

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 07-60534-CIV-DIMITROULEAS
MAGISTRATE JUDGE: ROBIN ROSENBAUM

HOWARD K. STERN,

Plaintiff,

vs.

JOHN O'QUINN, and JOHN M. O'QUINN
& ASSOCIATES, PLLC d/b/a
The O'Quinn Law Firm,

Defendants.
_____ /

**DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND
MEMORANDUM OF LAW, IN SUPPORT THEREOF**

Defendants, John O'Quinn and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm, ("The Firm"), by and through undersigned counsel and pursuant to Fed.R.Civ.Pro. 26(b) moves this Court for a protective order as to the deposition of Wilma Vicedomine, and as grounds therefor would state as follows.

1. On April 30, 2008, the Plaintiff, Howard K. Stern, served non-party Wilma Vicedomine with two identical subpoenas relating to the instant lawsuit as well as Stern's lawsuit against Rita Cosby, *et. al.* (Stern v. Rita Cosby, *et. al.*, CA 07-CV-8536 (DC), pending in the United States District Court for the Southern District of New York.

2. The Plaintiff, Howard K. Stern, was previously scheduled to take the deposition of Wilma Vicedomine in her "capacity as an

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agent, employee, or otherwise authorized representative of Defendants" on June 2, 2008.

3. Undersigned counsel conferred with opposing counsel L. Lin Wood and counsel in Stern's lawsuit against Rita Cosby, *et. al.* (Stern v. Rita Cosby, *et. al.*, CA 07-CV-8536 (DC), and the deposition previously scheduled for June 2, 2008 has been postponed pending a ruling by this Court on the instant Motion For Protective Order and pending a ruling by the Southern District of Texas on the Motion To Quash Subpoena that is simultaneously being filed with this Motion For Protective Order. The deposition will include both the New York lawsuit as well as the subject case.

3. The Subpoenas command Ms. Vicedomine to produce numerous documents. Copies of the Subpoenas are attached, hereto, as Composite Exhibit "A."

4. The Subpoenas contain the following instructions:

1. Each request seeks documents in the possession, custody, or control of Ms, Wilma Vicedomine, individually and in her capacity as an agent of The O'Quinn Law Firm, John O'Quinn, or Don Clark. Documents in Ms. Vicedomine's possession, custody, or control include all documents previously provided to her attorneys, agents, employees or any other person acting on her behalf in response to prior subpoenas issued in this matter, or requests for documents government agencies(*sic*). Documents in Ms. Vicedomine's possession, custody, or control shall also include all documents contained on any computer and PDA utilized by Ms. Vicedomine, and said computer's or PDA's hard drive.

See, Composite Exhibit A.

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4. The Subpoenas include the following definitions:

"1. The word 'document' and 'documents' mean written, typed, printed, and recorded (including electronic, magnetic, photographic, graphic and computerized) matter of any type and description including, but not limited to, e-mails, witness statements, blog postings, text messages, photographs, tape recordings, handwritten notes, or computerized chats depicting conversations between two or more persons occurring via the internet. A draft or non-identical copy is a separate document for purposes of this definition."

"2. As used herein, the word 'communications' means documents constituting the exchange of thoughts, messages, ideas or other information between two or more persons or entities, e.g. e-mails, text messages, online chat transcripts, recorded statements, or written correspondence."

"5. The words 'you' or 'your' shall refer to you, Wilma Vicedomine, individually and in your capacity as an agent for The O'Quinn Law Firm, John O'Quinn, Don Clark or any other person or entity that has investigated Howard K. Stern, Larry Birkhead, the death of Anna Nicole Smith, the death of Daniel Smith, or the paternity of Dannielynn Hope Marshall Birkhead."

5. The Subpoenas specifically command Ms. Vicedomine to produce the following documents:

1. All documents concerning your investigation of Howard K. Stern.
2. All communications concerning Howard K. Stern.
3. All documents concerning your investigation of Anna Nicole Smith.
4. All communications concerning Anna Nicole Smith.

