

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

THOMAS C. and PAMELA McINTOSH,

Plaintiffs,

v.

STATE FARM FIRE & CASUALTY CO.
and FORENSIC ANALYSIS &
ENGINEERING CO., et al.,

Defendants.

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CIVIL ACTION NO.
1:06-CV-1080-LTS-RHW

**OBJECTIONS OF CORI RIGSBY AND KERRY RIGSBY
TO MAGISTRATE JUDGE’S DECEMBER 11, 2007 ORDER
DENYING MOTIONS TO QUASH NOTICES OF DEPOSITION AND SUBPOENAS**

Pursuant to Fed. R. Civ. P. 72(a), non-parties Cori Rigsby and Kerri Rigsby, by counsel, object to Magistrate Judge Walker’s December 11, 2007 order denying motions to quash notices of deposition, with document requests, and subpoenas to Richard Scruggs and Zach Scruggs, two of the Rigsbys’ attorneys. The order is clearly erroneous and contrary to law because it violates the attorney-client and work product/anticipation-of-litigation privileges held by the Rigsbys. By separate motion, the Rigsbys have sought leave to intervene pursuant to Fed. R. Civ. P. 24(a)-(b) for the purposes of filing these objections. Because these objections are due under Fed. R. Civ. P. 72(a) before a ruling on the motion to intervene is likely to be made, we file these objections

at this time, recognizing that the Court's ruling regarding intervention will determine whether they remain on file.¹

A. Background

This case is brought by State Farm policyholders against State Farm and other defendants for mishandling a property claim made after Hurricane Katrina. The Rigsbys were claims adjustors who brought the mishandling to light by providing their attorney, Richard Scruggs, with information and documents. *See* Exhibit A (transcripts showing Mr. Scruggs' representation of the Rigsbys). On behalf of the Rigsbys, Mr. Scruggs provided the information and documents to state and federal law enforcement authorities, filed in this Court a *qui tam* action against State Farm and others on behalf of the United States (No. 1:06cv433), which was also a victim of the claims mishandling, and later contacted the press, which notified the public about claims mishandling and led the plaintiffs in this case to file suit.

The Rigsbys are witnesses in this case. As the docket sheet reflects, the Rigsbys have been deposed for hours, and more depositions are in the offing. State Farm has sought and obtained their bank records and the tax and other records held by their accountant. The Rigsbys have produced to State Farm the documents they provided to Mr. Scruggs. State Farm has produced computer records showing that it can trace to the microsecond just exactly when the Rigsbys accessed State Farm documents, and what they accessed.

Another of the defendants in this case, E.A. Renfroe & Co., Inc., previously sought in other litigation to depose the Rigsbys' attorneys, including the Scruggs, regarding their interaction with the Rigsbys and the documents obtained from them. On December 3, 2007, the United States District Court for the Northern District of Mississippi quashed subpoenas to those

¹The subpoenas and deposition notices, with document requests set forth verbatim, that are at issue herein are attached hereto as Exhibit A. *See* Fed. R. Civ. P. 10(c).

attorneys for deposition testimony and documents. (No. 3:07-mc-00036). In this case, however, on December 11, 2007, Magistrate Judge Walker denied motions to quash similar subpoenas to Richard and Zach Scruggs.

B. The December 11, 2007 Order

Judge Walker appears to have intended to confine the attorney depositions to non-privileged material. Judge Walker explained his ruling as follows:

Although rarely allowed, depositions of a party's counsel are not altogether prohibited. Where the attorney has **non-privileged relevant information** unavailable by other means, such depositions have been allowed. The Court is of the opinion that the Scruggses may have such information, and that his case presents sufficiently unusual circumstances to justify allowing the depositions of Richard and Zach Scruggs.

Order, at 5-6 (emphasis added); *see id.*, at 5 (State Farm may question attorneys about "relevant, unprivileged matter"). Nowhere in the order did Judge Walker suggest that he found the absence of privilege or that he intended to disregard privileges. Consistent with the restriction of discovery to non-privileged information, Judge Walker indicated that State Farm could question the Rigsbys' lawyers about such matters as chain of custody of documents and the employment relationship between the Rigsbys and the attorneys. Order, at 4.

Notwithstanding restriction of discovery to non-privileged information, however, Judge Walker identified areas of permissible testimony that would breach attorney-client and work product privileges, apparently concluding erroneously that these areas did not involve privileged material. These areas include, for example, testimony about the Rigsbys' delivery of a particular engineering report to Richard Scruggs and what he did with it thereafter, including apparently exploration of which law enforcement agencies received the report from Mr. Scruggs. Order, at 5. As another example, Judge Walker indicated that State Farm could question Zach Scruggs concerning his receipt of certain State Farm documents from the Rigsbys. Order, at 4.

