

## Investigator's report discoverable in MGH retaliation case

*No attorney-client privilege, judge says*

By: Eric T. Berkman © September 26, 2019

A surgeon alleging Massachusetts General Hospital fired him in retaliation for whistleblower activities regarding its “double-booking” of surgical procedures was entitled to discovery of a report produced by the attorney MGH engaged as an independent investigator, a Superior Court judge has decided.

Plaintiff Dennis Burke, an orthopedic surgeon, raised concerns in 2011 that defendant MGH's practice of allowing the same doctors to schedule and perform multiple procedures concurrently compromised patient safety. In response, the hospital enlisted former U.S. Attorney Donald K. Stern to investigate the practice.

MGH did not release Stern's report, purportedly to ensure confidentiality of those interviewed, but publicly claimed the report did not support Burke's allegations.

Burke was terminated in 2015, allegedly for violating hospital confidentiality policies. When he filed suit against MGH in 2017, accusing the hospital of retaliating against him for raising concerns first with hospital management and later with regulators, he sought discovery of the Stern report.

MGH argued that the report was protected by both the attorney-client privilege and the peer-review privilege.

But Judge Rosemary Connolly, who previously ordered production of a redacted version of the report, ruled on Burke's motion for reconsideration that the hospital must produce the entire report.

“[T]he Defendants' opposition takes a 30,000-foot approach and paints the entire Stern report in broad strokes, as generally being a communication between counsel and client [but] the redacted report, the Stern engagement letter, and contemporaneous statements of [MGH officials] all support a conclusion that Attorney Stern was hired to investigate the practice of ‘concurrent’ or overlapping surgeries ... and to make recommendations for policy and procedural changes,” Connolly wrote.

Even if MGH could show portions of the report were privileged, Connolly continued, MGH's disclosure of the report to its public relations firm to help formulate its media strategy “constitutes a waiver of any privilege.”

### Sword and shield approach?

Counsel for the plaintiff, Ellen J. Zucker of Boston, said the ruling shows that a company cannot take a “sword and shield approach” to an investigator's report by providing selective information about it to the public and to regulators while seeking to hold it as privileged so nobody can test whether it exonerates the company as claimed.

“The decision makes clear that MGH was trying to put a shine on things that maybe — if you look at the Stern report and investigative materials that it turned up — is not quite accurate,” Zucker said.



The plaintiff claims MGH fired him in retaliation for his whistleblower activities.

### Burke v. The General Hospital Corp., et al. (12 pages)

**THE ISSUE:** Is a surgeon who alleges Massachusetts General Hospital fired him in retaliation for whistleblower activities related to its practice of “double-booking” surgical procedures entitled to discovery of a report produced by the outside attorney MGH brought in to investigate the practice?

Attorneys for MGH did not respond to interview requests, but Christina L. Lewis of Boston, who represents employers, said that while Stern apparently was hired solely as an investigator and not as MGH's legal counsel, the case illustrates the difficulty of maintaining the attorney-client privilege when outside counsel serves in both capacities.

"More often than not, when conducting an internal investigation, the attorney is gathering information about what happened, how and when," Lewis said. "As a result, it's often hard to prove that the attorney was 'giving legal advice' [in that context], which is necessary for claiming the privilege."

Meanwhile, even when an investigation may be protected by the privilege, it is easily waived, Lewis said.

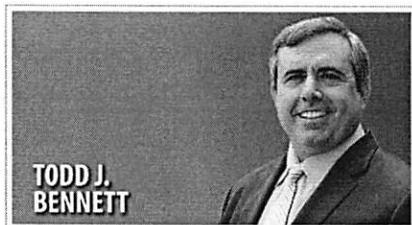
"When a client is facing negative publicity and intends to use the investigation report in whole or in part to respond to press inquiries or as part of a public relations strategy, the privilege is jeopardized," she said.

Cambridge attorney Todd J. Bennett, who represents employees, said he sees defense attorneys frequently misapplying the attorney-client privilege, demonstrating companies' failure to properly evaluate the goals and potential pitfalls of independent investigations in the first place.

