



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
www.doj.state.wi.us

Frank D. Remington  
Assistant Attorney General  
remingtonfd@doj.state.wi.us  
608/266-3542  
FAX 608/261-7991

June 13, 2008

The Honorable William Eich  
840 Farwell Drive  
Madison, Wisconsin 53704

Re: State of Wisconsin v. Amgen, Inc., et al.  
Case No. 04-CV-1709

Dear Judge Eich:

Enclosed you will find Plaintiff's Notice of Motion and Motion and Brief Requesting a Protective Order Pertaining to Defendants' Notice to depose Former Medicaid Fraud Investigator Gregory L. Kipfer.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank D. Remington', written over a large, stylized 'F'.

Frank D. Remington  
Assistant Attorney General

FDR:gdt

Enclosures

c: All Counsel of Record by LexisNexis File & Serve (w/enclosures)  
Ann Ford, Chambers of the Honorable Richard Niess (w/enclosures)

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 9

DANE COUNTY

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STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AMGEN INC., et. al.,

Defendants.

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NOTICE OF MOTION AND MOTION  
AND BRIEF  
REQUESTING A PROTECTIVE ORDER PERTAINING TO  
DEFENDANTS' NOTICE TO DEPOSE  
FORMER MEDICAID FRAUD INVESTIGATOR GREGORY L. KIPFER

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To: All Defense Counsel

PLEASE TAKE NOTICE, that on a date and time to be set by the Court, the Plaintiff State of Wisconsin, by Frank D. Remington, Assistant Attorney General, will move the court pursuant to Wis. Stats. § 804.01(3) and 804.01(2)(c), for a protective order relating to Defendants' request to depose Gregory Kipfer, a former Medicaid Fraud Control Unit Investigator at the Wisconsin Department of Justice. The grounds for this motion are as follows:

**STATEMENT OF FACTS<sup>1</sup>**  
**AND**  
**STATEMENT OF CASE**

At all times relevant to this case, Gregory L. Kipfer was an investigator in the Medicaid Fraud Control Unit of the Wisconsin Department of Justice. Currently Mr. Kipfer is a Securities Examiner with the Wisconsin Department of Financial Institutions, Division of Securities. Kipfer left the Department of Justice in late June, 1998. (Exhibit A, Supplemental Verification of Gregory L. Kipfer).

On May 25, 2008, the Defendants served the Plaintiff with their Seventh Set of Interrogatories. In that document, the Defendants asked the following question: *“Did any of Your employees, agents or representatives attend the March 19, 1998 NAMFCU Presentation, or any other NAMFCU meeting at which the March 19, 1998 NAMFCU Presentation was discussed?”* (Exhibit B, at p. 4, Defendants’ Seventh Set of Interrogatories and Requests for Production of Documents Directed to Plaintiff).

On April 29, 2008, the Plaintiff responded with the following: *“The Plaintiff OBJECTS to this interrogatory on the ground that it is overbroad. The Plaintiff also OBJECTS on the ground that the interrogatory impermissibly intrudes into confidential matters of prosecutorial discretion and work-product. Notwithstanding this objection, there is no record or recollection of anyone attending the above defined “NAMFCU Presentation.”* (Exhibit C, at p. 1, Plaintiff’s Response to Defendants’ Seventh Set of

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<sup>1</sup> The salient facts set forth in this motion are supported by the “supplemental verification of Gregory L. Kipfer” (attached hereto and marked as Exhibit A), copies of discovery pleadings, (attached hereto and marked as Exhibits B & C), and copies of e-mail correspondence between counsel, (attached hereto and marked as Exhibits D & E), all of which are true and correct copies of the originals filed in this case or in counsel’s possession.

Interrogatories and Requests to Produce). The verification for the statement that “there was no record or recollection of anyone attending” the “NAMFCU Presentation” was made by the MFCU Operations Program Associate who personally reviewed Department of Justice files and made other inquiries necessary to make this statement. (Exhibit C, at p. 3). The Director of the Medicaid Fraud Control Unit at that time was Juan Colas, who is also no longer employed at the Department of Justice.

The next day, Defendants sent an e-mail message asking for a “meet and confer” regarding Plaintiff’s response. In that message the Defendants “tipped their hand” and remarked: “[i]n advance of the call, you may wish to touch base with Gregory Kipfer.” (Exhibit D).

