviews.

(WH Decl. ¶ 13.) "At no point did any of the counsel with whom WilmerHale spoke suggest that WilmerHale should refrain from further efforts to contact and interview former patients of Dr. Anderson as part of [its] independent investigation." (*Id.* ¶ 14.)

Moreover, WilmerHale's "standard practice before interviewing any of Dr. Anderson's former patients is to ask if the individual is represented by legal counsel in connection with the allegations related to Dr. Anderson. If the answer is in the affirmative, [WilmerHale] explain[s] that [it] may not proceed with the interview without the consent of the individual's counsel, and [it] immediately end[s] the conversation." (*Id.* ¶ 21.)

C. The University’s Communication To A Large Group that Included Putative Class Members Was Entirely Proper.

With respect to Rule 23 and potential members of the putative class, which has not yet been certified, “[t]he court should begin with the premise that . . . a defendant does *nothing wrong* by communicating directly with someone who may become, but is not yet, a member of a class.” *Doe I v. Mich. Dep’t of Corr.*, 2014 WL 3809419, at *5 (E.D. Mich. Aug. 1, 2014) (emphasis in original) (quotation omitted); see *James v. Detroit Prop. Exch.*, No. 18-13601, 2019 WL 9098024, at *11 (E.D. Mich. July 11, 2019) (“Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification[.]” (quotation omitted)); Fed. Judicial Ctr., Precertification Communications with the Proposed Class, Annotated Manual for Complex Litigation § 21.12, at 247–49 (David F. Herr ed., 4th ed. 2004) (citing *Gulf Oil* for proposition that “Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification”). Such communications are inappropriate only when they “are false or misleading, contain material omissions, or are coercive or intimidating.” *Tolmasoff v. Gen. Motors, LLC*, No. 16-11747, 2016 WL 3548219, at *11 (E.D. Mich. June 30, 2016).

The University President’s communication with its alumni was nothing of the sort, and indeed targeted a far wider public audience than just the proposed class. As an initial matter, the University communicated in writing, which courts recognize as an unthreatening and non-invasive form of communication. *See Benion v. LeCom, Inc.*, No. 15-14367, 2016 WL 11577279, at *2 (E.D. Mich. Aug. 10, 2016) (favoring mail over telephone calls); *James*, 2019 WL 9098024, at *11 (characterizing favorably communications with potential class members that occur “only in writing” (quotation omitted)); (*see* Ex. 1-B, WH Decl. (Letter from W. Manuel, Apr. 7, 2020); Ex. 1-C, WH Decl. (Letter from M. Schlissel (June 16, 2020))). The University’s communication is not about these lawsuits. And it does not suggest alternative compensation or a waiver of claims.

Instead, the communication invites recipients—all University alumni with whom the University has an ongoing relationship, and not just the proposed class of “[a]ll male students who were seen by Anderson at UM between 1968 and 2003,” (Class Compl. ¶ 114, Case No. 20-10629, ECF No. 1 at PageID.29)—to speak voluntarily with the independent investigators. *See Perkins v. Benore Logistics Sys., Inc.*, No. 16-13737, 2017 WL 445603, at *4 (E.D. Mich. Feb. 2, 2017) (finding that a communication was not suggestive or threatening when it offered the recipient the option to speak). And the University’s communication is sensitive to the victims’ needs, offers support services, and promises confidentiality.

Those responsible actions are consistent with recognized “best practices” for these types of investigations. *See, e.g.*, Debevoise & Plimpton LLP, Report on the Investigation of Dr. Reginald Archibald 18 & n.21 (May 23, 2019), *available at* <https://tinyurl.com/y92w58au> (summarizing evidence obtained about allegations of a former professor and senior physician at The Rockefeller University, and explaining that “proactive outreach to affected communities” is a “best practice[]”); The Ohio State University, Office of University Compliance and Integrity, “Strauss Investigation,” *available at* <https://compliance.osu.edu/strauss-investigation.html> (explaining that, as part of its investigation, Ohio State broadly communicated about the investigation, contacting 115,000 alumni and former student-athletes and reaching an additional 147,000 people through university-wide notifications”). And they in no way interfered with these separate lawsuits.

Indeed, President Schlissel’s communication followed a prior “email and postal correspondence from Warde Manuel, the Director of Intercollegiate Athletics at the University” informing recipients about the independent investigation. (WH Decl. ¶ 16; *see also* Ex. 1-B, WH Decl. (Letter from W. Manuel (Apr. 7, 2020).) Notably, “WilmerHale did not receive any correspondence from counsel for any of Dr. Anderson’s former patients objecting to the University’s April 7 outreach from Athletic Director Manuel, nor did WilmerHale receive any requests from counsel to refrain from similar outreach in the future.” (WH Decl. ¶ 17.)

D. The Court Abused Its Discretion By Imposing a Broad Communication Ban.

The Supreme Court has recognized that—in limited circumstances—Rule 23 permits courts to impose carefully tailored restrictions on communications between parties and potential class members to prevent abusive communications. In so doing, however, the Supreme Court has emphasized that such “order[s] involve[] serious restraints on expression,” and, as a result, can only be “justified by a likelihood of serious abuses.” *Gulf Oil*, 452 U.S. at 104. “[T]he mere possibility of abuses does not justify routine adoption of a communications ban.” *Id.* Moreover, any “order limiting communications between parties and potential class members” must be “based on a *clear record and specific findings* that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.” *Id.* at 101 (emphasis added). And such an order should “giv[e] explicit consideration to the narrowest possible relief which would protect the respective parties” and “limit[] speech as little as possible.” *Id.* at 102 (quotation omitted).