**DECISION:** Yes (Suffolk Superior Court)

**LAWYERS:** Aaron S. Welo and Ellen J. Zucker, of Burns & Levinson, Boston; Robert F. Muse of Cunningham, Levy & Muse, Washington, D.C. (plaintiff)

Kiley M. Beliveau and Rebecca J. Wilson, of Peabody & Arnold, Boston; Robert E. Burgess Jr. and Edward F. Mahoney, of Martin, Magnuson, McCarthy & Kenney, Boston (defense)



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— Todd J. Bennett, Cambridge

"If the company is relying on portions of the report as a defense, it puts the contents of the report at issue and it almost certainly is going to be discoverable," he said.

Matthew J. Fogelman, an employment attorney in Newton Center, said the case illustrates the need for plaintiffs' lawyers to be dogged in their discovery.

"Unfortunately, people don't produce everything that should be produced, so you have to be tenacious," he said. "That doesn't mean you go on wild fishing expeditions, but it may mean filing motions. And, in the case of a report, looking at who drafted it, when it was drafted, why it was commissioned, and who it was shared with."

Evan M. Fray-Witzer of Boston, who counsels employers and conducts investigations, said Connolly's ruling makes sense based on the facts. But he found "deeply troubling" the judge's reasoning that the recommendations Stern was hired to provide regarding policy and procedural changes did not constitute legal advice.

"The problem is that this is potentially a part of every internal investigation, as are the interviews and fact-finding that could lead to those recommendations," Fray-Witzer said. "Taken on its face, that part of the decision could threaten the privilege for any independent investigation."

### Retaliatory animus?

Burke sued MGH for wrongful termination in 2017, alleging he was fired in retaliation for his whistleblowing activities, including raising concerns about double-booked surgeries first with hospital management and later with the Board of Registration in Medicine and Department of Public Health.

During discovery, he moved to compel production of the Stern report in its entirety, arguing it was relevant to his allegations of retaliatory animus.

In May 2018, Connolly allowed his motion in part, ordering that MGH produce the report with portions redacted under the attorney-client and peer-review privilege because she did not feel she had sufficient information at the time from which to render a decision as to the appropriateness of the privilege.

After additional discovery, Burke moved for reconsideration, citing new support for his claim that Stern was not hired to provide legal advice for MGH and that, in any event, MGH had waived any privilege claim by sharing the report with its PR firm, Rasky Baerlein Strategic Communications.

### **No privilege**

"[T]he Stern engagement letter and the Stern Report's overview belies the Defendants' claim that Stern and his team were hired to provide, in part legal advice," Connolly wrote, finding that the attorney-client privilege did not, in fact, apply to the report.

The judge added that Cathy Minehan, chair of MGH's board of trustees, corroborated such a conclusion through deposition testimony that she saw Stern as an independent investigator and not part of the MGH legal team.

Meanwhile, Connolly said, MGH's privilege log further suggested that Stern was not hired for legal counsel.

"Like the clue derived from the dog that does not bark, in examining the privilege log, what one does not find are any communications between Stern and MGH's legal counsel either just before or just after the Stern report was issued," the judge observed.

Connolly also implied that MGH undermined the privilege by using the Stern report as "both sword and shield."

Specifically, the judge noted that MGH publicly cited the report by name, claiming in *The Boston Globe* that the report supported its assertion that it was not compromising patient safety while relying on the report in responding to regulatory inquiries about its double-booking practices.

Finally, Connolly rejected MGH's argument that its PR firm, with which it shared the report, was the functional equivalent of an in-house employee for privilege purposes.

"While there have been specific matters Rasky discussed with [MGH] counsel that may be properly considered attorney client privileged communications, that ... does not cloak the entire engagement in privilege," the judge said. "Sharing of the unredacted Stern Report with Rasky, for the purposes of countering an adverse public narrative created, in part, by Dr. Burke and the *Globe* series [on concurrent surgeries at MGH] constitutes a waiver of any privilege that may have attached to the report."

Accordingly, Connolly ordered that MGH produce the unredacted Stern report along with any notes and documents used in drafting it.

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