

IN THE CIRCUIT COURT OF THE 6TH  
JUDICIAL CIRCUIT, IN AND FOR  
PINELLAS COUNTY, FLORIDA

CASE NO.: 12-012447 CI-011

TERRY GENE BOLLEA, professionally  
known as HULK HOGAN

Plaintiff,

v.

GAWKER MEDIA, LLC, aka GAWKER  
MEDIA, NICK DENTON, and A.J. DAULERIO

Defendants.

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**LEVINE SULLIVAN KOCH & SCHULZ, LLP'S MOTION FOR PROTECTIVE  
ORDER IN RESPONSE TO NOTICE TO DEFENDANT, A.J. DAULERIO, TO  
PRODUCE DOCUMENTS AT OCTOBER 31, 2016 HEARING**

COMES NOW, LEVINE SULLIVAN KOCH & SCHULZ, LLP ("LSKS"), by and through the undersigned counsel, pursuant to Fla. R. Civ. P. 1.280(c) and the Fourth and Fourteenth Amendments to the U.S. Constitution, and files this Motion for Protective Order in response to Plaintiff, TERRY GENE BOLLEA's, p/k/a HULK HOGAN'S ("Plaintiff" or "Bollea") Notice to Defendant, A.J. Daulerio, to Produce Documents at October 31, 2016 Hearing ("Notice to Produce") filed October 14, 2016, and in support thereof, states as follows:<sup>1</sup>

1. On or about October 14, 2016, Plaintiff filed its Notice to Produce, wherein he seeks the production of documents from Defendant, A.J. DAULERIO ("Daulerio") "for purposes of the evidentiary hearing scheduled on Plaintiff's Amended Motion for Sanctions and Order to Show Cause Against Daulerio and His Counsel," ("Amended Sanctions Motion"). *See* Notice to

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<sup>1</sup> Although the Notice to Produce is not directed at LSKS, this Motion is being filed by LSKS, a non-party in this litigation, in an abundance of caution.

Produce at 1. Specifically, Plaintiff seeks to use the requested documents as evidence related to Plaintiff's Amended Sanctions Motion.<sup>2</sup> *Id.*

2. In addition, Plaintiff seeks an in camera review by this Court in the event that any privilege objections are put forth. *Id.*

3. In the Amended Sanctions Motion, which Plaintiff has incorporated by reference into the Notice to Produce, Plaintiff seeks the imposition of sanctions against Daulerio and LSKS arising out of alleged misconduct that purportedly occurred in this litigation. *See* Amended Sanctions Motion. The Amended Sanctions Motion also seeks an order to show cause as to why Daulerio and LSKS should not be held in criminal contempt as a result of the purported allegations of misconduct contained therein. *See Id.* at 24.

4. The Notice to Produce seeks seven (7) categories of documents from Daulerio. *See* Notice to Produce at 4. These documents are principally within the possession of LSKS, which formerly represented Daulerio in this matter.<sup>3</sup>

5. The requests set forth in the Notice to Produce are improper because: (a) the civil discovery process may not be used, as Plaintiff is attempting to do here, in aid of criminal contempt proceedings; (b) there is no basis for Plaintiff to obtain the requested documents, even for the relief that Plaintiff seeks that is civil in nature; and (c) the documents sought are protected from disclosure by the attorney-client and work product privileges.

## **I. Legal Argument**

### **A. Legal standard applicable to Motion for Protective Order**

Under Florida Rule of Civil Procedure 1.280(c), judges have broad discretion to issue protective orders to limit or prohibit discovery “to protect a party or person from annoyance,

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<sup>2</sup> An evidentiary hearing on the Amended Sanctions Motion is scheduled on November 21, 2016.

<sup>3</sup> LSKS has filed a Motion to Withdraw as Pro Hac Vice Counsel to Daulerio.

embarrassment, oppression, or undue burden or expense that justice requires....” See *Rasmussen v. South Florida Blood Serv., Inc.*, 500 So.2d 533, 535 (Fla.1987); *SCI Funeral Servs., Inc. v. Light*, 811 So.2d 796 (Fla. 4th DCA 2002). In deciding whether a protective order is appropriate, the trial judge must balance the competing interests that would be served by granting or denying discovery. See *Rasmussen v. South Florida Blood Serv., Inc.*, 500 So.2d 533 (Fla.1987); *North Miami Gen. Hosp. v. Royal Palm Beach Colony, Inc.*, 397 So.2d 1033 (Fla. 3d DCA 1981); *Dade County Med. Ass'n v. Hlis*, 372 So.2d 117 (Fla. 3d DCA 1979). Importantly, Florida law is well-settled that discovery requests cannot be used as a “fishing expedition.” See *McCarty v. Schultz' Estate*, 372 So. 2d 210, 212 (Fla. 3d DCA1979) (finding that a subpoena for production of documents cannot be used to obtain documents not relevant to the subject matter); see also *Palmer v. Servis*, 393 So.2d 653, 654 (Fla. 5th DCA 1981) (“The subpoena duces tecum should not become a search warrant, requiring a witness to produce broad categories of items which the party can search to find what may be wanted”).