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- 5. All communications concerning your investigation into the d
- 6. All communications concerning the death of Anna Nicole Smith.
- 7. All documents concerning your investigation of Daniel Smith.
- 8. All communications concerning Daniel Smith.
- 9. All documents concerning your investigation into the death of Daniel Smith.
- 10. All communications concerning the death of Daniel Smith.
- 11. All documents concerning your investigation of Larry Birkhead.
- 12. All communications concerning Larry Birkhead.
- 13. All documents concerning your investigation into the paternity of Dannielynn Hope Marshall Birkhead.
- 14. All communications concerning the paternity of Dannielynn Hope Marshall Birkhead.
.
- 23. All communications concerning Virgie Arthur, including but not limited to all communications with Virgie Arthur.
.

See, Composite Exhibit A.

6. John O'Quinn and The Firm are currently representing their client, Virgie Arthur, in numerous proceedings arising out of the death of her daughter, Anna Nicole Smith. In addition, the Defendants are representing Ms. Arthur in a defamation action which

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has been filed against the Plaintiff, Howard K. Stern, in the United States District Court for the Southern District of Texas.

(Virgie Arthur v. Howard K. Stern, Case No.: 4:07-CV-03742).

7. Ms. Vicedomine has assisted The Firm in developing information which is relevant to the various proceedings which The Firm is handling on behalf of its client, Virgie Arthur. Any information that she has developed for use by The Firm, or any communications which she has maintained with The Firm would, therefore, implicate attorney/client and work product privileges, to the extent that they would necessarily relate to The Firm's ongoing role as counsel for Ms. Arthur.

8. Attorney Neil McCabe of The Firm is co-counsel for O'Quinn in this action and has been granted *pro hac vice* status by this Court. A subpoena to Ms. Vicedomine could, therefore, theoretically threaten the disclosure of information that is being developed for the actual defense of the claim that the Plaintiff, Howard K. Stern, has filed against O'Quinn to the extent that there are common elements of fact that are relevant to both The Firm's representation of Virgie Arthur and The Firm's defense of the claims that have been filed against O'Quinn and The Firm in the case at hand.

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MEMORANDUM OF LAW

Federal Rule 26(b) governs the scope of discovery in Federal Court litigation. That rule specifically allows discovery of "any matter not privileged, that is relevant to the claim or defense of any party...." Rule 26(b)(3) only permits discovery of trial preparation materials "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Nevertheless, even where discovery of trial preparation materials is allowed, the Court is required to fashion an order to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Due to the expansive nature of discovery available under the Federal Rules of Civil Procedure, the discovery process can be susceptible to abuse or can pose a significant threat by exposing significant and otherwise confidential information of a person required to make discovery disclosure. It is the role of the protective order to help prevent such harms in the course of the discovery process. Rule 26(c) was adopted as a safeguard for the protection of parties. Pursuant to Fed. R. Civ. P. 26(c), for "good cause" shown, this Court may issue a protective order preventing a

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deposition or a discovery disclosure. *See also, Baratta v. Homeland Housewares, LLC.*, 242 F.R.D. 641 (S. D. Fla. April 17, 2007). When evaluating whether a movant has satisfied his burden of establishing "good cause" for a protective order, a court balances the non-moving party's interest in obtaining discovery against the moving party's proffer of harm that would result from the deposition. *See, Farnsworth v. Procter & Gamble Co.*, 758 So.2d 1545, 1547 (11th Cir. 1985). *See also, Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 447 (1991).

The Defendants respectfully submit that good cause exists in the case at hand to issue a protective order. The Subpoenas served on Wilma Vicedomine are particularly problematic because they define the word "document" as "electronic, magnetic, graphic and computerized matter of any type and description including, but not limited to e-mails, blog¹ postings, text messages and computerized chats depicting conversations between two or more persons occurring via the internet." Equally troubling is the definition of the word "communications," which is defined as "the ideas or other

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The very definition of the word "blog" supports the fact that postings on a blog, no matter how unreliable, go unchecked, as it is virtually impossible to unmask an anonymous blogger. A 'blog' is defined as "an online personal journal with reflections, comments, and other hyperlinks provided by the writer." *See, Merriam-Webster's Collegiate Dictionary* (11th ed. 2005).