Consistent with these standards, “orders limiting communication are cautiously, rarely, and carefully entered.” *Bobbitt v. Acad. of Court Reporting*, No. 07-10742, 2008 WL 4298458, at *2 (E.D. Mich. Sept. 18, 2008). Courts must “refrain from interfering with any party’s ability to communicate freely with putative class members unless there is a specific reason to believe that such interference is

necessary.” *Perkins*, 2017 WL 445603, at *2 (quotation omitted). And these rare communication restrictions are permissible only when “the actual or anticipated communications are or will be abusive in that they threaten the proper functioning of the litigation.” *James*, 2019 WL 9098024, at *11 (citation omitted).

Again, Plaintiffs’ counsel raised their objection to the University’s communication with potential putative class members for the first time in open court. They simply failed to provide the Court any evidence or law that might support even a tailored restriction on the University’s communications. As a result, the Court’s “sweeping restraint order” was based on no “record useful for appellate review,” no “factual findings,” and no “legal arguments supporting the need for this sweeping restraint order.” *Gulf Oil*, 452 U.S. at 102. And instead of “giving explicit consideration to the narrowest possible relief which would protect the respective parties,” *id.* (quotation omitted), the Order bans communication entirely (ECF No. 54 at PageID.1211).

As the Sixth Circuit has recognized, such an “extreme restriction[] on intra-class communications . . . would only be appropriate to control abuses or potential abuses which appeared on the record to be egregious.” *Williams v. U.S. Dist. Court*, 658 F.2d 430, 436 (6th Cir. 1981) (issuing a writ of mandamus where the “record, like the record in *Gulf Oil*, disclose[d] neither legal nor factual grounds on which the

district court could have determined that it was necessary or appropriate to impose the order”). The Court’s blanket ban falls well short of that standard.

E. The Communication Ban Is Causing and Will Continue to Cause Serious Harm.

As a consequence of the Court’s broadly worded order, “WilmerHale has ceased all outreach to and contact with any of Dr. Anderson’s former patients, except as necessary to cancel previously scheduled interviews.” (WH Decl. ¶ 25.) And the University has been forced to shut down its hotline, an important tool for survivors that is intended to “provide a safe and secure environment for survivors to share their stories . . . and to continue to provide resources to support the survivors who bravely share their truth.” Press Release, University of Michigan, U-M hires WilmerHale to handle Robert E. Anderson investigation (Mar. 24, 2020), *available at* <https://tinyurl.com/y7gksq6p>. And the University fears that the Order—and Plaintiffs’ counsels’ statements to the press and the public about it—may deter some witnesses and survivors from coming forward at all.

Moreover—and although it is not clear that the Court meant to sweep so far—the Court’s Order puts the University in a truly impossible position with respect to communications unrelated to this litigation. Like other colleges and universities, the University of Michigan regularly contacts its many alumni (most of whom are not potential members of the putative class) about sporting and cultural events, class

reunions, and fundraising. It also employs some of its own alumni, treats many of them in a medical capacity, and interacts with them in any number of other ways.

The University recognizes that the Court may not have anticipated that its Order would have these consequences. But the Order is presently causing serious harm to Anderson's alleged victims, and it is frustrating the University's efforts to investigate and promptly gather information as witnesses come forward. Indeed, until this Court takes action and rescinds, clarifies, or modifies its order, victims and witnesses who have mustered the courage to speak up will be met with court-ordered silence. And the University's other routine communications, which have nothing at all to do with the subject matter of this litigation, are all potentially subject to question. In the meantime, Plaintiffs' counsel are continuing to advertise and to contact University alumni, operate their own hotlines, and use this Court's Order as basis to recruit additional clientele. *See, e.g.,* Lieff Cabraser Heimann & Bernstein LLP, Judge Orders Univ. President Mark Schlissel To Attend Next Court Conference in U of M / Dr. Robert Anderson Sexual Abuse Lawsuit (June 25, 2020), *available at* <https://tinyurl.com/y9b8hpn3>.

* * *

The University respectfully requests that the Court immediately vacate its order in relevant part. Consistent with the governing law, and as they have been doing already, neither Jones Day nor WilmerHale will contact parties that they know

are represented by counsel. (*See* WH Decl. ¶ 21 (“Our standard practice before interviewing any of Dr. Anderson’s former patients is to ask if the individual is represented by legal counsel in connection with the allegations related to Dr. Anderson. If the answer is in the affirmative, we explain that we may not proceed with the interview without the consent of the individual’s counsel, and we immediately end the conversation.”).) Any further restriction is unlawful and, left in place, constitutes an abuse of discretion.

III. PRESIDENT SCHLISSEL’S INVOLVEMENT

Finally, the Court’s Order requires that President Schlissel be “involve[d]” in an upcoming status conference. (ECF No. 54 at PageID.1211.) The University seeks to clarify that the Court did not intend to order him personally to appear.

Just last year, the Sixth Circuit squarely held, in another case involving the University of Michigan, that a district court abuses its discretion by “order[ing] a specific high-ranking state official”—there, as here, the University’s President himself—“to serve as a party’s representative” at a court conference. *Univ. of Mich.*, 936 F.3d at 464. In that case, Judge Tarnow had ordered President Schlissel, an officer of the State of Michigan, to attend a settlement conference after rejecting the University’s proposal to send another representative. *Id.* Judge Tarnow ordered President Schlissel to appear because, in Judge Tarnow’s view, President Schlissel “had a duty to explain University policy to his constituents.” *Id.* But as the Sixth

Circuit explained, “[t]hat is not a valid reason” to compel his attendance. *Id.* And it issued a writ of mandamus, holding that requiring President Schlissel to attend a public settlement conference “certainly” warranted issuance of the writ. *Id.* at 466.