Kipfer had not been contacted prior to Defendants’ remark for two reasons. One, Kipfer had left the office ten years prior to the interrogatory and as it turns out only months after the NAMFCU Conference. (See Exhibit A). Two, the NAMFCU Conference, and in particular, the referenced “NAMFCU Presentation” was made at the “Director’s meeting,” which traditionally is only attended by the Directors of the various state Medicaid Fraud Control Units. But, as suggested by the Defendants, Plaintiff “touched base” with Kipfer. The information he gave was subsequently relayed to the Defendants by Plaintiff’s counsel:

I spoke with Mr. Kipfer. He has no recollection of attending the "NAMFCU Presentation". If he had attended, he stated he would likely remember. I assume you have some document indicating that Mr. Kipfer attended the conference. Mr. Kipfer recalls attending the conference. But, do you have any reason to believe Mr. Kipfer attended the "NAMFCU Presentation"? At any rate, unless you have something to add, I believe Plaintiff's answer, (that there is no record or recollection of anyone attending the "NAMFCU Presentation.") is still true and correct

(Exhibit D).

In response to this message, the Defendants again, for a second time, “tipped their hand” and showed another card. Defendants identified and subsequently sent the Plaintiff a document, (curiously marked “highly confidential”), that contained a list of States and names of individuals who purportedly accepted some material during a presentation made by Ven-a-Care at a meeting of the Medicaid Fraud Directors. Defendants explained that they had acquired the document in litigation pending in another state.

Gregory L. Kipfer’s signature appears in this document on a line next to “Wisconsin.” If Plaintiff had had this document, it was and is nowhere to be found. But what the document did show was that notwithstanding Kipfer’s lack of recollection, the document appeared to indicate that Kipfer did attend the “Presentation.”

In furtherance of this collegial “meet and confer,” the Plaintiff re-interviewed Kipfer showed him the document and asked him again about the “NAMFCU Presentation.” His response was memorialized in a “supplemental verification” (Exhibit A). Although the answers to the Defendants’ interrogatory did not change, the Plaintiff filed a “supplemental verification” in perhaps a Pollyannaish notion that these facts would satisfy Defendants’ concern as to the accuracy of the answer to the original interrogatory even despite the existence of this document. Instead, Defendants responded to the supplemental verification by redoubling their demand to depose Investigator Kipfer. (Exhibit E).

The parties continued to discuss the issue in an attempt to resolve the matter. The following colloquy between counsel ensued: It is reprinted here for two reasons. First,

notwithstanding these "meet and confers," from Plaintiff's perspective, it was and still is unclear what information Defendants are seeking from Investigator Kipfer. Second, these communications show, again from only Plaintiff's perspective, that Defendants were unwilling in the end to either back down or employ other discovery tools to accomplish their unstated discovery goals.

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(Plaintiff):

... I filed the "supplemental verification" to address the matters we discussed and in an attempt to accommodate the defendants. What is very clear is that the answers given to the Seventh Set of Interrogatories were and are still true and correct.

Now I understand you would like to depose Mr. Kipfer. You have already said as much. I continue to oppose this deposition. I have stated to you the legal grounds underlying my opposition. Mr. Kipfer was a criminal investigator for the Wisconsin Department of Justice. I have drawn your attention to the seminal case on the issue in Wisconsin. In response, you only indicated that you wanted to ask Mr. Kipfer about the "NAMFCU Presentation." As should be clear from his affidavit, there is nothing more to say.

If there is something else to cover during this deposition, you have not shared it with me.

Thus, before I give my final answer, please let me know what non-privileged matters you would like to cover during this deposition that would elicit relevant and admissible evidence or lead to the discovery of the same. I believed we are obligated to meet and confer before using Judge Eich.

In closing, and with due respect, I simply do not understand what it is you would like to ask Mr. Kipfer that would not be privileged given the fact that he has no recollection of the "Presentation" and is otherwise unfamiliar with the issues in this lawsuit. Please illuminate this for me so we may be able to reach some kind of accommodation.

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(Defendants):

... Let me be clear that I do not intend to ask Mr. Kipfer anything that would require him to divulge privileged information. If I do, you can object and instruct him not to answer. There are a number of questions I would like to ask based upon the sign-in sheet previously provided to you and his supplemental verification. These questions are pretty

obvious and I know of nothing obligating me to give you an advance preview of my questions in any event. I obviously am not prohibited from deposing Mr. Kipfer because of the verification; indeed, it is common to depose those providing verifications to understand and probe the bases for the verification.

