

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-22236-CIV-GOLD/GOODMAN

HOWARD ADELMAN and
JUDITY SCLAWY, as
Co-Personal Representatives of THE
ESTATE OF MICHAEL SCLAWY-ADELMEN,

Plaintiffs,

vs.

BOY SCOUTS OF AMERICA, et al

Defendants.

**ORDER ON ISSUES UNDERLYING PLAINTIFFS' MOTION FOR JUDICIAL
REVIEW OF DENIAL OF *TOUHY* REQUESTS AND TO COMPEL
APPEARANCE OF U.S. PARK SERVICE EMPLOYEES FOR DEPOSITION**

This Cause is before the Court *sua sponte* in connection with Plaintiffs' Motion for Judicial Review of Denial of *Touhy* requests and to Compel Appearance of U.S. Park Service Employees for Deposition (DE# 217).

At a hearing today on a different issue involved in this case, Plaintiffs' counsel advised the Court and Defendants that he had spoken with a Department of Interior attorney about the instructions from the Court's Order (DE# 218) concerning the *Touhy* issues which have arisen from Plaintiffs' efforts to take depositions of four National Park Service employees. According to Plaintiffs' counsel, an Assistant United States Attorney is expected to work with the Department of Interior on its response to the motion.

The Court has reviewed the motion and has pinpointed issues on which clarification should be provided in the DOI's response:

1. In a March 1, 2011 letter to Plaintiffs' attorney (DE# 217-9), the DOI Regional Solicitor noted that the DOI is not a party to this litigation and that the Department's "policy" is to "not permit its employees to testify, either in deposition or at trial, in litigation to which the United States is not a party.

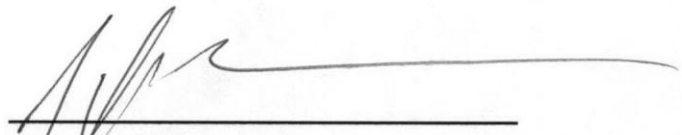
...” The letter then adds that, “in very limited circumstances, the Department will vary from this policy and permit such testimony if, by application of the criteria set forth in 43 C.F.R. § 2.88, we determine that such testimony would be appropriate.”

Given this position, how often, under the Department’s *Touhy* regulations (in the Code of Federal Regulations) has the DOI permitted its employees to provide deposition or trial testimony in cases where the United States was not a party, and how many employees have provided testimony?

2. What are the case names, case numbers and citations of those cases where the DOI has permitted its employees to testify (in a trial, deposition or hearing) when the United States is not a party?
3. What were the “limited circumstances” which caused the DOI to authorize its employees to testify in cases where the United States was not a party? [The DOI may simply attach copies of the authorization letters or memoranda in lieu of summarizing the circumstances in its to-be-filed brief].
4. In a June 1, 2011 letter, the DOI Regional Solicitor advised that the DOI is willing to allow two employees to testify by affidavit about two limited issues: the GPS download and the existence of a trailhead sign. Is the DOI willing to permit any other employees to provide information via an affidavit? If so, which employees and on which issues? Concerning the two employees mentioned in the June 1, 2011 letter, is the DOI willing to allow them to provide affidavits on issues other than the two subjects mentioned in the letter?
5. Given the DOI’s willingness to provide two employees to provide information on limited topics in affidavits, is the DOI willing to permit any of the requested employees to provide testimony through answers to written deposition questions, and, if so, is it willing to authorize such testimony on topics other than the GPS and the trailhead sign? If so, what other topics could be addressed in written deposition questions?

6. Is the DOI willing to produce any documents beyond those already made available in this case? If so, which ones?

DONE AND ORDERED in Chambers, at Miami, Florida, this 7thth day of June,
2011.



Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Hon. Alan S. Gold
Counsel of Record