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information between two or more persons or entities, e.g. e-mails, text messages and online chat transcripts." Arguably, this request is sufficiently broad to encompass communications between Ms. Vicedomine and any of the attorneys representing Ms. Arthur and Mr. O'Quinn--including undersigned counsel-- despite the fact that Stern had been fully apprized of the fact that Ms. Vicedomine has served in an investigatory capacity for the O'Quinn firm in related Stern matters. For this reason alone, a protective order should be entered.

The Internet has been referred to judicially as "the most participatory marketplace of mass speech that. . .the world. . .has yet seen"; as a "far more speech-enhancing medium than print: and a "never-ending world-wide conversation." See, *ACLU v. Reno*, 929 F. Supp. 824, 881-883 (E.D. Pa. 1996). Although that particular case focused on the balance between freedom of information and one particular type of speech, namely "indecent" speech, a major emphasis was on the effect of the Internet as a method of communication. The Internet was said to be capable of "blurring the distinction between speakers and listeners." *Id.* at 873. It may nevertheless serve as a viable source of information, for potential research on innumerable topics.

Any research undertaken by Ms. Vicedomine in that domain on behalf of the Firm would per force be privileged; disclosure of the

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information accumulated would potentially reveal privileged information as to the issues being researched or pursued on behalf of Ms. Arthur, or in defense of the claims that have been leveled against Mr. O'Quinn. When those considerations are coupled with the fact that the information on the Internet is available to a potentially world-wide audience...including Stern's counsel...one must necessarily question the need for a subpoena seeking any information which Ms. Vicedomine gathered, or her communications concerning her efforts with counsel of record in two separate matters.

One of the first blogs to reach real prominence was "Instapundit." As the name indicates, its novel contribution was seen as its ability to comment on the developments of the day more or less in real time. See, Catherine Seipp, *Online Uprising*, AM. JOURNALISM REV., June 2002, at 42. The sudden deaths of Anna Nicole Smith and her young son, Daniel Smith, were ideal fodder for bloggers. Clearly, the uninhibited nature of anonymous comments posted in online forums make such forums an attractive source of possible evidence. Efforts to mine those sources for information should not be subjected to an opposing party's discovery requests.

The Subpoenas to Ms. Vicedomine do not differentiate between any of the various matters for which John O'Quinn and The Firm had represented (or are currently representing) their client, Virgie

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Arthur. The Subpoenas also fail to distinguish between the subject case and the defamation action filed by Ms. Arthur against the Plaintiff, Howard K. Stern, in the United States District Court for the Southern District of Texas. (Virgie Arthur v. Howard K. Stern, Case No.: 4:07-CV-03742). John O'Quinn and The Firm also represent Virgie Arthur in that lawsuit. The Subpoenas are, therefore, overbroad both as to their scope and the time frame encompassed by the subpoenas, since they would apply equally to Ms. Vicedomine's assistance in this case as well as a multitude of other matters.

The Defendants additionally submit that any information obtained by Ms. Vicedomine or any communications by Ms. Vicedomine to The Firm - or communications received by her from the Firm - should be protected from discovery by application of the work product doctrine. Further, any inquiry pertaining to Ms. Vicedomine's efforts on behalf of The Firm or communications with the Firm would potentially threaten The Firm's attorney/client privilege, to the extent that Ms. Vicedomine can be deemed an agent of The Firm for the purposes of any services that she performed on behalf of The Firm, or at The Firm's request. Thus, Plaintiff should be precluded from taking her deposition or obtaining the requested documentation. Conversely, any information which Ms. Vicedomine may have developed on her own would clearly be

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irrelevant to any potential issue in this case, thus obviating any need whatsoever for Ms. Vicedomine's deposition.

The work-product doctrine protects not only the mental processes of an attorney, but also the attorney's investigators who assist in the preparation of a case for trial. The work product privilege has been favorably acknowledged by the United States Supreme Court, since its inception in *Hickman v. Taylor*, 329 U.S. 495 (1947).

At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

United States v. Nobles, 422 U.S. 225, 238-39 (1975).

Other courts have recognized that someone who performs some manner of investigation for an attorney qualifies as an agent of that attorney, thus bringing that individual within the ambit of the work product doctrine. See, *Jeffers v. Russell County Bd. Of Education*, 2007 WL 2903012 (M.D. Ala. 2007); *In re Southwest Florida Tele-Communications, Inc.*, 195 B.R. 504 (Bkrtcy. M.D. Fla. 1996). Thus, while there do not appear to be any decisions from

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this District which are directly on point this Court looks to decisions from other District Courts for guidance.

