

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' REPLY TO PLAINTIFF HOWARD K. STERN'S
MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION FOR PROTECTIVE ORDER**

Defendants, John O'Quinn and John M. O'Quinn and Associates, PLLC d/b/a The O'Quinn Law Firm ("O'Quinn"), by and through undersigned counsel and pursuant to Fed. R. Civ. P. 26(b), hereby reply to Plaintiff Howard K. Stern's ("Stern") Memorandum of Law in Opposition to Defendants' Motion for Protective Order ("Opposition Memo"), and as grounds therefor state as follows:

A. Defendants Have Satisfied Their Burden of Demonstrating Good Cause To Prevent Discovery.

Stern contends that O'Quinn's Motion for Protective Order should be denied because "they did not present affidavits or other evidentiary support for their contention that the testimony of Vicedomine and her responsive documents were prepared in anticipation of litigation or are otherwise privileged under the work-product doctrine" citing *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691 (S.D. Fla. 2007). While *Milinazzo* does require a party asserting work-product protection to provide the court with "sufficient information to determine which documents . . . are

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protected by the work-product doctrine,” Stern has misconstrued the holding of *Milinazzo* as applied here.

Milinazzo addressed certain rebuttable presumptions established in *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655 (S.D. Ind. 1991), and adopted by the Middle District of Florida in *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 2006 WL 1733857 (M.D. Fla. 2006), that documents or things prepared before the final decision on an insured’s claim are not work-product, and that documents produced after claims had been denied are work-product. *See Milinazzo*, 247 F.R.D. at 701. Those presumptions “may be rebutted ‘by specific evidentiary proof of objective facts.’” The court simply determined that the defendant had failed to rebut the presumption through the presentation of affidavits or other evidentiary support. *Id.* (quoting *Harper*, 138 F.R.D. at 663).

This case does not involve a similar rebuttable presumption; it clearly implicates the attorney/client and work-product privileges, to the extent that Mr. Stern expressly subpoenaed Ms. Vicedomine “as agent, employee, or other authorized representative” of the O’Quinn Firm.

Stern next contends that O’Quinn relied on “generalities” and has not provided any “specific proof of prejudice to be suffered from disclosure.” O’Quinn respectfully directs the Court’s attention to the following passages from the Motion for Protective Order:

Equally troubling is the definition of the word “communications,” which is defined as “the ideas or other 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. [pp. 7-8].

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Any research undertaken by Ms. Vicedomine [on the internet] on behalf of the Firm would per force be privileged; disclosure of the 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. [pp. 8-9].

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 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. [pp. 9-10].

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 irrelevant to any potential issue in this case, thus obviating any need whatsoever for Ms. Vicedomine's deposition. [pp. 10-11].

Similarly, Ms. Vicedomine shared certain information with the Defendants (in a multitude of cases) to assist them in their representation of Ms. Arthur.

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Clearly, given the commonality of the claims and the involvement of Plaintiff, Howard K. Stern, in 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. [pp. 13-14].

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. [p. 16].

Thus, O'Quinn has not merely made "broad or general allegations of harm," as was suggested by the Third Circuit's decision in *Cippollone v. Leggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). Similarly, O'Quinn has provided this Court with a more detailed illustration of prejudice than the defendant in *Williams v. Asplundh Tree Expert Co.*, 2006 WL 2598758, *3 (M.D. Fla. 2006), who did not "articulate[] to the Court with any level of specificity what information needs to be protected and why." In that instance, the defendant leveled vague allegations of privilege with regard to any proposed testimony by a corporate representative who had been subpoenaed to testify at trial. Here, Stern has subpoenaed an individual who assisted the Firm with

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regard to research and investigation of the underlying claims and the pending claim against Mr. O'Quinn to produce the product of those efforts, as well as her communications with virtually any and all members of the Firm and the current defense team. Defendants would submit that they have satisfied their burden of demonstrating the requisite cause necessary to obtain a protective order under the Federal Rules of Civil Procedure 26(b).

II. Defendants Have Not Waived Their Work-Product Protection By Relying on the Vicedomine Investigation or By Asserting an Affirmative Defense Based on This Investigation.