We have met and conferred on this previously and exchanged numerous emails about it. We have read the case you mentioned in a prior email and disagree that it prevents us from deposing Mr. Kipfer. I am not sure there is much to add. Short of the State agreeing to allow the deposition to proceed, I am not sure there is any accommodation we can reach. I do thank you for confirming the State's position.

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(Plaintiff):

I apologize if my filing a "supplemental verification" makes defendants now believe the door has been opened to a deposition. Frankly, I filed the document as part of our negotiation for compromise and in what now appears to be a naïve attempt to satisfy the defendants that what I as counsel was saying, was in fact the truth. I told you and now Mr. Kipfer tells you that he has no records and no recollection. I filed the document in the hope that you would believe him, even if you doubted me. Plaintiff's response to defendants' seventh set of interrogatories was and still is true.

But make no mistake about my position.

1. As a Justice Department Investigator, Investigator Kipfer is not subject to deposition or discovery except on very limited circumstances, (not present here). I start from the position that everything Investigator Kipfer knows or has done for the Department as an Investigator is privileged.

2. I believe you are obligated to tell me what it is you need from my investigator. You say once again that nothing obligates you to preview your questions to me. That may be true, but the law obligates you to satisfy the court that you seek relevant evidence that this relevant evidence is otherwise unavailable elsewhere. Given Investigator Kipfer's statement, in the absence of you telling me what it is you are looking for, (and sincerely for the life of me I cannot fathom what it is), I can only assume that you are not seeking relevant evidence. Additionally, I further assume you do not desire to seek whatever it is you desire from elsewhere.

3. The case law also obligates you to show that whatever it is you hope to gain by a deposition of the opposing counsel's investigator cannot be obtained through less intrusive discovery means. We have not discussed as much, but I suppose you would not be amenable to serving yet one more set of interrogatories or another request to produce. If you are, as a compromise, please let me know.

If you still desire to push this issue, please let me know. I will file a motion for protective order. I would like to confer with you on the timing of such motion and the schedule for submission of briefs.

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(Defendants):

Without getting into a detailed response to your email (much of which I disagree with), perhaps can you answer these questions which will inform how we proceed:

1. Will Mr. Kipfer sign this verification under oath?
  2. Will the State stipulate that it will not call Mr. Kipfer at any trial under any circumstances and also stipulate that it will not submit an additional or amended affidavit, statement, declaration or verification of Mr. Kipfer in these cases?
  3. Will Mr. Kipfer acknowledge under oath that the signature on the sign-in sheet is his?
  4. Will the State stipulate to the relevance and admissibility of 1 & 3?
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(Plaintiff):

1. Mr. Kipfer's verification was made under oath.
  2. Given Mr. Kipfer's statement and my discussion with him that he knows nothing about the case, I cannot imagine why we would want him to make any additional statement. But as much as I would like to, I cannot really promise in advance and in the abstract that he will never be heard from again. I have no way of knowing what may come up or what devious plan the defendants have concocted. What if defendants present a witness who says he had a thorough discussion with Mr. Kipfer. How can I promise Kipfer will never be heard from again and deny him the opportunity to rebut something that is untrue? We have absolutely no plans for Mr. Kipfer.
  3. I will tell you here that Mr. Kipfer told me that was his signature. So what you will get is a statement that the Plaintiff will not contend elsewhere or later that it is not his signature. Please do not infer anything more, however. He has no recollection or record of attending any presentation. But we will not deny that is his signature.
  4. I do not know what this means.
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(Defendants):

1. The signature is notarized, but the statement is not under oath, at least not the copy I received from Lexis File & Serve. I'd appreciate you sending the version signed under oath.
2. We have "concocted" no "devious plan." We simply want to depose someone who is in possession of discoverable information. I think you are reading too much into this.