If anything, compelling President Schlissel’s attendance in this case would be an even clearer abuse of discretion. With respect to settlement discussions, the Federal Rules of Civil Procedure recognize that, out of concerns related to settlement authority, a court may order that “a party or its representative be present or reasonably available by other means to consider possible settlement.” Fed. R. Civ. P. 16(c)(1). Even then, however, “the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility.” *Univ. of Mich.*, 936 F.3d at 464 (quoting Fed. R. Civ. P. 16 Advisory Committee Notes (1993 Amendments)). With respect to matters apart from settlement, the Rules provide only that “[a] represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference.” Fed. R. Civ. P. 16(c)(1).

Any questions the Court has about the litigation must be directed to the University’s counsel or other representative. Accordingly, the University respectfully requests that the Court clarify that the President’s personal attendance at the upcoming status conference is not required.

CONCLUSION

For the foregoing reasons, the University hereby requests that, as soon as reasonably practicable, the Court vacate the portion of its Order prohibiting the University from communicating with potential putative class members and clarify that neither the University's President nor WilmerHale need attend any future status conference.

Dated: June 26, 2020

Respectfully submitted,

/s/ Stephanie E. Parker

Stephanie E. Parker

Jack Williams

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on June 26, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court through the CM/ECF system, which will effectuate service upon all counsel of record.

/s/ Stephanie E. Parker

Stephanie E. Parker

Counsel for Defendants

Exhibit 1

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

John Doe MC-1,

Plaintiff,

vs.

The University of Michigan,
the Regents of the University of Michigan,

Defendants.

Case No. 2:20-cv-10568-VAR

Hon. Victoria A. Roberts

DECLARATION OF BRUCE M. BERMAN

I, Bruce M. Berman, make the following declaration:

1. I have been a partner at the law firm Wilmer Cutler Pickering Hale and Dorr LLP and its predecessor Wilmer Cutler Pickering, LLP (“WilmerHale”), resident in the firm’s District of Columbia office, since 1987. I have been a member in good standing of the District of Columbia Bar since 1980. I lead WilmerHale’s Higher Education practice group. My practice includes conducting investigations and advising colleges and universities on matters of compliance with state and federal law.

2. I have reviewed the Court’s Order Following June 23, 2020 Status Conference, Dkt. 54, and the transcript of the June 23, 2020 video status conference, Dkt. 57.

3. I make this Declaration to provide the Court with information about the independent investigation WilmerHale has been engaged to conduct by the Board of Regents of the University of Michigan into allegations of sexual misconduct by Dr. Robert E. Anderson. I am one of the partners leading the independent investigation.

4. No draft of this Declaration has been reviewed or edited by the Board of Regents, the University, the University's litigation counsel Jones Day, or any other representative or agent of the University of Michigan.

5. On February 19, 2020, the University of Michigan publicly announced that it was undertaking an "independent, outside review" of allegations of sexual misconduct by Dr. Anderson.¹ The University stated that the law firm Steptoe & Johnson LLP would conduct the review and invited "any former patients" of Dr. Anderson "who believe they were subjected to sexual misconduct during a medical exam to contact a dedicated call center."² The University's announcement received significant press coverage at the time.³

6. Two weeks later, the University announced that, by March 2, 2020, it had received more than 100 complaints related to Dr. Anderson.⁴ University officials continued to "urge anyone to come forward and talk directly and confidentially to [the University's] outside, independent investigators."⁵

7. On March 24, 2020, the University announced that, on March 21, 2020, it had retained WilmerHale to take over the independent investigation into Dr. Anderson's alleged

¹ "Patients of Late U-M Campus Physician Asked to Call Hotline," THE UNIVERSITY RECORD, Feb. 19, 2020, *available at* <https://record.umich.edu/articles/patients-of-late-u-m-campus-physician-asked-to-call-hotline/> (last visited June 25, 2020).

² *Id.*

³ *See, e.g.*, "University of Michigan Asks Patients of Former Athletic Doctor to Report Sexual Abuse to Hotline," MLIVE, Feb. 19, 2020, *available at* <https://www.mlive.com/news/ann-arbor/2020/02/university-of-michigan-asks-patients-of-former-athletic-doctor-to-report-sexual-abuse-to-hotline.html> (last visited June 25, 2020); "Michigan Seeking Information About Late Doctor Accused of Sexual Assault," ESPN NEWS SERVICES, Feb. 19, 2020, *available at* https://www.espn.com/college-sports/story/_/id/28736533/michigan-seeking-information-late-doctor-accused-sexual-assault (last visited June 25, 2020).

⁴ "More Than 100 Complaints Now Logged Against Former University of Michigan Doctor Robert Anderson," MLIVE, Mar. 2, 2020, *available at* <https://www.mlive.com/news/ann-arbor/2020/03/more-than-100-complaints-now-logged-against-former-university-of-michigan-doctor-robert-anderson.html> (last visited June 25, 2020).

⁵ *Id.*

misconduct.⁶ The University’s announcement received significant contemporaneous press coverage.⁷

8. The University has published the Engagement Letter entered into by the Board of Regents and WilmerHale.⁸ *See* Ex. A. As set forth in the Engagement Letter, the University hired WilmerHale “to conduct an independent investigation of allegations that Dr. Robert Anderson engaged in sexual misconduct during his employment at the University.” Ex. A at 1. The investigation was structured from the outset so as to maximize WilmerHale’s independence. For example, the Engagement Letter provides that “neither the Board nor any University employee will conduct, direct, or otherwise manage or influence [WilmerHale’s] independent investigation in any manner.” *Id.* The Engagement Letter further provides that WilmerHale “will have sole discretion to employ investigative resources, techniques, and processes that we deem appropriate in order to conduct and complete our independent investigation.” *Id.* at 2. The Engagement Letter also provides that the University “will not request or receive names of, or identifying information about, complainants,” and “will not request, receive, or claim ownership of [WilmerHale’s] work product.” *Id.*

9. As set forth in the Engagement Letter, WilmerHale undertook to “issue a non-privileged public report about the results of our independent investigation . . . in a manner that

⁶ “U-M Hires WilmerHale to Handle Robert E. Anderson Investigation,” THE UNIVERSITY RECORD, Mar. 24, 2020, *available at* <https://record.umich.edu/articles/u-m-hires-wilmerhale-to-handle-robert-e-anderson-investigation/> (last visited June 25, 2020).