Where, as here, the Notice to Produce seeks documents that are irrelevant to the allegations asserted in the Amended Sanctions Motion and is being used to improperly obtain documents that would otherwise not be discoverable, the Court should exercise its broad discretion and issue a protective order in favor of LSKS.

**B. Plaintiff may not use the civil discovery process to obtain discovery in aid of criminal contempt proceedings**

In the Amended Sanctions Motion, Plaintiff spuriously contends that Daulerio and LSKS engaged in conduct warranting an order to show cause as to why they should not be held in criminal contempt. See Amended Sanctions Motion at 24. It is well-settled that when a party seeks both criminal contempt and civil relief in one order, the rules of criminal procedure apply.

*See Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 591 (1947); *Pugliese v. Pugliese*, 347 So.2d 422, 426-27 (Fla. 1977).

Here, because Plaintiff utilizes the same proceeding, to wit, the Amended Sanctions Motion, to seek civil relief and criminal contempt against LSKS, *criminal* proceedings in which rules governing *criminal* procedure apply to both the civil and criminal aspects. *See Penfield Co. of Cal.* 330 U.S. at 591 (“Where a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character for purposes of procedure on review”); *Pugliese v. Pugliese*, 347 So.2d 422, 426-27 (Fla. 1977). In this regard, Plaintiff cannot circumvent the due process protections attendant in criminal proceedings by asserting a civil claim. *Id.* Notwithstanding the clear law on this point, Plaintiff has improperly invoked rule 1.410 of the Florida Rules of *Civil* Procedure as basis for obtaining the requested documents. *See* Notice to Produce at 1. In fact, Florida Rule of *Criminal* Procedure 3.840 provides the exclusive vehicle for Plaintiff to pursue the allegations of indirect criminal contempt that are asserted in the Amended Sanctions Motion. Plaintiff’s failure to strictly adhere to Fla. R. Crim. P. 3.840 is error. *Sramek v. State*, 946 So.2d 1235, 1236 (Fla. 2d DCA 2007); *McAtee v. State*, 899 So.2d 1245, 1246 (Fla. 4th DCA 2005). Indeed, the rule must be strictly followed because contempt prosecutions trigger all “the basic constitutional rights” that inhere in a criminal proceeding. *Aaron v. State*, 284 So.2d 673, 675 (Fla. 1973). Moreover, Fla. R. Crim. P. 3.840 does not authorize Plaintiff to engage in this nefarious attempt to utilize the civil procedural rules to investigate Daulerio and LSKS as an apparent first step in a possible criminal contempt prosecution.

Not only is Plaintiff’s Notice to Produce improper based on Florida law, but it is also improper under the Fourth Amendment to the U.S. Constitution. To be sure, if the State sought to

gather evidence for potential use in criminal contempt proceedings against LSKS, that evidence-gathering must conform to the requirements of the Fourth Amendment. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 222 (1968); *Cole v. State*, 714 So.2d 479, 489 n.14 (Fla. 2d DCA 1998). The liberal procedures governing civil discovery are inconsistent with the protections of the Fourth Amendment. *See Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) (“A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery.”); *United States v. Tison*, 780 F.2d 1569, 1573 (11th Cir. 1986) (State may not evade the Fourth Amendment by “institut[ing] a civil action to generate discovery for a criminal case”).

In the instant case, Plaintiff’s requests for documents within the Notice to Produce that LSKS possesses contravenes the Fourth Amendment in at least four (4) ways, as follows:

- The allegations of criminal conduct supporting Plaintiff’s requests are not supported by a sworn statement of facts, *see Moreno-Gonzalez v. State*, 67 So. 3d 1020, 1025 (Fla. 2011);
- There is no probable cause to conclude that evidence of a crime can likely be found in the demanded records, *see State v. Sabourin*, 39 So. 3d 376, 380 (Fla. 1st DCA 2010);
- Plaintiff’s descriptions of the documents are the equivalent of an improper “general, exploratory search,” *see United States v. Khanani*, 502 F.3d 1281, 1289 (11th Cir. 2007); and
- Plaintiff is seeking sets of records that are far more extensive than what could plausibly be evidence of a crime, *see Carlton v. State*, 449 So. 2d 250, 251-52 (Fla. 1984).

Indeed, the robust set of procedural safeguards set forth within Florida’s criminal procedural rules, and the corollary protections within the U.S. Constitution reflect the recognition, both by the State legislature and federal government, of the severity and seriousness of criminal accusations. Plaintiff’s attempt to circumvent these well-settled protections through his improper discovery requests should not be condoned by this Court.