3. I cannot understand how you can justify reserving the right to call Mr. Kipfer as a witness at trial, but refusing to allow us to depose him.
  4. From your prior email, I don't understand the statement that "everything Investigator Kipfer knows or has done for the Department as an Investigator is privileged." What is the asserted privilege? There is no attorney-client communication at issue here.
  5. I do not understand why you cannot have him submit an affidavit that the signature is his if he has told you it is his signature.
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(Plaintiff):

If I have Investigator Kipfer resign his affidavit "under oath" and also include a sentence acknowledging that the signature on the "receipt" was his will that avoid, for now, defendants' demand to depose him.

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(Defendants):

Perhaps. I'd like to understand the basis for the privilege assertion.

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(Plaintiff):

The Plaintiff invokes its attorney work-product privilege.

I also looked at the document on LexisNexus. At the bottom of the second page the Notary Public stated that the above had been "subscribed and sworn". You might not be aware of it, but Wisconsin has dispensed with many of the antiquated conventions of form, in many respects, and in particular relating to oaths. see Wis. Stat. sec. 887.03. Let me know what it is you want and I'd rather conform than debate.

Please also let me know your decision on my offer of compromise.

As a final matter, and I suspect it has been certainly implied, this offer of compromise is made but should not be construed as a waiver of this privilege. The defendants do not need to acknowledge the privilege or its application here. But I also don't want this offer to be construed as a waiver. There are some cases that hold when an attorney discloses part of his work-product he, (or she), waives all protection. I think the point is rather academic, but as you have once told me, you cannot be too careful on these important matters.

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## ARGUMENT

### I. GREGORY KIPFER HAS NO RELEVANT TESTIMONY TO OFFER

From a practical standpoint, it is unclear what the Defendants hope to gain by deposing the Plaintiff's investigator. There is no genuine dispute that Kipfer reviewed the previous response made by the State of Wisconsin to Defendants' Seventh Set of Interrogatories and that he stated under oath that he believed that response to be true and correct to the best of his knowledge, information and belief. Kipfer also stated that he does not possess any material which may have been distributed during the March 18, 1998 presentation by Ven-a-Care of the Florida Keys Inc. He does not recall accepting any written material nor does he recall ever having any material provided by this entity. He does recall attending the annual NAMFCU general meeting in Virginia, in March, 1998, but he has no recollection of attending any Director's Meeting at which Ven-a-Care of the Florida Keys Inc. made its presentation, nor does he have any knowledge, understanding, or recollection of what might have been discussed during such presentation. Furthermore, Kipfer stated that other than in connection with this discovery request, (as part of his discussions with legal counsel), he never has had any discussion with anyone about pharmaceutical pricing fraud, the "average wholesale price" or any other issue which he now understands is being litigated by the Wisconsin Department of Justice.

II. THE KNOWLEDGE INVESTIGATOR KIPFER POSSESSES IS PRIVILEGED UNDER THE ATTORNEY WORK-PRODUCT DOCTRINE AND SECTION 804.01(2)(c)1, STATS.

As a preliminary matter, it appears that all of the published cases discuss the concept of the attorney work-product rule most commonly in the context of one lawyer seeking documents from opposing counsel. There are a few cases that discuss the privilege in the context of one counsel sending interrogatories to opposing counsel seeking what is claimed to be privileged “information.” Although there could be, to date, counsel has found no published cases discussing the work-product rule in the context of counsel seeking to depose opposing counsel’s investigator. The unusual and seemingly unprecedented nature of Defendants’ demand, (to open with a deposition of opposing counsel’s investigator), is a telling foreshadow of what Plaintiff respectfully suggests is an inappropriate and objectionable discovery request.

In fact, the language of Wis. Stat. § 804.01(2)(c)1<sup>2</sup> only references “materials,” “documents” and “other “tangible things.” See generally, *State v. Hydrite Chemical Co.* 220 Wis.2d 51, 61, 582 N.W.2d 411 (Wis. App. 1998), (“The work-product doctrine as set forth in *Dudek* is now generally codified by §804.01(2)(c)1”). The Statute, to the extent it is relevant, nonetheless reiterates the principles behind the work-product privilege and that to overcome a motion for protective order, the party seeking the discovery must show that the information sought is: (1) relevant, (2), that there is a

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<sup>2</sup> Section 804.01(2)(c)1 provides: (c) *Trial preparation: materials.* 1. Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental

substantial need for the materials in the preparation of the case, and (3) that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

It is not possible to imagine what “relevant” testimony Mr. Kipfer has. It is equally unclear that whatever Defendants seek from this deposition is supported by a “substantial need.” But most importantly, the Defendants appear to have rejected Plaintiff’s earlier suggestion that they employ other discovery tools to seek whatever it is they want, (or at least talk about it). It is hard for the Plaintiff to say more given the complete absence of understanding what it is Defendants’ hope to gain.