⁷ *See, e.g.*, “U-M Hires Law Firm to Finish Investigation of Former Football Team Doctor Robert Anderson,” DETROIT FREE PRESS, Mar. 24, 2020, *available at* <https://www.freep.com/story/news/education/2020/03/24/university-michigan-hires-firm-finish-investigation-former-doctor-robert-anderson/2905954001/> (last visited June 25, 2020); “University of Michigan Hires New Law Firm in Abuse Inquiry,” ABC NEWS, Mar. 24, 2020, *available at* <https://abcnews.go.com/Sports/wireStory/university-michigan-hires-law-firm-abuse-inquiry-69769595> (last visited June 25, 2020).

⁸ *See* <https://publicaffairs.vpcomm.umich.edu/wp-content/uploads/sites/19/2020/03/ENGAGEMENT-LETTER.pdf> (last visited June 25, 2020).

protects the anonymity and privacy of complainants and witnesses.” Ex. A at 2. The University agreed to receive WilmerHale’s report “only upon its public release.” *Id.* at 3.

10. As a further measure designed to preserve WilmerHale’s independence, WilmerHale and the University agreed that WilmerHale would “not undertake any matters to defend any potential claims that are related to the allegations about Dr. Anderson,” nor would it “advise the University on the defense of any actions brought by plaintiffs alleging that they were harmed by Dr. Anderson.” Ex. A at 2-3.

11. The Board of Regents commissioned the independent investigation for three principal purposes: (a) to make a full and fair accounting to former patients of Dr. Anderson, the University community of students, faculty, staff, alumni, donors, and supporters, and the broader public concerning Dr. Anderson’s conduct; (b) to make a full and fair accounting of whether the University knew or should have known of any misconduct by Dr. Anderson, whether appropriate actions were taken, and, if not, why not; and (c) to inform the University’s consideration of measures that should be taken in the future so that misconduct such as Dr. Anderson is alleged to have committed does not happen again. The University has directed WilmerHale to follow the facts wherever they lead, without regard to any pending or future litigation against the University.

12. WilmerHale has taken care to maintain its independence from any litigation relating to Dr. Anderson’s alleged conduct. To that end, we have had no contact with the University’s outside litigation counsel, including Jones Day, about the investigation WilmerHale is conducting or about any litigation against the University relating to Dr. Anderson. We have not coordinated, either directly or indirectly, with the University’s outside litigation counsel, and we will continue to refrain from any such contacts, either directly or through the University. As

contemplated by the Engagement Letter, we have not shared with the University the identity of Dr. Anderson's former patients with whom we have had contact or any information those individuals have provided to us from which their identity could be inferred.

13. Within about a week after WilmerHale was retained by the Board of Regents, we began making extensive efforts to contact counsel for Dr. Anderson's former patients at more than twenty different law firms, including every law firm appearing on behalf of Plaintiffs at the June 23, 2020 video status conference before this Court, *see* Dkt. 57 at 2-3. Our purposes in reaching out to counsel for Dr. Anderson's former patients were to introduce ourselves, provide information about the independent investigation we were conducting, and ask if their clients would consider being interviewed by us. In every conversation we initiated we made clear that we would welcome the participation of counsel for Dr. Anderson's former patients in any interviews we conducted of their clients. One law firm has made more than a dozen of its clients available for interviews with WilmerHale and attended every one of those interviews. Several other firms have indicated that they, too, would consider making their interested clients available for interviews.

14. At no point did any of the counsel with whom WilmerHale spoke suggest that WilmerHale should refrain from further efforts to contact and interview former patients of Dr. Anderson as part of our independent investigation.

15. On April 7, 2020, the University announced that it was reaching out to roughly 6,800 former student-athletes, some of whom may have been patients of Dr. Anderson, in an

effort to encourage them “to come forward to talk with independent investigators.”⁹ The University’s announcement received significant contemporaneous press coverage.¹⁰

16. The University’s outreach consisted of email and postal correspondence from Warde Manuel, the Director of Intercollegiate Athletics at the University. *See* Ex. B. In the correspondence, Athletic Director Manuel informed recipients that WilmerHale’s mission was to “follow the facts wherever they may lead in order to help the University understand how the abuse that has been reported could have occurred.” Ex. B at 1. That knowledge, Athletic Director Manuel continued, would “allow the [U]niversity to better prevent abuse from happening in the future.” *Id.* Athletic Director Manuel also noted that it would be “up to WilmerHale to decide how to conduct the investigation”; the University, he stated, would “not seek to influence or interfere with the investigation in any way.” *Id.*

17. WilmerHale did not receive any correspondence from counsel for any of Dr. Anderson’s former patients objecting to the University’s April 7 outreach from Athletic Director Manuel, nor did WilmerHale receive any requests from counsel to refrain from similar outreach in the future.

18. On June 16, 2020, the University announced that it was reaching out to roughly 300,000 alumni and attendees of the University who may have been patients of Dr. Anderson to

⁹ “U-M Contacting Former Student-Athletes in Anderson Case,” THE UNIVERSITY RECORD, Apr. 7, 2020, *available at* <https://record.umich.edu/articles/u-m-contacting-former-student-athletes-in-anderson-case/> (last visited June 25, 2020).