**C. There is no authority permitting Plaintiff to obtain discovery in aid of the civil relief that Plaintiff seeks against LSKS in the Amended Sanctions Motion**

Even to the extent that the Amended Sanctions Motion seeks civil remedies against Daulerio and LSKS, there is no basis for the discovery requests set forth in the Notice to Produce. As this litigation is now in the post-judgment phase, Plaintiff's ability to seek discovery from Daulerio and/or LSKS is limited by Fla. R. Civ. P. 1.540(b) based on allegations that a judgment was procured through material misrepresentations. *See, e.g., Dynasty Exp. Corp. v. Weiss*, 675 So.2d 235 (Fla. 4th DCA 1996) (citing cases). As the Amended Sanctions Motion does not seek the exclusive relief offered by Rule 1.540(b), to wit, relief from the judgment, Plaintiff is not entitled to obtain the discovery sought in the Notice to Produce. Plaintiff's citation to Fla. Stat. § 45.045(4) within the Amended Sanctions Motion also does not provide a basis for Plaintiff to obtain the discovery sought within the Notice to Produce. In particular, that statute provides only "a narrow avenue for discovery for a limited stated purpose," namely, discovery in aid of execution. *BDO Seidman, LLP v. Banco Espirito Santo Int'l, Ltd.*, 26 So.3d 1, 5 (Fla. 3d DCA 2009). As Plaintiff is not seeking discovery in aid of execution, but rather, is plainly seeking to obtain evidence to support the baseless allegations set forth within the Amended Sanctions Motion, the statute does not provide a basis for Plaintiff to obtain the discovery sought within the Notice to Produce.

**D. The documents requested in the Notice to Produce are protected by the attorney-client and work product privileges**

It is well-settled that "The attorney-client privilege applies to communications made in the rendition of legal services to the client. *S. Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1380 (Fla. 1994). Moreover, "Pursuant to Florida Rule of Civil Procedure 1.280(b)(3), materials prepared in anticipation of litigation by or for a party or its representative are protected from

discovery, unless the party seeking discovery has need of the material and is unable to obtain the substantial equivalent without undue hardship.” *Id.* at 1384. Moreover, opinion work product, which “consists primarily of the attorney’s mental impressions, conclusions, opinions, and theories,” is generally protected from disclosure. *Id.* These protections apply to former clients. *Shafnaker v. Clayton*, 680 So.2d 1109, 1112 (Fla. 1st DCA 1996). Moreover, under Fla. R. Civ. P. 1.280(c), “materials entitled to protection as work product may be discovered only upon an adequate showing under Florida Rule of Civil Procedure 1.280(b)(2).” *See Am. States Ins. Co. v. Kransco*, 641 So.2d 175, 177 (Fla. 5th DCA 1994). Importantly, even an “adequate showing under [Fla. R. Civ. P. 1.280(b)(2)] will *not* permit *disclosure* of *documents* entitled to the *attorney-client privilege*.” *Id.* (emphasis in original).

In the instant case, all of the Requests in the Notice to Produce seek records that are protected by the attorney-client and work product privileges. *See* Notice to Produce at 4. To be sure, all of the requests ask for documents that either directly or indirectly call for communications between LSKS and Daulerio and/or LSKS’ mental impressions regarding the instant litigation. *Id.* Accordingly, all of the requested documents are subject to the attorney client and work product privileges and are, therefore, protected from disclosure to the Plaintiff.

### CONCLUSION

In short, the discovery requests set forth in Plaintiff’s Notice to Produce are improper. There is no basis for Plaintiff to engage in post-judgment discovery into alleged misconduct by LSKS that is not tied to any request by Plaintiff for relief from the judgment that has been entered in this case. Even assuming arguendo, that the requests were proper, which they are not, they seek information that is protected by the attorney-client and work product privileges.

Therefore, this Court should exercise its broad discretion to enter a protective order as to all of the requests set forth in the Notice to Produce. *See Rasmussen*, 500 So.2d at 535.

**WHEREFORE**, LEVINE SULLIVAN KOCH & SCHULZ, LLP respectfully requests that this Court enter a protective order preventing the production of documents sought in Plaintiff's Notice to Produce, releasing LEVINE SULLIVAN KOCH & SCHULZ, LLP of any duty it may have to produce documents in its possession that are responsive to the Notice to Produce, and for such other relief as this Court deems just and proper.

Dated: November 16, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**WE HEREBY CERTIFY** that, on this 16th day of November, 2016, we have filed the foregoing with the Clerk using the Florida Courts' ePortal System which will furnish a true and



correct copy to counsel listed on the below Service List, at counsel's respective designated electronic mail address.

*s/ Jonathan Vine*

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