

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

CASE NO. 2:04-cv-47-FtM-34SPC

WHITNEY INFORMATION  
NETWORK, INC., a Colorado corporation,

Plaintiff,

v.

XCENTRIC VENTURES, LLC., an  
Arizona limited liability company;  
BADBUSINESSBUREAU.ORG, an  
Arizona limited liability company; and  
ED MAGEDSON, an individual,Defendants.  

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**PLAINTIFF'S MOTION FOR SANCTIONS FOR  
IMPROPER DEPOSITION CONDUCT  
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, Whitney Information Network, Inc. ("WIN"), by and through its undersigned attorneys, moves this Court to enter an order sanctioning defendants' and defendants' counsel for defendants' counsel's improper deposition conduct and as grounds therefore states as follows:

**A. Improper Coaching of Witness**

WIN took the deposition of defendant, Ed Magedson, in Phoenix, Arizona. During the deposition while questioning was taking place defendants' counsel passed a note to Mr. Magedson. Transcript of August 1, 2007, deposition of Ed Magedson ("Magedson Transcript") at pp. 173-178 (a copy of which is attached hereto as Exhibit 1). "An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted." Hall v. Clifton Precision, 150 F.R.D. 525, 527 (E.D. Penn. 1993). "A civil party does not have a right to consult with his counsel at any time about any matter during the course of his or her testimony." Reynolds v.

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Alabama Dept. of Transp., 4 F.Supp.2d 1055, 1066 (M.D. Ala. 1998). “A lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth. Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness’s testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own.” 150 F.R.D. at 528.

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Defendants’ counsel improperly communicated with Mr. Magedson in the middle of questioning during his deposition. It is unclear whether or not the instructions on the note were privileged, and that will never be known since defendants’ counsel refused to preserve the note for this Court’s review. Magedson Transcript at pp. 175-178 (included in Exhibit 1 hereof). Whether or not the communication was privileged does not settle the issue presented in this motion; whether privileged or not counsel cannot communicate with a witness in the middle of questioning. Defendants’ counsel’s actions are akin to approaching her client while testifying and whispering in his ear while he is on the witness stand. To make matters worse, defendants’ counsel does not think there is anything wrong with what she did. Magedson Transcript at pp. 175-178 (included in Exhibit 1 hereof).

Defendants’ counsel’s improper conduct obstructed the deposition and should result in sanctions. Among the sanctions that this Court should impose is revoking defendants’ counsel’s admission to appear before this Court *pro hac vice*.

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**B. Refusal to Answer Questions Based on Relevance Objection**

“[I]t is improper to instruct a witness not to answer a question based on form and relevancy objections.” Gober v. City of Leesburg, 197 F.R.D. 519, 520 (M.D. Fla. 2000). A “counsel’s instruction not to answer the subject deposition question based on ‘relevancy’ was improper and violates Rule 30(d)(1) of the Federal Rules of Civil Procedure.” Id.

On multiple occasions during Mr. Magedson’s deposition defendants’ counsel instructed Mr. Magedson not to answer certain questions on the basis of relevancy. Magedson Transcript at pp 119-124 (a copy of which is attached hereto as Exhibit 2), 231-32 (a copy of which is attached hereto as Exhibit 3) and 236-41 (a copy of which is attached hereto as Exhibit 4). Doing so clearly violated the rules of civil procedure and obstructed the fact finding process of discovery, and should therefore be sanctioned. Among the sanctions to be imposed should be paying the fees and costs for WIN’s counsel to return to Phoenix to complete their inquiry of Mr. Magedson into the areas which he improperly refused to testify (which is precisely what WIN’s counsel cautioned defendants’ counsel they would seek. Magedson Transcript at pp. 119-124 (a copy of which is attached hereto as Exhibit 2)).

WHEREFORE, Whitney Information Network, Inc. respectfully requests that this Court enter an order sanctioning defendants, Xcentric Ventures, LLC, badbusinessbureau.org and Ed Magedson, and their counsel, Maria Crimi Speth, for their improper discovery conduct including, without limitation, withdrawing Maria Crimi Speth’s authority to appear before this Court *pro hac vice* and requiring them to pay the fees and costs incurred by Whitney InformationNetwork, Inc.’s counsel to return to Phoenix, Arizona to complete their inquiry into the areas that Ed Magedson

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improperly refused to testify and granting all other relief this Court deems just and appropriate.

October 19, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of October, 2007, I electronically filed the forgoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing is being served this day upon all counsel of record identified on the Court delineated Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Shawn L. Birken

Shawn L. Birken

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