¹⁰ *See, e.g.*, “6,800 Former Student-Athletes Being Contacted in University of Michigan Investigation Into Late Doctor,” MLIVE, Apr. 7, 2020, *available at* <https://www.mlive.com/news/ann-arbor/2020/04/6800-former-student-athletes-being-contacted-in-university-of-michigan-investigation-into-late-doctor.html> (last visited June 25, 2020); “U. of Michigan Reaching out to Ex-Athletes About Late Doctor,” ABC NEWS, Apr. 7, 2020, *available at* <https://abcnews.go.com/Sports/wireStory/michigan-reaching-athletes-late-doctor-70019324> (last visited June 25, 2020).

ask them to “share information that may be helpful to an independent investigation into allegations of sexual misconduct.”¹¹

19. The University’s outreach consisted of email and postal correspondence from President Mark Schlissel. *See* Ex. C. In the correspondence, President Schlissel informed recipients that the University had “retained the law firm WilmerHale to conduct an independent investigation” and that WilmerHale would “issue a public report” that would “include a full accounting of Anderson’s conduct, a discussion of any institutional failings that may have allowed him to harm others, and recommendations for preventing what Anderson is alleged to have done from happening ever again.” *Id.* President Schlissel further noted that the University would “not influence or interfere with the investigation.” *Id.*

20. As part of WilmerHale’s independent investigation, we have reviewed relevant documents and have conducted interviews of current and former University personnel, other individuals who may have relevant information, and former patients of Dr. Anderson. The only former patients of Dr. Anderson we have interviewed are those who have previously spoken to the University or indicated to us or the University that they would like to be contacted by us.

21. Our standard practice before interviewing any of Dr. Anderson’s former patients is to ask if the individual is represented by legal counsel in connection with the allegations related to Dr. Anderson. If the answer is in the affirmative, we explain that we may not proceed with the interview without the consent of the individual’s counsel, and we immediately end the conversation. If an individual asks us whether he or she should retain counsel, we explain that,

¹¹ “U-M Reaching Out to Former Students in Anderson Case,” THE UNIVERSITY RECORD, June 16, 2020, *available at* <https://record.umich.edu/articles/u-m-reaching-out-to-former-students-in-anderson-case/> (last visited June 25, 2020).

as counsel for the Board of Regents, we are unable to provide legal advice to the individual, including whether the individual should retain counsel.

22. At no point in our correspondence or interactions with anyone who identifies himself or herself as a former patient of Dr. Anderson do we discuss any litigation against the University, including the litigation before this Court, or the individual's participation in it; nor do we discuss whether the individual should cooperate with any plaintiff's counsel. If a former patient asks us about such matters, we respond that under the terms of our engagement with the University, we are not and will not be involved in any potential litigation, settlements, negotiations, or class actions regarding Dr. Anderson. We do not make or respond to settlement offers or request liability releases from anyone.

23. Many of the individuals WilmerHale has interviewed have emphasized the importance of maintaining their anonymity and confidentiality. A number of individuals have told us that they would not agree to share information with us if they knew that their names and personal information would be shared with third parties, including the University. Keeping this information confidential also maintains the integrity of our investigation by minimizing the risk of tainting the memories of individuals with whom we have not yet been able to speak.

24. Prior to the Court's Order, we endeavored to reach out to former patients who wished to speak with us as promptly as possible, typically within 24-48 hours after they provided their contact information. We understood that for some former patients, discussing their experiences was a difficult decision, and we did not want to unnecessarily prolong the period when they were waiting for a return call.

25. In compliance with the Court's Order, WilmerHale has ceased all outreach to and contact with any of Dr. Anderson's former patients, except as necessary to cancel previously-scheduled interviews.

June 26, 2020

By: /s/ Bruce M. Berman
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Exhibit A

WILMERHALE

March 21, 2020

Danielle Conley
Aaron Zebley

Ron Weiser, Chair
Denise Ilitch, Vice Chair
Board of Regents
University of Michigan
Fleming Administration Building
503 Thompson Street
Ann Arbor, Michigan 48109-1340

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Dear Mr. Weiser and Ms. Ilitch:

This is to confirm that the Board of Regents (the “Board”) of the University of Michigan (the “University”) is engaging Wilmer Cutler Pickering Hale and Dorr LLP (“WilmerHale” or “the Firm”) to conduct an independent investigation. This letter will confirm our discussion with the University regarding the engagement and describe the basis on which our Firm will provide legal services. If there are any questions about any of these provisions, do not hesitate to call, and if any of these terms are not acceptable, please notify us immediately.

We understand you have asked our Firm to conduct this independent investigation in addition to our ongoing independent investigation of allegations about Dr. Martin Philbert (the “Philbert Matter”) because we have developed an understanding of relevant University policies and procedures through our work on the Philbert Matter. In addition, although each matter is entirely separate and distinct, the matters may present certain common questions about University policies and procedures. We will assign personnel to both matters in a manner to complete them as expeditiously as possible.

1. *Client; Scope of Representation.*

Our client in this matter will be the Board, on behalf of the University. References to the University include the Board and the individual Regents, who are the constitutional officers of the University. *See Mich. Const. art. VIII, § 5.*

We will be engaged to conduct an independent investigation of allegations that Dr. Robert Anderson engaged in sexual misconduct during his employment at the University (the “Matter”). Except as expressly set forth in this paragraph, neither the Board nor any University employee will conduct, direct, or otherwise manage or influence our independent investigation in any manner, and any participation in the investigation by the University will be at our request. We understand that the Board has authorized the University’s General Counsel to act as our point of contact concerning this investigation for purposes of securing such logistical and related support as we may require to conduct and complete the investigation. The Board and the General Counsel have agreed that they will support and assist us in gaining whatever access or resources we need to complete our investigation of the Matter and to report our findings. In the event we

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are denied access to relevant information, we will state that in our non-privileged public report on the Matter, described below.