While these rulings do not permit examination into explicit communication between the Rigsbys and their attorneys, they do not permit inquiry into implicit communication, and into work undertaken in anticipation of litigation. These implicit communications involve the Rigsbys' communications regarding what they believe is evidence of claims mishandling, including their selection and organization of it, as well as communications concerning the subject matter as to which they sought legal advice. It is one thing to ask the plaintiffs in this case to produce documents that originated from State Farm and that are held by plaintiffs or their attorneys, which could identify possibly relevant evidence. It is quite different to ask witnesses like the Rigsbys or their attorneys to describe, even implicitly, how they went about preparing for litigation, to identify which documents they used as the framework and subject matter of attorney-client communications, and when and where the communications occurred. Such inquiry involves more than just nibbling around the edges of the privilege.

Judge Walker also denied the motion for a protective order as to a notice of deposition that included document requests, ruling that he could not grant a protective order without first receiving a privilege log. State Farm has asserted that denial of the protective order means that documents must be produced. Exhibit B hereto. We explain below that, whether or not there is a protective order, State Farm's request for documents in a notice of deposition is ineffective, as the rules require a Rule 45 subpoena for the documents from the Rigsbys' attorneys, who are not parties to this action and cannot, unlike parties, be required to produce documents upon the simple filing of a Rule 30 deposition notice.

Further, we explain that, in any event, Judge Walker erred by failing to rule on the privilege issues simply because he did not have a privilege log. A log is not required by the Federal Rules of Civil Procedure, and the Local Rules require a privilege log only as to

documents withheld from initial disclosures. Local Rule 26.1. Moreover, the document requests were, on their face, for privileged documents, so that no further description of the documents was needed to rule on privilege issues. For example, Request No. 1 sought production of “any and all documents constituting or referring to communications in any form between” the Rigsbys and Richard Scruggs, Zach Scruggs or any lawyer in their firm or associated with them. This is not different from a request for all privileged documents. The issue was whether privileges should be disregarded, which State Farm argued unsuccessfully, not whether the documents are privileged. It was, therefore, error to rely on the absence of a log as a reason not to enter an order protecting obviously privileged information.

C. Adoption of Objections Filed by Plaintiffs and to Be Filed by the Rigsbys’ Attorneys

To avoid repetition, pursuant to Fed. R. Civ. P. 10(c) we adopt the objections to the December 11, 2007 order filed by plaintiffs (Document 947) on December 21, 2007. We understand that Richard and Zach Scruggs likewise will file objections to the December 11, 2007, and we also adopt those objections pursuant to same rule.

D. December 11, 2007 Order as Clearly Erroneous and Contrary to Law

1. The Depositions

The areas of examination of the Rigsbys’ attorneys identified in Judge Walker’s order are the following, and only the following.

a. “[T]he report, as well as other State Farm documents the Rigsbys provided, the circumstances surrounding the receipt of such documents and the chain of custody of the documents after the Scruggses received them.”

b. Zach Scruggs’ “receipt of confidential internal emails which the Rigsbys forwarded to him while they were still in the employ of Renfroe/State Farm.”

c. “[T]he particulars of the employment relationship between the Scruggses and the Rigsbys, who are material witnesses in the McIntosh lawsuit.”

d. “[T]he delivery and receipt of the October 12 report, as well as what was done with it after the Scruggses received it.”

Order, at 4-5. No other areas of examination are identified in the order; it contains no suggestion that communications between attorney and client may be forced into public view; and there is no reference to the production of any particular document.

Even if confined to the areas of examination identified by Judge Walker, still the order erroneously compromises the Rigsbys’ attorney-client and work product/anticipation-of-litigation privileges. Questions concerning what documents the Rigsbys handed to their lawyer reveal the subject matter on which they sought attorney advice, implicitly reveal communications to their attorney regarding the fraud they believed they had witnessed, and reveal their organization and selection of relevant information needed to prove that fraud. *See In re Grand Jury Subpoena*, 926 F.2d 1423 (5th Cir. 1991) (even client name, which ordinarily is not privileged, is privileged if it would implicitly reveal attorney-client communications); *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (attorney’s organization and selection of documents is protected); Fed. R. Civ. P. 26(b)(3) (protecting trial preparation materials).