In his waiver argument, Stern claims that "Defendants cannot have it both ways," by using work-product in their defense without waiving the work-product privilege, citing *U.S. v. Nobles*, 422 U.S. 225 (1975). In *Nobles*, the United States Supreme Court held a party who had presented an investigator as a witness waived the work-product privilege with respect to the matters covered in the investigator's testimony. *Id.* at 239. In this instance, Ms. Vicedomine has never been offered as a witness in this cause by the defendants. To the contrary, as the plaintiff himself notes, Mr. O'Quinn had never even heard of Ms. Vicedomine when his jurisdictional deposition was taken in this case in July of 2007. (Nor has she been listed as a witness by O'Quinn.). Clearly, therefore, O'Quinn has no intention of testifying that he relied upon any information that was provided directly to him by Ms. Vicedomine when he spoke with the media in February and March of 2007.

In re Kidder Peabody Sec. Litig., 168 F.R.D. 459 (S.D. N.Y. 1996), involved a party's assertion of work-product immunity for an investigative report which the party "repeatedly proffered . . . not merely as a signal of its own good faith, but as a reliable, if not authoritative, source of data on which the court should rely in reaching whatever conclusion would favor the company." *Id.* at

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472. The court determined that *Kidder* could not invoke the work product privilege to bar disclosure of that investigative report where it had “made representations to the various courts and an arbitration panel” as to the substance of statements in that report. Here, there is no suggestion that O’Quinn relied upon any of Ms. Vicedomine’s work-product in speaking with the press. Unless or until that becomes a legitimate issue in this case, therefore, the work-product privilege should remain intact.

Similarly, *Kallas v. Carnival Corp.*, 2008 WL 2222152 (S.D. Fla. 2008), is inapplicable to the circumstances here. In *Kallas*, the plaintiffs relied upon an investigative survey of their counsel’s agents to support their arguments in a motion for class certification. *Id.* at *5. The Magistrate noted that the plaintiffs “decided to file the affidavits of the investigators themselves, attaching as exhibits some of the information those investigators obtained from the witnesses,” rather than attaching “affidavits from the persons that were interviewed, which would have generated no waiver of work-product protection.” *Id.* The court held that the investigators’ “testifying that the survey was accurate and that the results of the survey is as they are describing,” was “clearly a testimonial use of what would have otherwise been work-product protected information.” *Id.* Once again, there has been no suggestion in this cause that Mr. O’Quinn used any specific portions of Ms. Vicedomine’s investigation to support testimony that he has given in this cause. Thus, cases involving the testimonial waiver are simply not applicable to overcome legitimate assertions of work produce privilege.

If Stern's view of testimonial waiver were to be accepted by this Court, any form of reliance on work-product to prove an element of a claim or defense would constitute a waiver of the work-product protection. This position is at odds with the United States Supreme Court's view of testimonial waiver. As noted in *Nobles*, supra,

[W]hat constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances. Counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, *there normally is no waiver*. But where, as here, counsel attempts to make a *testimonial use* of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents.

Noble, 422 U.S. at 240, n.14 (emphasis added). Clearly, Stern has attempted to invoke the rule of testimonial waiver in a situation where "there normally is no waiver." *Id.*

Stern also cites cases which suggest that opinion work-product may be discoverable when the attorney's mental impressions are at issue in the case. *See Holmgren v. State Farm Mut. Auto Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084 (D. N.J. 1996); *Hartman v. Banks*, 164 F.R.D. 167, 170 (E.D. Pa. 1995). Those decisions have been criticized in many jurisdictions, and have not been adopted in Florida. As explained by the Third Circuit Court of Appeals in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994):

These decisions are of dubious validity. While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence

should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.

See also, 8 Wright and Miller, *Federal Practice & Procedure* § 2016.2 at 253-54 (2d ed. 1994)

“[T]he courts have carried this waiver concept beyond the situation in which the privilege-holder raises certain legal or factual issues. These cases do not fit within any sensible concept of waiver, and might best be viewed as ad hoc adjustments by courts in the scope of privilege.”

While the *Rhone-Poulenc* court analyzed this issue in the context of attorney-client privilege, its rationale is equally applicable to the work-product doctrine. The court drew a distinction between situations where privileged information is placed at issue by a party attempting to prove their claim or defense by disclosing or describing the privileged information, and situations where only a party's state of mind – not the actual privileged information – is placed in issue by the assertion of a claim or defense:

Thus, in a patent suit, where an infringer is alleged to have acted willfully, the advice of the infringer's lawyer may be relevant to the question of whether the infringer acted with a willful state of mind. However, the advice of the infringer's counsel is not placed in issue, and the privilege is not waived, unless the infringer seeks to limit its liability by describing that advice and by asserting that he relied on that advice.