We will have sole discretion to employ investigative resources, techniques, and processes that we deem appropriate in order to conduct and complete our independent investigation and to make our report regarding the allegations about Dr. Anderson, subject to the University's relevant policies and procedures. Our acceptance of this engagement does not involve an undertaking to represent the University or its interests in any other matter (our Firm will complete its ongoing independent investigation of the Philbert Matter). Our Firm will not undertake any matters to defend any potential claims that are related to the allegations about Dr. Anderson.

We will supervise the other partners, associates, paralegals and any others who may be called upon to assist in this effort. Professionals who are not attorneys will not provide legal advice or give legal opinions. All work will be performed consistent with applicable rules of professional conduct.

2. Report.

We will issue a non-privileged public report about the results of our independent investigation of the Matter in a manner that protects the anonymity and privacy of complainants and witnesses. The University and the Firm will endeavor to protect the identity and confidentiality of complainants and witnesses in the Matter to the greatest extent permitted by law.

Recognizing that the University anticipates litigation on a range of issues related to the allegations about Dr. Anderson, the following terms and conditions shall apply to the Firm's provision of legal advice and legal services in the Matter. Except as required by law:

- 1) the University will not request or receive names of, or identifying information about, complainants; and
- 2) the University will not request, receive, or claim ownership of our Firm's work product underlying our report on the Matter.

The University will not use information gathered by our Firm from complainants and witnesses in the Matter as evidence in its defense of any actions brought by plaintiffs alleging that they were harmed by Dr. Anderson except to the extent that such information either is (i) publicly disclosed, or (ii) produced to third parties (including a plaintiff or claimant against the University) in civil litigation or otherwise. (But in no event will the University use our Firm's report itself as evidence in its defense of any such actions.)

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Further, the Board and the University will receive our report on the Matter only upon its public release.

We intend our underlying work product to otherwise be subject to the work product doctrine and applicable privileges. We regard our communications with the University, including any attorney, employee, or agent acting on behalf of the University (including you), as well as communications within the Firm or with any other third parties that we might engage in furtherance of our work on the Matter, as privileged and confidential because they will be made for the purpose of assisting the Firm in giving legal advice to the University concerning the Matter. We will not advise the University on the defense of any actions brought by plaintiffs alleging that they were harmed by Dr. Anderson.

3. *Fees and Expenses.*

As we have discussed with the University, our fees are ordinarily based on hourly rates for lawyers and, where applicable, other professionals and paraprofessionals. We review and may adjust our billing rates annually, and changes in billing rates for personnel working on a matter may occur during the course of the representation. Other than annual adjustments to our underlying billing rates, the fee structure we discussed with the University will apply for the duration of this Matter.

Our invoices will include separate charges for disbursements made and internal charges incurred on behalf of the University. These may include such items as printing and copying, after hours support, computerized research charges, courier and messenger charges, supplies, travel and related lodging and meal expenses, charges for complex document production, and late-night meal and transportation expenses. Except as set forth in the Pricing Guidelines for Disbursements and Other Charges attached hereto and incorporated herein, we will bill the University at cost for charges paid to third parties, and charges for internal services will be billed at our usual and customary rates for such services. Fees and expenses of others (such as consultants, experts, and local counsel) and other extraordinary expenses (such as remote office requirements) will be billed directly to the University, unless other arrangements, such as use of disbursement retainers, are put in place.

In order to maintain the independence of our investigation, the University agrees that we may omit from our invoices those details that we determine could reveal the course and/or progress of our investigation. We will maintain our customary detailed billing records for the Matter.

We expect to hire, on the University's behalf, consultants, experts, and others to assist us in and in furtherance of our investigation. The University agrees to pay all fees and expenses for any such outside assistance and other extraordinary expenses (such as remote office requirements for proceedings that require our on-site presence, etc.). The University agrees that it is solely responsible for those fees and expenses, and that it will pay those amounts directly to the payee(s) identified by the Firm. The Firm will receive and review invoices for those fees and

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expenses to confirm that they reflect amounts for services rendered, and we will convey to you the amounts for payment directly to the consultant, expert, or other third-party.

We will ordinarily send the University monthly invoices for work performed and expenses recorded on our books during the previous month. If there are any special policies with respect to information you want to have included in our invoices, please advise us promptly. You, as authorized on behalf of the University, agree to waive any such policies that we determine could reveal the course and/or progress of our investigation, or otherwise raise any concern regarding our independence. Please review our invoices when you receive them so that any questions you may have are raised in a timely fashion. All such invoices are due and payable upon your receipt of our invoice, and we reserve the right to discontinue providing legal services and/or to discontinue providing the discounted fee arrangement, after notice, if our invoices are not paid promptly. Additional details concerning expense reimbursement are set forth in the enclosed Pricing Guidelines for Disbursements and Other Charges.

4. Conflicts.

We are a large firm with offices in a number of cities in the United States and abroad, and we represent many companies and individuals. In addition, we may represent, now or in the future, competitors in the same industry or patent space. Given the breadth of our practice, it is possible that during the time we are representing the University, some of our present or future clients are or will be engaged in transactions, or encounter disputes, with the University. For instance, as we discussed with the University, we represent clients adverse to the University in unrelated matters. The University agrees that we may continue to represent, and may undertake in the future to represent, existing or new clients in any matter that is not substantially related to our work for the University even if the interests of such clients in those matters are directly adverse to the University; provided, however, that this waiver shall not extend to initiation of litigation, arbitration or other dispute resolution proceedings against the University on behalf of another client concurrent with the representation. Attorneys working on this Matter will not be staffed on any matters adverse to the University during this engagement and for a period of 18 months after the engagement concludes; precautionary screens will also be implemented. In addition, subject only to compliance with any applicable rules of professional conduct, during the pendency of our representation of the University in this Matter, our firm will not knowingly undertake the representation of a person in a particular matter where that person is alleged to have engaged in the same type of conduct that the complainants allege was perpetrated against them by Dr. Anderson in the Matter. At no time would we use or disclose any confidential or proprietary information relating to the University's representation in connection with our representation of another client without the University's written consent.

