

**THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Miami Division

Howard Adelman and Judith Sclawy,
as Co-Personal Representatives of
The Estate of Michael Sclawy-Adelman,

Plaintiffs,

vs.

Boy Scouts of America, et al.

Defendants.

CASE NO. 1:10-cv-22236-ASG

District Ct. Judge: Alan S. Gold

Magistrate Judge: Jonathan Goodman

**NOTICE OF SOUTH FLORIDA COUNCIL'S JOINDER WITH ANDREW SCHMIDT'S OPPOSITION
TO PRODUCTION OF CERTAIN E-MAILS AND POST-JULY 14, 2011 HEARING MEMORANDUM IN
SUPPORT THEREOF**

DEFENDANT, The South Florida Council, Inc. ("SFC") by and through its undersigned counsel, hereby joins with Andrew Schmidt's opposition to production of certain e-mails and files its memorandum in support thereof seeking an Order from this Court protecting Defendants from producing certain e-mails through discovery and states more fully as follows:

PREFACE

1. Plaintiffs moved to compel production of 32 emails initially withheld by Andrew Schmidt due to privilege and relevancy objections. [D.E. 234].
2. Andrew Schmidt filed his response and turned over 10 of the 32 originally withheld e-mails. [D.E. 243].
3. A hearing on the discoverability of the remaining 22 e-mails took place before the Honorable Jonathan Goodman on July 14, 2011.
4. Judge Goodman ordered Defendant Schmidt to file a post-hearing supplemental memorandum of law concerning the confidential nature of certain of the 32 e-mails. [D.E. 247 and 251].
5. At the very end of the hearing, undersigned requested that SFC be permitted to join with Andrew Schmidt in objecting to the production of certain e-mails that were sent to SFC under the work product exception to the discovery rules. Judge Goodman granted this request, and this pleading represents SFC's joinder.

E-MAILS SUBJECT TO THE WORK PRODUCT EXCEPTION TO DISCOVERY

6. SFC asserts that the following e-mails – that are numerically listed on Andrew Schmidt’s Privilege Log [Exhibit B to D.E. 243] – should not be produced pursuant to the work product exception to discovery:

- **(#1) e-mail sent by Andrew Schmidt on 5/10/2009 at 1:16 p.m. to Annette Hungler (SFC employee) with the subject “Troop 111 Incident”**
- **(#7) e-mail sent by Schmidt on 5/11/2009 at 12:25 p.m. to Annette Hungler with the subject “Trek Safely- T 111”**
- **(#9) e-mail that appears to be forwarded to Andrew Schmidt on 5/11/2009 at 1:05 p.m. in response to #7 and**
- **(#8) e-mail sent by Andrew Schmidt on 5/11/2009 at 12:42 p.m. that appears to be in response to #9.**

7. E-mail #1 was created one day after the subject incident and e-mails #s 7-9 were created two days after the subject incident. All four e-mails were sent to SFC as part of the claims reporting procedures of the Boy Scouts of America’s (“BSA”) self-insured Risk Management Program. These Reports contain information of the subject incident in anticipation of litigation. While #s 8 and 9 may not have been sent directly to SFC they respond to inquiries in #7 by Schmidt to SFC, which concern the subject incident.

INCIDENT REPORTING POLICY OF BOY SCOUTS OF AMERICA

8. Jeff Hunt (former Scout Executive for SFC) and John Anthony (current Scout Executive for SFC) testified that BSA has a policy, which mandates that adult members, including Andrew Schmidt, report incidents involving scouts or adult members. *See* Deposition of Jeff Hunt at p. 157 attached as *Exhibit “A”* and Deposition of John Anthony at pp. 37-38 attached as *Exhibit “B.”*

9. BSA’s Risk Management policy requires the reporting of incidents involving death or serious injury in anticipation of possible litigation. When an adult member learns of such an incident, it is his/her responsibility to inform his/her council’s Scout Executive who is then charged under the

provisions of the BSA Risk Management policy with preparing a Preliminary Report of Fatal or Serious Injury or Illness. That Report is immediately provided to the Director of the Health and Safety Service at BSA's headquarters. These Risk Management procedures are followed by SFC and BSA at the direction of legal counsel and constitute claims handling procedures in litigation. *See* Affidavit of Joshua Christ attached as *Exhibit "C."*