In *Tele-Communications*, Darling's activities were being investigated by Boegner on behalf of Defendants. Darling sought to compel the production of documents which had been prepared by Boegner, which were included in communications between Boegner and the attorneys for Defendants. The Defendants claimed that these documents were prepared in anticipation of litigation and were protected by work-product privilege. The court reasoned that the Defendants' attorney engaged Boegner as an agent/investigator to compile information and documents in preparation for trial. Relying on *Nobles*, the court further confirmed that the work-product privilege protects material prepared by agents for the attorney as well as the material prepared by the attorney himself. *Id.* at 506. As such, the court concluded that the documents sought to be produced qualified for protection under the work-product privilege.

Similarly, in *Jeffers*, the District Court was faced with a motion for a protective order seeking to preclude the production of notes, papers, and documents created during the course of an investigation by the Defendant, Russell County, relative to allegations of sexual assault and harassment, which had been made by Plaintiffs. The County's superintendent and assistant

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superintendent had conducted the investigation. The Plaintiffs argued that the investigation could not have been undertaken "in anticipation of litigation," because no litigation was pending at the time the investigation was initiated. Plaintiffs also argued that neither the superintendent nor the assistant superintendent could be protected, because they investigated in their capacity as school officials rather than at the specific direction of the Board's attorney. *Id.* at *2.

The court disagreed with this contention, finding that the mere fact that the investigation was conducted by the Board's employees did not strip the documents of the protection offered by the work-product doctrine. *Id.* Moreover, the court found that the Plaintiffs were free to conduct their own investigation and to question the same witnesses and obtain the same documents. "By its own terms, then, the work-product privilege covers materials prepared by or for any party or by or for its representative; they need not be prepared by an attorney or even for an attorney." *Id.* at *3 (quoting *Hertzberg v. Veneman*, 273 F. Supp.2d 67, 76 (D.D.C. 2003)).

Similarly, Ms. Vicedomine shared certain information with the Defendants (in a multitude of cases) to assist them in their representation of Ms. Arthur. Clearly, given the commonality of the claims and the involvement of Plaintiff, Howard K. Stern, in

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each of these proceedings, that information may also assist The Firm in defending itself in this matter. Under the circumstances, it would violate the Defendants' work product privilege to require Ms. Vicedomine to produce documents or, otherwise, testify concerning any information that she may have provided to The Firm as part of its efforts to represent a Firm client, or to otherwise defend itself in this case. The proposed discovery may also violate Ms. Arthur's attorney/client privilege, to the extent that The Firm may have communicated with Ms. Vicedomine with regard to its representation of Ms. Arthur, issues in her case, or confidential facts which may have warranted further investigation, which would be performed by Ms. Vicedomine as an agent for The Firm.

Texas law and the Texas Rules of Evidence 503(b) also bar the disclosure of confidential communications made for the purpose of facilitating the rendition of professional legal services to a client where the communications are between the client or his representative and his lawyer or his lawyer's representative. The Rule defines the lawyer's representative as "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." See, Tex. R. Evid. 503(a)(4).

In *Bearden v. Boone*, 693 S.W.2d 25 (Tex. Ct. App. 1985), a Texas court found that an investigator had the authority to claim attorney/client privilege on behalf of a client who had hired him

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with regard to confidential communications between the investigator and the client or the client's attorney for the purpose of facilitating the rendition of professional legal services to the client. So too, in this instance, Mr. Stern and his attorneys should not be allowed to review communications by and between Ms. Vicedomine and The Firm, where those communications were designed to facilitate The Firm's rendition of professional legal services to both Ms. Arthur or Mr. O'Quinn, himself.

In *IMC Fertilizer, Inc. v. O'Neill*, 846 S.W.2d 590 (Tex. App. Ct. 1993), the Defendant petitioned for a Writ of Mandamus to set aside a discovery order which had compelled the depositions of various investigators who had been hired by the Defendants' attorney. The court held that the attorney/client privilege was applicable to any testimony that might be given by the investigators, to the extent that they were representatives hired by Defendants' counsel to assist in the rendering of professional services.