It is also our mutual understanding that we are being engaged by, and will represent, only the University and not any parent, subsidiary, joint venture partner or other affiliated entities and that our representation of the University in this Matter will not give rise to any conflict of interest in

WILMERHALE

Board of Regents
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the event other clients of the Firm are or become adverse to any such parent, subsidiary or affiliate. Further, this will confirm that, unless specifically confirmed otherwise in writing, our representation is not a representation of any individual members of the University Board of Regents or any other officials or employees of the University.

These conflicts terms govern in lieu of any conflicts terms in any outside counsel guidelines.

5. *Consent Regarding WilmerHale Privileged Communications.*

It may be necessary or appropriate for the Firm or Firm lawyers to consult (at the Firm's own expense, of course) with WilmerHale's General Counsel, other WilmerHale lawyers or external counsel regarding our rights and responsibilities concerning the Firm's engagement by the University. In such instances, a conflict of interest may arise between the Firm and the University as to the subject matter of such consultation. The University consents to such consultations, waives any conflict of interest that may result therefrom, and acknowledges that such consultations are protected by WilmerHale's (i.e., not the University's) attorney-client privilege.

6. *Data Protection.*

In the course of the engagement, the Firm may utilize cloud-based or hosted data applications and systems ("Cloud Services") to facilitate collaboration, operational efficiencies, and business continuity. Any use by the Firm of such Cloud Services shall comply with the Firm's ISO 27001 information security program (including, for example, data encryption, user authentication, malware and perimeter defense protection, user access controls, and ongoing third-party security review).

7. *Conclusion of Representation.*

The University, via an authorized agent, or we may terminate the engagement at any time for any reason by written notice, subject on our part to our professional obligations to the University under applicable rules of professional conduct. Unless previously terminated, our representation of the University will terminate upon completion of the services for the Matter described above in paragraph 1. In the event a period of six months has passed during which we have not performed legal services on the University's behalf, the engagement shall be deemed concluded unless extended by mutual agreement. It is understood and agreed that in the event of any termination or withdrawal, we will be entitled to receive any unpaid fees and expenses. Subsequent invoices sent to collect expenses and/or unpaid balances, and/or accounting records or client lists shall not extend the attorney-client relationship. Unless the University engages us after termination of this Matter, we will have no continuing obligation to advise the University with respect to future legal developments, such as changes in the applicable laws or regulations that could have an impact on the University's future rights and liabilities.

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Without limiting the foregoing, we may be required to withdraw from this representation if continuing with it would become unethical. We may also withdraw, after consultation with you, in the event that the University does not cooperate fully with us in the Matter, does not follow reasonable advice that we render, and/or our invoices are not paid in accordance with this agreement.

Following the conclusion of our representation, we will keep confidential any non-public information the University has supplied to us, which we will retain in accordance with applicable rules of professional conduct. Upon request, we will return the University's papers and property promptly upon receipt of payment for outstanding fees and expenses. The Firm will retain its own files pertaining to the Matter in accordance with the Firm's records retention program. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such documents or other materials after a reasonable time following the termination of the engagement.

Finally, I would like to confirm that our representation of the University's interests in the Matter shall not encompass advice concerning insurance matters (including evaluations of insurance claims, notices to brokers, agents, or insurers, procurement of insurance, or coverage issues), or, except as required by law and our ethical obligations to the University, advice about disclosure obligations under the federal securities laws or any other applicable law.

Please contact me immediately if you have any questions about this agreement. If the Board is in agreement with the terms and conditions of representation set forth in this letter, please sign this letter below, return the signed original back to us and retain the copy for the University's records.

Very truly yours,

WILMER CUTLER PICKERING HALE AND DORR LLP

By: _____
Danielle Conley, Partner

Aaron Zebley, Partner

ACKNOWLEDGED AND AGREED TO by and as authorized on behalf of the Board of Regents of the University of Michigan:

Ron Weiser, Chair, Board of Regents

Denise Ilitch, Vice Chair, Board of Regents

Date

WILMERHALE

Wilmer Cutler Pickering Hale and Dorr LLP Pricing Guidelines for Disbursements and Other Charges As of January 1, 2020

Consistent with ABA Formal Opinion 93-379, WilmerHale does not charge for overhead expenses generally associated with operation of the firm, yet seeks to recoup expenses reasonably incurred in connection with a client's matter for services performed in-house, such as photocopying, computer research, and similar services. We have standardized pricing for these services as listed below. WilmerHale does not make a profit on these services. Furthermore, WilmerHale does not charge for more than our direct costs associated with third-party services, such as court reporter fees, except to the extent that actual supplemental costs are incurred.

REPROGRAPHICS

Document Printing/Scanning	\$0.15 per page
Internal Photocopy	\$0.15 per page
Color Photocopy/Document Printing	\$1.00 per page

The Firm's in-house vendor also has separate charges for special projects such as labeling, velo binding, pagination, and oversize copies.

AFTER HOURS SUPPORT

Late-evening/Weekend	\$65.00 per hour
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After Hours Support is charged to the client when work is performed at the Firm past normal working hours expressly in response to work for a particular client, and not in response to general workload or for personal convenience.

