

## Mary Clifford

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**From:** Alosey@foley.com  
**Sent:** Monday, March 02, 2015 5:50 PM  
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**Subject:** Florida v. Georgia, No. 142 Orig. - Jointly Submitted Clawback Order  
**Attachments:** Clawback Order.pdf

Ms. Clifford:

Attached please find a proposed Protective Order Containing Clawback Provision. This proposed order is jointly submitted by the parties to the Special Master for his consideration. The parties jointly request entry of the attached proposed order, containing a clawback provision protecting against claims of waiver by production of privileged documentation. Three paper copies of the proposed order will be placed in the mail today to your attention.

Very Truly Yours,

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No. 142, Original

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In the

SUPREME COURT OF THE UNITED STATES

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STATE OF FLORIDA,

Plaintiff

v.

STATE OF GEORGIA,

Defendant

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Before the Special Master

Hon. Ralph I. Lancaster

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**PROTECTIVE ORDER CONTAINING CLAWBACK PROVISION**

Because the parties to this case or non-parties may be required to produce documents, answer interrogatories, and provide testimony and other information that may contain information covered by the attorney-client privilege, work product protection, or that may be confidential in nature, and in order to permit discovery to proceed without delay and avoid possible disputes regarding the privileged, protected, or confidential nature of such information, the Special Master hereby **ORDERS**:

Due to the large volume of electronic and hard copy data in the possession, custody, or control of the parties and concerns regarding attorney-client privilege and work product protection the Special Master enters this clawback provision to expedite and facilitate the production of electronic and hard copy data, information, models, and documents, and to protect

against inadvertent disclosure of attorney-client privileged communications and work product materials. The parties agree to waive any arguments that reasonable precautions were not taken by the parties or their agents to prevent disclosure of privileged or confidential information. Moreover, the inadvertent disclosure<sup>1</sup> or production of any information or document that is subject to an objection on the basis of attorney-client privilege or work-product protection will not be deemed to waive any claim to its privileged or protected nature (and will not be construed as subject-matter waiver), and will not estop any party or privilege holder from designating the information or document as attorney-client privileged or protected work product doctrine at a later date.<sup>2</sup>

Any party that receives documents, models, or information that are privileged shall alert the producing party that it has received such information, irrespective of whether the producing party first alerted the recipient or requested a clawback. *See* Florida Rules Regulating the Florida Bar 4.4(b); Georgia Rules of Professional Conduct 4.4. Moreover, any party receiving documents, models, or information that are subject to an objection on the basis of attorney-client privilege or work-product protection shall return such documents, models, or information upon request from the producing party. Upon receiving such a request as to specific information, models, or documents, the receiving party shall return the information, models, or documents to the producing party within five (5) business days, regardless of whether the receiving party agrees with the claim of privilege or work-product protection. The receiving party may object to

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<sup>1</sup> For purposes of this agreement, an “inadvertently produced document” is a document (or portion of a document) produced to a party in this litigation that could have been withheld or redacted, in whole or in part, based on a legitimate claim of the attorney-client privilege, the work-product doctrine, or any other applicable privilege recognized under applicable law.

<sup>2</sup> The treatment of confidential documents will be governed by Section 10 of the Special Master’s December 3, 2014 Case Management Plan.

the producing party's designation of information, models, or documents as privileged by providing written notice of the objection to the producing party within 7 days of receiving a written demand for the return of such information, models, or documents. The burden of establishing any privilege or protection will remain on the producing party. Pending resolution<sup>3</sup> of the privilege determination, the parties (a) shall promptly return the specified documents (and any copies) subject to a claim of privilege; (b) must not use for any purpose any information, models, or documents that are claimed to be privileged; (c) must take reasonable steps to retrieve the information if the receiving party disclosed it before being notified; and (d) after meeting and conferring, may promptly present the issue to the Special Master for a determination of the claim. *See* Federal Rule of Civil Procedure 26(b)(5)(B).

This Order and clawback provision shall be governed by Federal Rule of Evidence 502(d) and is entered pursuant to Federal Rule of Civil Procedure 26(c)(1).

Dated: \_\_\_\_\_

\_\_\_\_\_  
Ralph I. Lancaster  
Special Master

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<sup>3</sup> Resolution will be achieved if the parties agree to a privilege designation (or lack thereof) in writing, or -- if the parties cannot agree -- when the Special Master rules on a claim of privilege.