Id. at 863.

Here, Ms. Vicedomine's investigation has not been placed in issue; Mr. O'Quinn never spoke with her. *See* O'Quinn's Response to Plaintiff's First Set of Continuing Interrogatories at No.8 (p.23) (“Other than media interviews, any information that I had received would have come directly

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from our own in-house investigator, Don Clark.”). Thus, while Stern argues that Ms. Vicedomine’s investigation should be treated the same as Mr. Clark’s own work-product simply because she worked with Clark on the investigation, that claim alone is insufficient to overcome the work-product privilege that applies to Ms. Vicedomine’s investigation. Confer *Hartman*, 164 F.R.D. at 170-71 (cited by Stern in his Opposition Memo at p.15) (in bad faith action against insurer, only those opinions and mental impressions that were directly in issue were subject to discovery; not the insurer’s entire file).

Here, Stern makes no pretense about the fact that he seeks to explore “the full scope of [Ms. Vicedomine’s] employment by the Law Firm and her contacts with Florida while she was acting as an agent for the Law Firm,” in addition to “the full details of Ms. Vicedomine’s relationship with the Law Firm, what acts she took as an agent for the Firm, and the documents she generated for the firm.” See Letter from Plaintiff’s counsel, Linn Wood, dated November 28, 2007 (attached hereto as Exhibit “A”); see also, April 30, 2008 Subpoenas served on Wilma Vicedomine by Stern. Clearly, the information sought by Stern from Ms. Vicedomine goes well beyond the limited scope of implied waiver applied in *Hartman* and the other cases cited in Stern’s Opposition Memo.

Many other jurisdictions have also rejected the suggestion of implied waiver to circumvent work-product or attorney-client privilege, even when a party’s state of mind is in issue. See *In re Geothermal Resources Int’l, Inc.*, 93 F.3d 648, 652-53 (9th Cir. 1996) (Chapter 11 debtor did not waive attorney-client privilege as to communications with outside counsel regarding propriety of officers’ employment contracts, by filing breach of fiduciary duty counterclaim in officers’ action

to enforce agreements); *Dixie Mill Supply Co. v. Continental Cas. Co.*, 168 F.R.D. 554, 558-59 (E.D. La. 1996) (“The mere fact that a claim of bad faith (or its affirmative defense of good faith) or other claim or defense based on a party’s state of mind is involved does not waive the attorney-client privilege [or work-product protection].”); *Arkwright Mut. Ins. Co. v. Nat’l Union Fire Ins. Co.*, 1994 WL 510043, *12 (S.D. N.Y. 1994) (“Even where a party’s state of knowledge is particularly at issue, such as in a case involving claims of laches or justifiable reliance, waiver of the privilege should not be implied because the relevant question is not what legal advice was given or what information was conveyed to counsel, but what facts the party knew and when.”); *Ryan v. Appleton Elec. Co.*, 153 F.R.D. 660, 662-63 (D. Colo. 1994) (concept of implied waiver “does not concern the distinct and broader concept of work-product immunity”).

Accordingly, Stern is not entitled to the discovery of Ms. Vicedomine’s work-product based on the suggestion of implied waiver. At best, plaintiff may be able to establish some basis for an argument of waiver, to the extent that Mr. O’Quinn testifies as to specific statements made by Don Clark to Mr. O’Quinn, which Mr. O’Quinn relied upon as a basis for the allegedly defamatory remarks by Mr. O’Quinn. Nevertheless, even assuming that testimony is given by Mr. O’Quinn concerning reliance upon specific information related to him by Mr. Clark, any limited waiver which might be implicated by this type of testimony would hardly be sufficient to support Stern’s generalized contention that the Firm’s work-product – and the results of Ms. Vicedomine’s investigation – are now subject to full discovery and disclosure.

III. Stern Cannot Circumvent Applicable Privileges By Claiming He Only Seeks the Underlying “Facts” of Vicedomine’s Investigation.