2. The documents

Judge Walker twice indicated in the December 11th order that he intended to compel the disclosure only of non-privileged information. Although Judge Walker denied the McIntosh plaintiffs’ motion for a protective order and to quash noticed depositions with document requests, his order did not address the individual document requests because no privilege log had been submitted. Order, at 5. Judge Walker ruled that he could not accept the privilege claims

without having a log but did not rule that the privileged documents must be produced. Indeed, State Farm had not filed a motion to compel.

It appears that litigation regarding privileged documents may await State Farm's decision actually to subpoena documents from the Rigsbys' attorneys. State Farm has not yet subpoenaed documents from Richard Scruggs or Zach Scruggs, non-parties to this case. The subpoenas that State Farm served on them, Exhibit C hereto, do not have a box checked for the duces tecum part of the subpoena. As non-parties, the Rigsbys' attorneys must be subpoenaed in this case under Fed. R. Civ. P. 45(a), which would require that the subpoena list any documents that are commanded to be produced. Rule 45 does not envision document requests. Here, State Farm apparently served document requests that were included as a part of a notice of deposition, citing Fed. R. Civ. P. 30(b)(5) as authorizing such an approach. *See* Exhibit C hereto. Rule 30(b)(5), however, has no application with respect to non-parties; it is limited by its terms "to a party deponent." The Scruggs are not party deponents.

If construed to finally resolve privilege issues as to the documents listed in the notices of deposition, the December 11, 2007 order is clearly erroneous and contrary to law. The order denied a protective order only because no privilege log had been offered, but the rules do not require a privilege log. The rules require only a description of the nature of the documents in issue, a description sufficient to enable the demanding party to assess the privilege. Fed. R. Civ. P. 26(b)(5)(a) & 45(d)(2)(A). There is no requirement that a privilege log be given to the Court. *See* Local Rule 26.1 (only provision in Local Rules regarding privilege logs, which are required as to documents withheld by parties from initial disclosures at the outset of a case).

The privileged nature of the documents is fully revealed in the requests. Request number 1 to both Richard Scruggs and Zach Scruggs could just as easily have been "for all privileged

communications.” In fact, it was for “any and all documents constituting or referring to communications” between the Scruggs or any lawyers working with them and either of the Rigsbys. That is a request for privileged communications. No particularization of the documents involved would make that plainer. State Farm was seeking by this and similar requests to pierce the attorney-client privilege completely, based largely on an argument about the crime-fraud exception that Judge Walker did not accept. Whether to disregard the privilege was the issue. Whether the privilege applied to the documents specified in the request was not the issue, as the request on its face was for privileged documents.

The same point applies to the rest of the document requests in issue. Request 2 is for all documents received from or provided to the Rigsbys; that is not a request for, say, all documents concerning State Farm; it is for documents defined by the request to include only those that passed between attorney and client as part of communications between them, even if they concern legal strategy and advice, or requests for such things. Request 3 similarly is for those the Rigsbys “represented” to the attorneys to be State Farm’s; for a document to be responsive to this request, the attorneys are required to disclose what the Rigsbys said about the documents. Request 4 is for electronically stored information that is responsive to the requests for privileged material. And request 12 is for notes referring to information communicated by the Rigsbys to their lawyers.

Further, beyond these explicit requests for attorney-client privileged information, the document requests were, on their face, for materials protected as work product and as materials prepared in anticipation of litigation. This is particularly true as to requests 10 and 12, which are for all notes or other documents prepared by the Rigsbys’ lawyers “after reviewing” State Farm

documents provided by the Rigsbys and all notes referring to information provided by the Rigsbys.

The attorney-client privilege protects communications made in confidence by a client to his or her attorneys. *See, e.g., United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684 (1st Cir. 1997). “Its purpose is to encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). “That purpose, of course, requires that clients be free to make full disclosure to their attorneys.” *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989).

Under Rule 501 of the Federal Rules of Evidence, state law determines the applicability of a privilege in civil diversity actions where state law supplies the rule of the decision. *Dunn v. State Farm*, 927 F.2d 869, 875 (5th Cir.1991). This diversity action is governed by Mississippi privilege law.

“Rule 502(b) of the Mississippi Rules of Evidence defines the attorney-client privilege as the client's right to refuse to disclose and prevent others from ‘disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.’ Rule 502 requires that the confidential communications must have been made:

(1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of a client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.”

United Investors Life Insurance Company v. Nationwide Life Insurance Company, 233 F.R.D. 483, 487 (N.D. Miss. 2006) (citing MISS. R. EVD. 502(b)).

