

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

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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

Hearing Requested

**MOTION OF CORI RIGSBY AND KERRY RIGSBY TO QUASH AND OBJECTIONS  
TO SUBPOENAS TO RICHARD SCRUGGS AND D. ZACHARY SCRUGGS**

Non-parties Cori Rigsby and Kerri Rigsby hereby object to and move to quash the January 14, 2008 subpoenas of State Farm Fire & Casualty Co. (“State Farm”) and E.A. Renfroe & Co. (“Renfroe”) to their attorneys, Richard Scruggs and D. Zachary Scruggs. *See* Exhibits A (State Farm subpoenas) and B (Renfroe subpoenas). The Rigsbys object to the subpoenas to the Scruggses insofar as they call for production of attorney-client privileged and work-product protected material related to the Scruggses’ representation of the Rigsbys.

Although this Court has ordered that State Farm be permitted to depose the Scruggses, it has repeatedly reaffirmed its intention to protect attorney-client and work product privileged information related to the Scruggses’ representation of the Rigsbys. Indeed, the Court’s December 11, 2007 Order allowing the Scruggses to be deposed confined those depositions to *non-privileged* subjects:

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 this 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 has this Court suggested that it intends to disregard privileges that belong to the Rigsbys.

A. Background

As this Court is aware, the Scruggses have represented the Rigsbys in the Rigsbys' efforts to provide information to state and federal law enforcement officials regarding State Farm's mishandling of its policyholders' claims after Hurricane Katrina. *See* Exhibit C (K. Rigsby Depo at 452:8-25). The Scruggses also represent the Rigsbys in a qui tam action filed in this Court against State Farm and others on behalf of the United States (No. 06-cv-433), which was also a victim of the claims mishandling. Although the Rigsbys later went on to work as consultants for the Scruggs Katrina Group, there is no question but that the Scruggses have served as the Rigsbys' attorneys for the qui tam case and in their disclosure of information and documents regarding State Farm to law enforcement.

State Farm previously sought certain documents from the Scruggses under Fed. R. Civ. P. Rule 30(b)(5). The Court ruled that those requests were improper because the Scruggses were not parties and directed State Farm to issue subpoenas *duces tecum* pursuant to Fed. R. Civ. P. 45 instead. Order of January 9, 2008 (Docket No. 989). Not content to rectify its procedural error as contemplated by the Order, State Farm took the opportunity to expand its requests. Further, Renfroe, who had not previously served document requests on the Scruggses at all, has now also served subpoenas on them.

B. The Rigsbys Have Standing to Object and Move to Quash the Subpoenas.

As will be shown below, the subpoenas at issue call for documents protected by privileges that belong to Cori Rigsby and Kerri Rigsby. For this reason, the Rigsbys have standing to file this motion to quash. *E.g.*, *Kiger v. Plaisance Dragline*, 2006 WL 3228289, \*1 (E.D. La. Nov. 2, 2006) (even if not the person to whom a subpoena is directed and not in possession or control of the requested materials, a person has standing to quash or modify a subpoena if he has a personal right or privilege in respect to the subject matter of the subpoena) (citing *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir.1979)); *Norris Mfg. Co. v. R.E. Darling Co.*, 29 F.R.D. 1 (D.Md. 1961) (party has standing to move to quash subpoena duces tecum directed at nonparty calling for production of party's work product documents); *Catskills Dev. LLC v. Park Place Ent.*, 206 F.R.D. 78, 93 (S.D.N.Y. 2002) (quashing "fishing expedition" subpoena for tribal records to Key Bank); *see generally* 9A Wright & Miller, *Federal Practice & Procedure 2d* § 2459, at 41 (1995 & 2007 supp).

C. Attorney-Client and Work-Product Privileges

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)).

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).

D. The Subpoenas Call For Documents Protected by the Attorney-Client and Work Product Privileges.

Under the foregoing standards, State Farm’s and Renfroe’s subpoenas call for the production of documents that are subject to both the attorney-client and work product/anticipation-of-litigation privileges.

1. *State Farm’s Subpoenas*

State Farm’s Requests 3, 4, 5, 6, 7, 8, 12, 13, 14, 15, 16, 20, and 22 call for privileged communications between the Rigsbys and the Scruggses or for documents reflecting the Scruggses work-product on behalf of the Rigsbys.

Indeed, Requests 3, 13, 14, 20, and 22 call on their face for communications between the Rigsbys and the Scruggses which are clearly privileged. For example, State Farm’s Request 3 to the Scruggses calls for “all documents concerning Kerri Rigsby, Cori Rigsby, Patricia Lobrano, or William Lobrano” for the period from October 12, 2005 through February 28, 2006. Mr. Scruggs first talked to the Rigsbys and agreed to represent them at a meeting at Cori Rigsby’s house in late February 2006 for which the Rigsbys do not recall the exact date. *See* Exhibit D (C. Rigsby Dep. at 302:8-303:5). To the extent this request calls for communications between Mr. Scruggs and the Rigsbys in connection with their efforts to obtain legal representation or to communications after the Rigsbys retained Mr. Scruggs, such documents are attorney-client privileged. Similarly, State Farm’s Requests 13 and 14 call broadly for documents exchanged

between the Rigsbys and Mr. Scruggs in that same time period which could include material the Rigsbys provided Mr. Scruggs in their efforts to obtain legal representation or material so provided after he agreed to represent them that would therefore be privileged.

