

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 07-60534-CIV-DIMITROULEAS/ROSENBAUM

HOWARD K. STERN,

Plaintiff,

vs.

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

Defendants.

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**ORDER**

This matter comes before the Court in relation to counsel for Defendants' September 24, 2008, letter [D.E. 195]. The letter seeks for the Court to conduct an *in camera* review of certain documents to determine whether Defendants are required to produce the documents to Plaintiff. The undersigned has reviewed the documents and finds that Defendants are not required to produce the documents to Plaintiff because the materials are entitled to work-product protection.

***BACKGROUND***

The Court previously set forth a complete recitation of the background facts of this case in its August 29, 2008, Omnibus Order. [D.E. 165]. Hence, another recitation is not necessary here. Instead, the Court refers to the background facts set forth in its prior Omnibus Order. As noted above, the matter now before the Court stems from Defendants' September 24, 2008, letter which attached nine pages of documents. Pursuant to their letter, Defendants submitted the nine documents for *in camera* review and a determination as to whether Defendants are required to produce the documents to Plaintiff in response to his discovery requests. Defendants note that the documents at issue are e-mail communications between freelance reporter Dawna Kaufman and Defendants'

investigators, Don Clark and Wilma Vicedomine. Defendants contend that the documents are Investigation Materials (as defined in the Omnibus Order) and further emphasize that all of the documents are dated after March 27, 2007 (*i.e.*, the date of Defendant O'Quinn's last alleged statement). For these reasons, Defendants appear to contend that the materials are work-product protected and need not be produced.

On September 26, 2008, counsel for Plaintiff responded to Defendants' letter [D.E. 194] arguing that Defendants had previously conceded that the documents at issue were not work product. Additionally, Plaintiff argues that even if the documents are work product, Defendants waived any work-product protection by sharing the information with third parties. Put simply, Plaintiff contends that Defendants could have no realistic expectation that such communications would remain confidential when they shared the information with news reporter, Dawna Kaufman. Plaintiff believes that Defendants' communications with Ms. Kaufman and other news media representatives should be treated the same as their communications with Rita Cosby and on the Internet, which were previously required to be disclosed pursuant to the Court's Omnibus Order.

### ***DISCUSSION***

The Court has reviewed the nine documents submitted for *in camera* review. As an initial matter, the Court finds that each of the documents constitutes Investigation Materials. As noted in the Omnibus Order, Investigation Materials are comprised of all documents, materials, and information obtained by Don Clark and those working with or for him in conducting the investigation into Plaintiff, the deaths of the Smiths, and the paternity of Dannielynn allegedly ordered by Defendants on behalf of their client Virgie Arthur. D.E. 165 at 11. Hence, because the documents at issue were collected by Defendants for purposes of investigation and in anticipation

of litigation, work-product protection applies.<sup>1</sup>

Having found that the documents are Investigation Materials, work-product protection applies unless Defendants waived that protection. In this regard, and as discussed in the Omnibus Order, the Court must determine whether the work-product doctrine was waived by either an implied waiver or disclosure waiver. As noted in the Omnibus Order, the Court found that Defendants had waived their work-product protection with respect to the Investigation Materials through March 27, 2007, the date that O'Quinn allegedly made the last statement attributed to him in the First Amended Complaint. *See* D.E. 165 at p. 30. Following the last alleged O'Quinn statement, however, the Court could not identify any affirmative acts on the part of Defendants placing the Investigation Materials at issue. *Id.* at p. 31. Consequently, the Court declined to find any implied waiver with respect to the post-statement Investigation Materials. *Id.* Here, because the documents at issue reveal that they were created after March 27, 2007, the Court finds that no implied waiver has occurred.

Next, the Court analyzes whether Defendants waived any work-product protection by disclosure. Under the theory of disclosure waiver, a party waives work-product protection by disclosing to third parties information otherwise protected by the work-product doctrine. A waiver occurs when protected materials are disclosed in a way that substantially increases the opportunity for potential adversaries to obtain the information. *Niagra Mohawk Power Corp. v. Stone & Webster*

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<sup>1</sup> If the Court's understanding of how the materials were obtained is incorrect, Defendants shall inform the Court of such misunderstanding immediately. If the materials were not collected during the course of the underlying investigation by Defendants' investigators, the Court will reevaluate whether the documents must be produced to Plaintiff. Defendants need only advise the Court if the materials do not fall within the definition of "Investigation Materials" set forth above.

*Engineering Corp.*, 125 F.R.D. 578, 587 (N.D.N.Y. 1989) (citations omitted).

Plaintiff argues that the documents at issue should be treated the same as the information deemed to have been waived previously by Defendants when their investigators spoke with Rita Cosby and when they made statements on the Internet. The Court disagrees and finds that no disclosure waiver has occurred. Unlike the disclosures by Wilma Vicedomine and Don Clark to Ms. Cosby and on the Internet, the nine documents reviewed by the Court do not involve Defendants' investigators providing information to third parties. Indeed, the documents at issue do not convey any information to Ms. Kaufman or any other third party. Rather, all of the communications memorialized in the documents are communications by reporter Kaufman to Clark and Vicedomine. Indeed, the e-mails involve Kaufman disclosing information to Defendants' investigators and not vice versa. Under this scenario, disclosure waiver has not occurred because Defendants have not disclosed anything to Kaufman. Consequently, Defendants have not substantially increased the opportunity for potential adversaries to obtain the information because no information was disclosed to Ms. Kaufman. Under these circumstances, the Court finds that the documents retain their status as work-product protected materials and need not be disclosed to Plaintiff.

**CONCLUSION**

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the documents submitted to the Court for *in camera* review are work-product protected materials and such work-product protection has not been waived by Defendants. As such, Defendants are not required to produce these documents to Plaintiff.

**DONE AND ORDERED** at Fort Lauderdale, Florida, this 1st day of October, 2008.

A handwritten signature in black ink, reading "Robin S. Rosenbaum", written over a horizontal line.

ROBIN S. ROSENBAUM  
United States Magistrate Judge

cc: Honorable William P. Dimitrouleas  
counsel of record