IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

AMY K. DRAPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 1:08-cv-01125-JDB**
	)	
UNIVERSITY OF TENNESSEE, PHIL DANE & DANELLE FABIANICH,	)	
	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Before the Court is Defendants' Motion for Protective Order [D.E. 39]. Plaintiff has responded. This matter was referred to the Magistrate Judge for determination. For the reasons that follow, Defendants' Motion is DENIED in part.

Defendants have moved for a protective order prohibiting Plaintiff from proceeding with a deposition noticed under Rule 30(b)(6). This rule provides:

> (6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to

> the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

In Plaintiff's 30(b)(6) notice, she requests that the University make a witness available to testify about twelve different subject matters, primarily concerning the University's e-mail preservation efforts. The notice also includes eighteen requests for documents.

In their Motion for Protective Order Defendants argue that the information sought in most of the listed categories of the notice can be provided only through a deposition of Defendants' trial counsel. They state that the information sought has either already been produced, is protected by the attorney-client privilege and work product doctrine, or can be obtained through more convenient and less burdensome discovery methods that Plaintiff has not utilized, such as interrogatories or depositions of non-attorney witnesses. Defendants further claim that the request for production of documents does not comply with the time requirements of Rule 34, and many of the documents sought are privileged or attorney work product. They argue that the burden of these invasive discovery tactics far outweighs any likely benefit considering the limited relevance of the discovery sought. Further, in an effort to accommodate Plaintiff, Defendants made an IT representative available for deposition (who Plaintiff's counsel then interviewed via telephone), and offered to make previously deposed individuals available for supplemental depositions. Defendants' counsel has filed a sworn affidavit as Exhibit 1 to Defendants' Motion, describing his actions with regard to the litigation hold notices and Defendants' production. Defendants' counsel attests:

> After repeated and diligent searches of more than 150,000 e-mails, I am aware of no e-mails pertaining to volleyball, complaints about other head coaches, or the factual issues raised in this lawsuit that the University has not already produced. In all, Plaintiff has propounded 162 document requests upon the Defendants. The Defendants have responded to these requests with the production of 19,273 pages of documents in this litigation, including more than 6,000 pages of e-mails. All of these documents are available through a mutually accessible Google Mail account.

Finally, Defendant offered to make all previously deposed individuals available for supplemental depositions, including Phil Dane, Darrin McClure, Danelle Fabianich and Trudy Henderson.

In her Response, Plaintiff contends that she is trying only to depose University representatives as to the maintenance and production of electronic information, including emails, and that Defendants are thwarting her right to this information by insisting that Defendants' counsel Mr. Fitzgerald is the only one who could provide this information. She denies seeking the deposition of Mr. Fitzgerald.

In their Reply, Defendants assert that, if she is seeking to depose Defendants' counsel, she cannot satisfy any of the prongs of the three-prong *Shelton* test the Sixth Circuit has adopted. Defendants state that Plaintiff has never served a single interrogatory inquiring about the matters listed in her 30(b)(6) notice. They further assert that almost all of the information sought in the notice is protected by the attorney-client privilege and work product doctrine, and Plaintiff's deposition is an attempt to "end-run" the privilege. Finally, they assert that Plaintiff already has much of the information sought.

Under Rule 26(c), "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending" Fed. R. Civ. P. 26(c). The Court has broad discretion to limit discovery. *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. S. Dist. Iowa*, 482 U.S. 522, 566 (1987) (explaining that under Rule 26, "[a] court may 'make any order which justice requires' to limit discovery, including an order permitting discovery only on specified terms and conditions, by a particular discovery method, or with limitation in scope to certain matters"); *Info-Hold. Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir. 2008) (emphasizing that district courts have discretion to limit the scope of discovery under Rule 26); *Surles ex reI. Johnson V. Greyhound Lines. Inc.*, 474 F.3d 288, 305 (6th Cir. 2007) ("district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce"); *Perry v. City of Pontiac*, 254 F.R.D. 309, 312 (E.D. Mich. 2008) ("A court may fashion a protective order to limit discovery in a number of ways, including ... 'forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.'" (quoting Fed. R. Civ. P. 26(c)(1)(D)).

In this case, the crux of the issue is whether Defendants' counsel Mr. Fitzgerald is the only person qualified to be deposed regarding the University's maintenance and production of electronic information. Here, the Court finds that Defendants can appropriately designate a person or persons to testify on its behalf, other than Mr. Fitzgerald, regarding these matters. While it does appear to the Magistrate Judge that some of the subjects and documents requested fall within the attorney-client privilege

or work product doctrine, the claim of privilege cannot be a blanket claim; it "must be made and sustained on a question-by-question or document-by-document basis." *United States v. Lawless,* 709 F.2d 485, 487 (7th Cir. 1983) (citing 8 Wigmore § 2292). The Court also understands that Mr. Fitzgerald may be uniquely qualified to answer some of Plaintiff's questions within these subject matters, but without going into an exhaustive analysis, the Court notes that Plaintiff has not met her burden to depose Mr. Fitzgerald under the *Sheldon* test. Defendants are ordered to designate one or more suitable persons, other than Mr. Fitzgerald, to testify on these matters to the best of their ability. These depositions should be scheduled as soon as possible, within forty-five days of this Order.

The Court realizes that given the nature of the case and the allegations, emotions inevitably run high. It is counsel's job not only to represent and advocate, but to counsel their clients. The Court hopes the parties will successfully mediate this matter, but in the event that mediation proves unfruitful, the show must go on. Discovery in this case has been extensive, and at this stage should be winding down and the parties should begin preparations for trial.[1]

Finally, the Court does not find an award or apportionment of fees and expenses appropriate or just under Rule 37.

[1] As noted at the status conference in December, a revised Scheduling Order on discovery and experts will be issued after resolution of the pending discovery motions.

IT IS ORDERED this 13th day of April, 2010.

s/Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE ORDER. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.