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Stern claims that he is entitled to depose Vicedomine and to secure complete production of the documentation which she has developed because the “‘facts’ discovered by the Clark/Vicedomine investigation and by Ms. Vicedomine herself are not privileged from discovery.” Stern construes the case law as suggesting that the entirety of Ms. Vicedomine’s investigation is discoverable, because she “has knowledge and documents containing facts...” This argument is not supported by the cases that Stern cites as authority for this proposition.

For example, in *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981) (cited by Stern at p.16 of his Opposition Memo), the United States Supreme Court considered an argument by the U.S. Government based on the following language in the Court’s earlier decision, *Hickman v. Taylor*, 329 U.S. 495, 511 (1947): “Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had And production might be justified where the witnesses are no longer available or can be reached only with difficulty.” The *Upjohn* Court actually rejected the Government’s argument based on this language, holding that, “[i]t is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine.” *Upjohn*, 449 U.S. at 401.

Dunkin’ Donuts, Inc. v. Mary’s Donuts, Inc., 206 F.R.D. 518 (S.D. Fla. 2002) involved a suit by a franchisor against a franchisee for underreporting gross sales. The franchisee moved to compel the franchisor to provide for the deposition of a corporate representative with knowledge of the facts supporting the franchisor’s claim of underreporting. *Id.* at 520. The franchisee objected to

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providing a corporate representative to testify as to the facts supporting their theory, contending that the information was subject to the work-product privilege. *Id.* The *Dunkin' Donuts* court held that the franchisee had to provide the facts supporting its contention of underreporting, but specified that "Plaintiffs will not be required to divulge the manner in which Plaintiffs intend to prove underreporting at trial; Plaintiffs' legal strategy; Plaintiffs' intended lines of proof; the strengths and weaknesses of Plaintiffs' underreporting case; or any inferences which Plaintiffs' counsel has drawn from interviewing witnesses." *Id.*

Stern construes the *Dunkin' Donuts* holding as support for his efforts to seek discovery of Vicedomine's work-product, simply because she may have uncovered facts during her investigation that are related to O'Quinn's defense in this matter. At best, defendants would suggest that Stern may seek discovery of those facts which served as a basis for Mr. O'Quinn's statements, or those facts that O'Quinn intends to rely upon as support for his defenses in this cause. As was noted earlier, however, none of those "facts" were imparted to Mr. O'Quinn by Ms. Vicedomine. Thus, her work-product should be exempt from discovery here.

Further, it is clear that Stern seeks more than just facts. As was noted previously, Stern's counsel has stated that the purpose of the Vicedomine deposition is to explore "the full scope of [Ms. Vicedomine's] employment by the Law Firm and her contacts with Florida while she was acting as an agent for the Law Firm," in addition to "the full details of Ms. Vicedomine's relationship with the Law Firm, what acts she took as an agent for the Firm, and the documents she generated for the firm." *See* Letter from Plaintiff's counsel, Linn Wood, dated November 28, 2007 (attached hereto

as Exhibit "A"); *see also*, April 30, 2008 Subpoenas served on Wilma Vicedomine by Stern (attached hereto as Exhibit "B"). It is therefore thoroughly disingenuous for Stern to now suggest that he is simply seeking discoverable facts underlying Vicedomine's investigation.

IV. Vicedomine Did Not Waive Work-Product Protection by Disclosure to Third Parties.

Stern claims that Vicedomine herself waived the work-product protection concerning her investigation for O'Quinn by revealing details of her investigation in conversations over the internet and in conversations with Rita Cosby. While O'Quinn agrees that this type of disclosure may occasion a waiver, any waiver on these grounds would be "limited to the information actually disclosed, not subject matter waiver." *Continental Cas. Co. v. Under Armour, Inc.*, 537 F. Supp. 2d 761, 773 (D. Md. 2008) (cited by Stern in his Opposition Memo at p. 19); *see also, Niagara Mohawk Power Corp. v. Sten & Webster Eng'g Corp.*, 125 F.R.D. 578, 590 (N.D. N.Y. 1989) (also cited by Stern). The appropriate application of this limited waiver thus directly contradicts Stern's broad contention that "Vicedomine waived *any* work-product privilege that may have existed for the investigation." *See* Opposition Memo at p. 19 (emphasis added).