“To remain protected, a communication must have not been intentionally disclosed to third persons unless the disclosure was ‘made in furtherance of the rendition of professional legal service to the client or disclosure was reasonably necessary for the transmission of the communication.’” *Id.* (citing MISS. R. EVD. 502(a)(5)). “Of course, the privilege is a two-way street, providing protection whether the lawyer communicates to the client or vice versa.” *Id.* (citing Miss. R. Ev. 502; cmt.; *Hewes v. Langston*, 853 So.2d 1237, 1244 (Miss.2003)).

Rule 502(b) “does not demand that the communication solely contain legal analysis or advice; rather, privilege protection attaches to those communications that would facilitate the rendition of legal services or advice.” *Id.*; *see also Dunn*, 927 F.2d at 875 (“The privilege does not require the communication to contain purely legal analysis or advice to be privileged.”). “[T]he Mississippi Supreme Court describes its interpretation of the attorney-client privilege as being broad and has held that ‘the privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of his representation.’” *United Investors*, 233 F.R.D. at 487 (citing *Hewes v. Langston*, 853 So.2d 1237, 1244 (Miss.2003)). Indeed, in Mississippi, even “research conducted by an attorney in response to his client's request achieves privileged status.” *Id.*, at n.2 (citations omitted).

The work product doctrine is embodied in Rule 26(b)(3) of the Federal Rules of Civil Procedure. It provides that items prepared in anticipation of litigation are generally protected from discovery by an opposing party. *See Fed.R.Civ.P. 26(b)(3)*. A document is deemed to have been prepared in anticipation of litigation if “in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1258 (3d Cir.1993); *see Upjohn Co. v. U.S.*, 449 U.S. 383, 398 (1981).

Under the foregoing standards, it was clear error and contrary to law for Judge Walker simply to deny a protective order as to the documents sought by State Farm. Those documents are subject to both attorney-client and work product/anticipation-of-litigation privileges, as is evident from the face of State Farm's document requests. As to such requests, the issue is whether privileges may be disregarded, not whether the documents are privileged. Judge Walker did not agree with State Farm that privileges may be disregarded. As a consequence, the Court should have entered a protective order barring all the requests and should not have declined one based only on the absence of a privilege log that is not required by the rules and that would not assist in the evaluation of the issues in any event. Moreover, in the face of requests literally seeking all communications with and regarding attorneys' clients, where they have represented the clients for nearly two years in wide-ranging matters involving a pending qui tam case, involving them as witnesses in other matters, and involving law enforcement authorities, logging all privileged communications would pose an obvious and unnecessary burden. Finally, even if it were useful to have a log, the Rigsbys cannot supply it. They should not be made to sacrifice the privilege they hold because of the absence of a log they cannot possibly create.²

²Privilege, not relevance, is the most important issue because even relevant information generally is not discoverable if it is privileged. Relevance nevertheless is important here. The December 11th order contains very little explanation of the relevance of any of the information sought by State Farm, whether by testimony or from documents.

The order notes that a key issue "is the existence of two engineering reports." Order, at 3. It is unclear what relevance that has to discovery. The reference is to the conflicting wind/water engineering reports, which the parties have and about which there has been no question at all as to authenticity. The December 11th order says only that it is "understandabl[e]" that State Farm wants to examine the Rigsbys' attorneys about the engineering report and other documents supplied by the Rigsbys, including a sticky note, but there is no explanation at all of any possible relevance, and there is none. In the absence of any suggestion that the documents are not authentic, the fact is that they say what they say, and there is nothing relevant that a lawyer can add about them.

The order also states that testimony about the Rigsbys' delivery of a particular engineering report to their lawyers is "clearly relevant," but again any explanation of that relevance is missing. Order, at 5.

In the rest of the order, there is nothing at all about relevance. Thus, notwithstanding the unprecedented nature of attorney depositions noted at the end of the order, Order at 5, the order does not describe relevance in any respect, except once to say that relevance as to one area of examination is clear. The fact is that all of the areas of

Respectfully submitted,

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examination identified in the order are irrelevant. They involve when and how the Rigsbys provided documents to their lawyers. That is not relevant to the contract and fraud issues in this case. So far as we know, it is undisputed that the documents are State Farm's or are from its files and are authentic. What the documents mean and how they were created are relevant, but the Rigsbys' interactions with their lawyers adds nothing to that and is not relevant. Certainly nothing in the December 11th order, which skips a discussion of relevance, embodies a contrary finding.

CERTIFICATE OF SERVICE

I certify that on December 27, 2007, I caused to be served via ECF a copy of the foregoing Objections of Cori Rigsby and Kerry Rigsby to Magistrate Judge's December 11, 2007 Order Denying Motions to Quash Subpoenas to Rigsbys' Attorneys on counsel of record as follows:

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