Assuming that any investigation performed by Ms. Vicedomine was shared with The Firm for use in its capacity as counsel on multiple matters involving Mr. Stern, or undertaken at The Firm's request, that material should not be subject to discovery. Conversely, as was noted earlier, to the extent that Ms. Vicedomine undertook her own investigation in a capacity that was wholly

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unrelated to the prosecution or defense of claims involving Mr. Stern, any information that she could provide or documentation that she could produce would be wholly irrelevant to this cause.

To the extent that Ms. Vicedomine assisted The Firm's investigation on behalf of its client, Virgie Arthur, she qualifies as an agent for the Firm. *See, Jeffers*, 2007 WL 2903012; *Tele-Communications, Inc.*, 195 B.R. 504. The Plaintiff, Howard K. Stern, should not be permitted to obtain information from an individual who performed services on behalf of the Defendants, in their capacity as counsel for Virgie Arthur, or to the extent that Mr. McCabe himself is also serving as co-counsel for Mr. O'Quinn in this matter. Thus, Ms. Vicedomine should not be required to provide any information, whatsoever, - or to attend a deposition - concerning the results of any investigation which she performed, or information that she shared with The Firm in its representation of Virgie Arthur, or its defense of this very litigation.

Generally, an individual does not have standing to challenge a subpoena served on another, unless that individual has a personal right or privilege with respect to the subject matter of the subpoena. *See, Barrington v. Mortgage It, Inc.*, 2007 WL 4370647 (S. D. Fla. Dec. 10, 2007). Here, the Defendants have a personal right with respect to the subject matter of the Subpoenas, as well as work-product and attorney client privileges. The inherent equitable

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power of Courts to grant protective orders is well-established. See, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35, 104 S. Ct. 2199, 81 L. Ed. 2d 1984) ("We have no question as to the court's jurisdiction to [enter protective orders] under the inherent equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.").

WHEREFORE, the Defendants, John M. O'Quinn and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm, respectfully request that this Court enter an order precluding Plaintiff, Howard K. Stern, from deposing Ms. Vicedomine or obtaining any information from her in this cause.

Respectfully Submitted,

STEPHENS LYNN KLEIN LA CAVA
HOFFMAN & PUYA, P.A.
Counsel for Defendants
9130 S. Dadeland Blvd., PHII
Two Datan Center
Miami, FL 33156
Tele: 305/670-3700
Fax : 305/670-8592
E-Mail: kleinr@stephenslynn.com
E-Mail: mandelr@stephenslynn.com

By: /s/
ROBERT M. KLEIN
Florida Bar No. 230022
ROBERTA G. MANDEL
Florida Bar No. 435953

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on May 30, 2008, this document was e-filed using the CMECF system and that a true and correct copy was served via e-mail to: **L. LIN WOOD, ESQ.**, (llwood@pogolaw.com) Powell Goldstein LLP, *Co-counsel for Plaintiff*, One Atlantic Center, 14th Floor, 1201 W. Peachtree Street, N.W., Atlanta, GA 30309; and **M. KRISTA BARTH, ESQ.** (krista@emsattorneys.com), Eric M. Sauerberg, P.A., *Co-counsel for Plaintiff*, Suite 102, 200 Village Square, Palm Beach Gardens, FL 33410 **NEIL McCABE, ESQ.**, (neilm@oglaw.com) The O'Quinn Law Firm, 440 Louisiana, Suite 2300, Houston, TX 77002 who are listed as recipients as counsel under said system.

CAVA

STEPHENS LYNN KLEIN LA

HOFFMAN & PUYA, P.A.

Counsel for Defendants

9130 S. Dadeland Blvd., PHII

Two Datran Center

Miami, FL 33156

Tele: 305/670-3700

Fax : 305/670-8592

E-Mail: kleinr@stephenslynn.com

E-Mail: mandelr@stephenslynn.com

By: /s/_____

ROBERT M. KLEIN

Florida Bar No. 230022

ROBERTA G. MANDEL

Florida Bar No. 435953

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STEPHENS LYNN KLEIN
LA CAVA HOFFMAN & PUYA, P.A.