10. The incident reporting guidelines are found in the *Guide to Safe Scouting*, which has already been produced through discovery. *See* "Reporting Death or Serious Injury" guidelines attached as *Exhibit "D."* The policy states, "Adult leaders are responsible for informing their council Scout executive or designee of a death or serious injury or illness as soon as possible." Id.
11. Andrew Schmidt, via e-mail, informed his council's Scout executive, Jeff Hunt, of Michael Sclawy-Adelman's death within two days of the incident pursuant to BSA policy.
12. Jeff Hunt took the information provided via email and created a "Preliminary Report of Fatal or Serious Injury or Illness" on June 10, 2009 and faxed it to the Director of the Health and Safety Service at BSA's corporate headquarters.
13. Thus, the incident report, as well as the e-mails discussed above were created in anticipation of litigation and constitute work product.
14. SFC provided to all parties an Amended Privilege Log dated February 10, 2011. SFC raised the work product exception to the discovery requests for the incident report titled "Preliminary Report of Fatal or Serious Injury or Illness" dated May 10, 2009. It was filled out by Jeff Hunt and sent to BSA's national office that same day. SFC also objected to producing e-mail correspondence dated May 10, 2009 regarding potential litigation arising out of the subject incident. *See* SFC's Amended Privilege Log attached as *Exhibit "E."*
15. Recently, SFC reviewed e-mails #s 1, 7, 8, and 9. These e-mails, especially #1 which reports the incident at issue, are early communications designed to assist SFC in creating the Risk Management mandated incident report for Michael Sclawy-Adelman's death.
16. Those early e-mails created for risk management purposes are work product protected as they were created in anticipation of this very litigation.

MEMORANDUM OF LAW

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer or agent).” Fed.R.Civ.P. 26(b)(3). For the work product doctrine to apply, the party seeking protection need only show that the “primary motivating purpose behind the creation of the document was to aid in possible future litigation” Fojtasek v. NCL (Bahamas) LTD., 262 F.R.D. 650, 656 (S.D.Fla. 2009) (*citing* United States v. Davis, 636 F.2d 1028 (5th Cir. 1981)).

The e-mails discussed above were prepared for SFC and/or gathered by SFC in anticipation of litigation. Critically, a document is work product protected “as long as it has been prepared in anticipation of litigation by *any* representative or agent of the party asserting the privilege.” Mitsui Sumitomo Ins. Co. v. Carbel, LLC, Slip Copy, 2011 WL 2682958 at *2 (S.D.Fla.) (ruling that documents that “specifically relate to insurance coverage . . . and the possibility of litigation . . for contribution. . .” were properly withheld under the work product privilege).

In this case, the emails were prepared by a defendant, Andrew Schmidt, and transmitted to SFC pursuant to BSA’s self-insurance incident reporting policy. Incident reports that are prepared by or for a party in anticipation of litigation are entitled to work product protection. Fojtasek at 655. In Fojtasek, an incident report was prepared one day after an incident, which was required pursuant to NCL’s internal policies in anticipation of future litigation. Id. at 655.

The e-mails in question were drafted in the first two days after the incident involving Michael Sclawy-Adelman occurred. They were drafted to assist SFC in preparing an incident report, which is mandated by the BSA Risk Management policy. In fact, it is clear that #1 was sent to assist SFC in creating an incident report, because the subject is labeled “**Troop 111 Incident**” (emphasis added). Moreover, it specifically asks Ms. Hungler to forward it ASAP to Jeff [Hunt]. Finally, it is not merely a recitation of facts to parents or other Troop 111 members; rather, it’s purpose is to “inform the Council...” Similarly, e-mails #s 7-9 represent questions to and from Andrew Schmidt and SFC regarding legal releases and hiking documentation. All four emails constitute communications designed

to facilitate the transmission of an incident report from SFC to BSA and BSA's legal department and to inform those entities of developments related to possible litigation stemming from the Michael Sclawy-Adelman incident. *See Fojtasek* at 660. It is clear that the substance of the e-mails relates to anticipated litigation and were created pursuant to BSA's self insurance/Risk Management Program. *See also Alexander v. Carnival Corp.*, 238 F.R.D. 318, 319 (holding that the creation of accident reports – pursuant to the internal investigatory policy of Carnival Cruise Lines – was done in anticipation of litigation and fell within the work product privilege).

WHEREFORE, DEFENDANT, The South Florida Council, Inc. respectfully request that this Honorable Court enter an Order finding that e-mails #s 1, 7, 8 and 9 are protected from discovery under the work product privilege and enter such other relief as this Court deems just.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was sent July 21, 2011 to: Robert D. Peltz, Esq, Ira H. Leesfield, Esq., LEESFIELD & PARTNERS, P.A., 2350 South Dixie Highway, Miami, FL, 33133; Frederick E. Hasty, Esquire, Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., 2800 Ponce de Leon Boulevard, Suite 800, Coral Gables, FL 33134; Greg Gaebe, Esq., Gaebe, Mullen Antonelli, Esco & DiMatteo, 420 S. Dixie Highway, Third Floor, Coral Gables, FL, 33146; Ubaldo J. Perez, Jr., Esq., LAW OFFICES OF UBALDO J. PEREZ, JR., P.A., 8181 NW 154th Street, Suite 210, Miami Lakes, FL 33016.

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