ONLINE RESEARCH

Our research usage volume has enabled us to obtain favorable discounts off published retail prices from LexisNexis, Westlaw, and other vendors. We charge the published retail price less volume discounts.

WHDS DATA PROCESSING & REVIEW

The Firm offers WilmerHale Discovery Solutions ("WHDS") for document review and discovery. WHDS work will be charged based on data volumes associated with processing and storage.

ADDITIONAL DISBURSEMENTS

Typical disbursements include courier and messenger charges, special supplies, travel and related lodging and meal expenses, charges for complex document production, select research services, and late night meal and transportation costs. Other expenses may include filing fees, patent/trademark and service fees, trial exhibit and transcript fees, registration fees, services of outside professionals, as well as court and subpoena fees.

FAX, TELEPHONE AND POSTAGE

The Firm does not charge for incoming or outbound faxes, local, long distance, or conference calls, web conference sessions, or routine postage.

Exhibit B

[Use this link to view a web version of this message](#)



Dear [REDACTED] :

I am writing to you today on behalf of the University regarding allegations that the late Robert E. Anderson, a former Athletics team physician and director of the University Health Service who died in 2008, engaged in sexual misconduct and sexual abuse of student-athletes and others during his employment by the University of Michigan. The University takes seriously the safety and well-being of its students and condemns the misconduct that has been reported.

The University's Board of Regents has retained the law firm WilmerHale to conduct an independent investigation of the allegations about Anderson. WilmerHale's mission is to follow the facts wherever they may lead in order to help the University understand how the abuse that has been reported could have occurred. That knowledge will allow the university to better prevent abuse from happening in the future.

At the conclusion of its investigation, WilmerHale will issue a public report with a full accounting of Anderson's conduct and any institutional failings that may have allowed him to harm others. It will be up to WilmerHale to decide how to conduct the investigation. The University will not seek to influence or interfere with the investigation in any way, nor will the University receive the report until it is released to the public.

I am writing to you as a former student-athlete to ask you to come forward and speak to WilmerHale if you experienced abuse by Anderson or if you have information you believe may be relevant to understanding this situation. WilmerHale will not disclose to the University or anyone else the names of any person who provides information in the investigation and WilmerHale will protect the identity and confidentiality of former patients and witnesses to the greatest extent permitted by law.

The University is sending this communication both by email and by U.S. Postal Service to all former student-athletes between the mid-1960s and the early 2000s for whom it has contact information. If you are aware of a student-athlete who did not receive this communication and should have, please share this message and encourage them to come forward as well.

The University has established a dedicated call center for the investigation at (855) 336-5900. The call center is staffed Monday-Friday, 8 a.m.-5 p.m. Eastern Time. You can also contact WilmerHale directly at (877) 428-9667 or UofM@wilmerhale.com.

The University also is offering free, confidential counseling to individuals affected by Anderson's conduct through Praesidium, a national firm with extensive experience facilitating confidential support services. Individuals may to contact Praesidium at (888) 961-9273 to learn more about how to access confidential counseling resources in their local area.

On behalf of the Athletics Department, thank you for your consideration and for all you do for and mean to the University of Michigan.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Manuel'.

Warde Manuel

Donald R. Shepherd Director of Intercollegiate Athletics

University of Michigan Athletic Department - 1000 South State Street, Ann Arbor, MI 48109-2201

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To update your email preferences or to unsubscribe, [click here](#).

Exhibit C



Office of the President
Mark S. Schlissel, M.D., Ph.D.
President
503 Thompson Street
Ann Arbor, MI 48109-1340

Dear [REDACTED],

I am writing to you today regarding allegations that Robert E. Anderson, a former director of the University of Michigan Health Service and Athletics team physician who died in 2008, engaged in sexual misconduct and sexual abuse of students and other patients during his employment by the University. The University takes the safety and well-being of our students seriously and condemns the conduct that has been alleged.

The University's Board of Regents has retained the law firm WilmerHale to conduct an independent investigation of the allegations about Anderson and to follow the facts wherever they lead. When it completes its investigation, WilmerHale will issue a public report. The report will include a full accounting of Anderson's conduct, a discussion of any institutional failings that may have allowed him to harm others, and recommendations for preventing what Anderson is alleged to have done from happening ever again. The University will not influence or interfere with the investigation, nor will the University receive WilmerHale's report until it is released to the public.

As President of the University, I am writing to ask you to come forward and speak to WilmerHale if you had any experience with Anderson you wish to report or if you have any other information you believe may be relevant. Safeguarding the confidentiality of Dr. Anderson's former patients is of paramount importance. Accordingly, WilmerHale will not disclose any identifying or confidential patient information to the University, and the identity and confidentiality of Dr. Anderson's patients will be protected from disclosure to others to the fullest extent permitted by law.

The University is sending this letter by email or U.S. Postal Service mail to all students who attended the University between the mid-1960s and the early 2000s for whom it has contact information. If you know of any students who did not receive this letter, please share this message with them.

The University has established a dedicated call center for the investigation at (855) 336-5900. The call center is staffed Monday–Friday, 8 a.m.–5 p.m. Eastern Time. You can also contact the WilmerHale team directly at (877) 428-9667 or UofM@wilmerhale.com.

The University is offering free, confidential counseling to individuals affected by Anderson's conduct through Praesidium, a national leader in abuse prevention with extensive experience facilitating survivor support services. Individuals who want access to free, confidential counseling may contact Praesidium at (888) 961-9273 to learn more about how to connect with counseling resources in their local area. On behalf of the entire University community, thank you for your consideration and for all you do for and mean to the University of Michigan.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Schlissel'.

Mark S. Schlissel
President