Regardless of the language set forth in Section 804.01(2)(c)1, the statute “was not, however, intended to displace the principles enunciated in *Dudek*. ... The work-product doctrine protects the enterprise – either analytical or entrepreneurial – by a party or by the party’s agent.” *Ranft v. Lyon*, 163 Wis. 2d 282, 297, 471 N.W.2d 254 (Wis. App. 1991). A “party seeking work-product information rather than ‘documents and tangible things’ need only show that failure to permit discovery would result in the ‘objectives of pretrial discovery [being] unnecessarily frustrated’ or in the alternative, that there is other ‘good cause’ for disclosure.” *Ranft v. Lyon*, 163 Wis. 2d at 298-299. In short, the Plaintiff invokes its privilege protected by the work-product doctrine and requests this Court shield it from Defendants’ unwarranted intrusions.

If the deposition is about Kipfer’s understanding of the issues in this litigation, he never has had any discussion with anyone about pharmaceutical pricing fraud, the

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impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

“average wholesale price” or any other issue which he understands is being litigated by the Wisconsin Department of Justice. If the deposition is to inquire about Kipfer’s recollection of the NAMFCU conference ten years ago, he has no recollection of attending any presentation by Ven-a-Care of the Florida Keys Inc., nor does he have any knowledge, understanding, or recollection of what might have been discussed during such presentation. If the questions are to be about the material which were distributed at the Director’s meeting, Kipfer does not possess any material distributed during the March 18, 1998 presentation by Ven-a-Care of the Florida Keys Inc. He does not recall accepting any written material nor does he recall ever having any material provided by this entity. Lastly, if it is to examine one of the State’s witnesses, the Plaintiff has conceded Kipfer does not know anything and that there is no plan to call him as a witness.

### III. CONCLUSION

Notwithstanding the legal arguments made above, and notwithstanding the fact of the matter is that Investigator Kipfer does not know anything, the issue boils down to Defendants’ relentless demand to cross examine an investigator employed by the Attorney General whose duties were, at the time, to investigate crimes prosecutable by the Department of Justice. Regardless of the legal standard and for the moment without regard to the facts, the notion that one party can simply demand to depose opposing counsel’s investigator is odious to the adversary system.

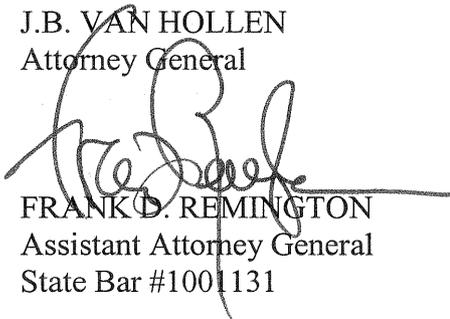
Defendants’ demand also interferes with the relationship between the Attorney General, his Assistants and the Investigators he employees to investigate crimes and civil claims prosecutable by this Office. Understandably, Defendants’ counsel was under no

obligation to disclose to the Plaintiff the questions counsel had hoped to ask Investigator Kipfer. However true that may be, it is also clear that in responding to this motion, the Defendants must now in effect lay all their cards on the table in order to meet their burden to show Investigator Kipfer has relevant information and that there is “good cause” for its disclosure. Plaintiff also submits that pursuant to Wis. Stat. § 804.01(2)(c)1 directly, or pursuant to Wis. Stat. § 804.01(3)(a)3 indirectly, Defendants must additionally show that whatever information they seek is not available by other less intrusive means.

For Plaintiff respectfully requests that this Court issue a protective order and pursuant to Wis. Stat. § 804.01(3)(a)1 quash the Defendants’ Notice of Deposition of Gregory L. Kipfer.

Dated this 13th day of June, 2008.

J.B. VAN HOLLEN  
Attorney General

A handwritten signature in black ink, appearing to read "Frank D. Remington", is written over the typed name and title of the Assistant Attorney General.

FRANK D. REMINGTON  
Assistant Attorney General  
State Bar #1001131

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-3542