Thus, the only information for which the work-product privilege may have been waived are the actual facts that Vicedomine revealed in statements made to Rita Cosby which were published in *Blonde Ambition*, or statements actually – not allegedly – posted by Vicedomine on the internet. Since that information is already available to Stern (or anybody else who seeks it out) online or in

Blond Ambition,¹ Stern should not be allowed to depose Vicedomine in order to discover the full gamut of her work-product. *See* Fed. R. Civ. P. 26(b)(3)(A)(ii) (party may only discover work-product if “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent *by other means*”) (emphasis added); *Hall v. Sullivan*, 231 F.R.D. 468, 475 (D. Md. 2005) (information obtainable from other source warranted denial of motion to compel); *Travelers Indem. Co. v. Metropolitan Life Ins. Co.*, 228 F.R.D. 111, 112 (D. Conn. 2005) (granting motion to quash subpoenas on grounds that subpoenas sought publicly available documents); *Proter & Gamble Co. v. Swilley*, 462 So. 2d 1188, 1194 (Fla. 1st DCA 1985) (“It is well established in Florida that absent this required showing of need and undue hardship to obtain the substantial equivalent of another party’s work-product by other means, a party’s work-product will remain immune from discovery.”).

Furthermore, any waiver of work-product protection allegedly occasioned by Vicedomine with regard to any investigation that she performed on behalf of the O’Quinn Firm would not affect a waiver on the part of Virgie Arthur, O’Quinn’s client in the related litigation. *See United*

¹ This same information is also available from the original sources who may have provided Ms. Vicedomine with information that was ultimately imparted to Ms. Cosby. Thus, and to the extent that Ms. Cosby has specifically identified individuals who purportedly provided information to Ms. Vicedomine during her deposition, or made note of those individuals in the book *Blond Ambition* itself, Mr. Stern is certainly at liberty to depose those individuals to confirm the statements or information which was reportedly attributed to them by Ms. Vicedomine. *See* Deposition Transcript of Rita Karen Cosby, dated November 15, 2007 (“Cosby Depo”) at 107, 164, 165-166. While Stern may argue that it will impose an undue hardship for him to obtain that information from these other sources, “in the ordinary case, the cost of one or a few depositions is not enough to justify discovery of work-product.” *In re Int’l Sys. & Controls Corp.*, 693 F.2d 1235, 1241 (5th Cir. 1982).

Steelworkers of America, AFL-CIO-CLC v. Ivaco, 2002 WL 31932875, *6 (N.D. Ga. 2002) (“[T]he work-product privilege belongs to both the client and the attorney, either one of whom may assert it; thus, a waiver of the privilege by the client does not deprive the attorney of his own privilege, and vice versa.”) (citing *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994); *In re John Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981)). Thus, since Virgie Arthur has not waived this protection, it would still apply to prevent Stern from deposing Ms. Vicedomine, regardless of whether or not there has been some kind of limited waiver occasioned by Ms. Vicedomine’s disclosures. Accordingly, O’Quinn’s motion for protective order should be granted.

V. Sanctions Against O’Quinn Are Inappropriate

Remarkably, Mr. Stern seeks attorneys’ fees as a sanction against O’Quinn on the grounds that O’Quinn’s Motion for Protective order is “patently baseless and unreasonable.” With all due respect to Mr. Stern’s position in this matter, Defendants would suggest that this motion might not have been necessary had Mr. Stern not attempted to use an overly broad subpoena to seek documentation which clearly includes the Firm’s work-product. It might also have been possible to resolve some of these issues had Stern not advanced the proposition that virtually all of the Firm’s investigation is now subject to full disclosure merely because Mr. O’Quinn has relied in part upon information that he received from his investigator when speaking with the press, or because individuals who were investigating this matter on behalf of the Firm spoke with a third party concerning the results of limited portions of their investigation.

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O'Quinn has provided ample support for every proposition set forth in the Motion for Protective Order and this Reply, and has cited numerous authorities establishing the legal arguments advanced in support of these assertions of privilege. *See Jade Trading, LLC v. U.S.*, 65 Fed Cl. 641, 645 (Fed. Cl. 2005) (denying motion for sanctions where position taken was not frivolous, i.e., had basis in law or fact, and where party was attempting to protect what counsel reasonably believed to be his client's rights). Sanctions are simply inappropriate where the O'Quinn Firm has legitimately sought to protect its own work-product privilege and its client's right to prevent the Firm's investigation from being fully and improperly disclosed to her adversary in the Texas litigation.

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,
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By: _____/s/_____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on July 11, 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.**,

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