Request 22 which broadly seeks “emails between or among at least [the Scruggses] and Kerri Rigsby or Cori Rigsby concerning or forwarding State Farm documents or information” for the period of October 12, 2005 through June 5, 2006 clearly includes privileged communications between the Rigsbys and Mr. Scruggs. The Rigsbys retained Mr. Scruggs in February 2006 specifically to obtain his advice on how to handle the documents and information they had collected from State Farm and thus it is likely that the Rigsbys communicated their confidences to the Scruggses by email in this period regarding the documents they had collected.

Further, Requests 4, 5, 6, 7, 8, 12, 14, and 15, though not calling explicitly for communications between the Scruggses and the Rigsbys, sweep in the Rigsbys’ privileged communications or work-product material related to the Scruggses’ representation of them. For example, Request 6 which is for “all documents concerning the United States Attorney’s Office pertaining State Farm and Hurricane Katrina” encompasses attorney-client privileged communications between the Rigsbys and the Scruggses about the documents and information that the Rigsbys disclosed to the United States Attorney’s office as part of their qui tam evidentiary disclosure as well as documents created in anticipation of the Rigsbys’ filing of their qui tam case which are protected by the work product privilege. Similarly, Request 12 calls for “all documents concerning” the Rigsbys’ friends Carron Rockco, Heidi Fisher, or Michelle Lee who assisted them in copying documents during the so-called “data dump” weekend, which includes privileged communications that may exist between the Rigsbys and the Scruggses about

Rocko, Fisher, or Lee as well as potentially work product protected documents created by the Scruggses relating to Rocko, Fisher, or Lee.

2. *Renfroe's Subpoenas*

Requests 1, 2, 3, 8, 9, 11, 12, 13, 14, 15, 16, and 17 of Renfroe's Subpoenas to the Scruggses also call for privileged documents.

For example, Request 3 calls for documents reflecting the legal fees and expense reimbursements paid by the Scruggses on behalf of the Rigsbys. Such a request plainly includes legal bills that contain the descriptions of the work the Rigsbys' attorneys performed in their representation of them, material protected by the work-product privilege. Further, Request 8 which calls for "any document related to the preliminary injunction issued by Judge Acker" implicates privileged communications between the Rigsbys, the Scruggses, and the Rigsbys' attorneys in the Alabama case of *Renfroe v. Rigsby*, No. 06-1752, U.S. District Court for the Northern District of Alabama, relating to compliance with that injunction.

Request 9 seeks any document "related to communications between [the Scruggses] and Jim Hood, Courtney Schloemer or anyone else with or then with, the Mississippi Attorney General's office." Because this request includes any documents "related to" such communications, it encompasses privileged communications that could have occurred between the Rigsbys and the Scruggses about the Scruggses' communications with the Mississippi Attorney General's office. For example, the Scruggses may have informed the Rigsbys of their communications with the Mississippi Attorney General's office on their behalf and thereafter given the Rigsbys legal advice based on those communications with the Attorney General's office. Requests 11-17 similarly call for all documents "related to" communications between the

Scruggses and third-parties which include privileged communications that may exist between the Rigsbys and the Scruggses related to those third-parties.

To the extent these requests could be interpreted as calling only for non-privileged responsive documents, the Rigsbys move in the alternative for an order so limiting them. Fed R. Civ. P. 45(c)(3)(A)(iii). An order limiting these subpoenas to non-privileged responsive material would be consistent with this Court's December 11, 2007 Order permitting the Scruggses to be deposed only as to non-privileged matters.

E. A Privilege Log Is Not Required and Cannot Be Created by the Rigsbys

As shown above, numerous of the subpoenas' requests call, on their face, for privileged documents, so that no further description of the documents is needed to rule on privilege issues. For example, State Farm's Request No. 3 seeks production of "all documents concerning" the Rigsbys between given dates. To the extent the Scruggses represented the Rigsbys in this time period, this is not different from a request for all privileged documents. Accordingly, a privilege log is not required to rule on the Rigsbys' motion to quash. Indeed, 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). And the Local Rules require a privilege log only as to documents withheld from initial disclosures. Local Rule 26.1.

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.

F. Joinder in Other Objections or Legal Arguments

The Rigsbys hereby adopt and incorporate by reference the Plaintiff's Motion to Quash Subpoenas, January 17, 2008 (Docket No. 1051) as well as any objections or other legal arguments made by the Scruggses or other interested parties in response to the subpoenas.

For the foregoing reasons, the Rigsbys object to and move that State Farm's and Renfroe's subpoenas to D. Zachary Scruggs and Richard Scruggs be quashed as violating the attorney-client and work-product privileges. The Rigsbys also respectfully request a hearing on this motion.

January 18, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on January 18, 2007, I caused to be served via ECF a copy of the foregoing Motion of Cori Rigsby and Kerry Rigsby to Quash and Objections to Subpoenas to Richard Scruggs and D. Zachary Scruggs on counsel of record as follows:

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