

66450-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG
Magistrate Judge: Magistrate Judge Jonathan Goodman

HOWARD ADELMAN and JUDITH SCLAWY-
ADELMAN, as Co-Personal Representative of the
Estate of MICHAEL SCLAWY-ADELMAN,

Plaintiffs,

v.

BOY SCOUTS OF AMERICA, THE SOUTH
FLORIDA COUNCIL, INC.; BOY SCOUTS OF
AMERICA; PLANTATION UNITED
METHODIST CHURCH; HOWARD K.
CROMPTON, individually; and ANDREW L.
SCHMIDT, individually,

Defendants.

**DEFENDANTS' MOTION FOR PROTECTIVE ORDER AS TO DEPOSITION
OF CARTER CONRAD, JR.**

Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, by and through the undersigned counsel, and in accordance with Federal Rules of Civil Procedure, and the Local Rules of the Southern District of Florida, hereby file this Motion for Protective Order as to Deposition of Carter Conrad, Jr., and in support thereof, state as follows:

1. On August 4, 2011, counsel for these Defendants conducted the deposition of Carter Conrad, Jr., who was appointed for the limited purpose of acquiring the data and downloading the data from Michael Adelman's cell phone and Howard Crompton's cell phone.¹ (See Notice of Taking Deposition Duces Tecum and Subpoena Duces Tecum attached as Exhibit "1"). The deposition was taken to with regard to what Mr. Conrad did

¹ The deposition transcript was ordered on an expedited basis, but it has not been received by undersigned counsel as of the time of the filing of this Motion.

pursuant to the Court Orders. The direct examination was limited to data extraction of Michael Adelman's cell phone.

2. In the months preceding Mr. Conrad's deposition, this Court had entered Orders permitting the Parties to only receive data that Mr. Conrad found on Michael Adelman's cell phone, and Howard Crompton's cell phone, on the dates of May 8, 2009, and May 9, 2009. [See, e.g., DE 118].

3. On the day of Mr. Conrad's deposition, Mr. Conrad produced a "DVD" that contained almost his entire file in electronic format. The DVD was marked for identification purposes only, and was retained by Mr. Conrad. The contents of the entire DVD were inventoried by the process of having Mr. Conrad answer general questions while looking at the DVD on his laptop computer. Undersigned counsel was aware of this Court's Orders and wanted to be certain that Mr. Conrad would not violate this Court's Orders by divulging any information or data that was outside of the May 8-9, 2009, timeframe.

4. Even though the deposition was not cross-noticed by Plaintiffs, undersigned counsel permitted counsel for Plaintiff, Robert Peltz, Esq., to participate in the inventory process. Mr. Peltz was aware of – and appeared to be concerned with – the specific limitations this Court had placed on the evidence in Mr. Conrad's possession.² [See, e.g., DE 118].

5. Eventually the contents of the DVD were inventoried and the materials were categorized into "protected" and "not protected" groups. This process took approximately two hours. Once the inventory was complete, Mr. Conrad printed the information that Mr. Conrad was confident he could produce without violating this Court's Orders – the non-protected group – at the court reporter's office.

6. Once the non-protected documents were printed, all counsel present at the deposition finally had the opportunity to review the overwhelming majority of the materials that Mr. Conrad had in his file. Counsel began to review the documents.

² Counsel for Plaintiffs used the Court Orders as Plaintiffs' exhibits during his cross-examination.

7. The printed documents were marked as exhibits to the deposition which took approximately one-half hour. Then, undersigned counsel began the substantive direct examination.

8. During the direct examination, undersigned counsel was careful and mindful so as not to request protected information from Mr. Conrad. Additionally, undersigned counsel on multiple occasions reminded Mr. Conrad that he should not provide protected documents or information while answering the questions.³

9. During the deposition, Mr. Conrad testified that:

- a. He was not retained by any of the parties as an expert witness.⁴
- b. He had not been asked to be retained by any of the parties.
- c. He had not been paid by any of the parties.
- d. He did not have any substantive conversations with any of the attorneys beyond arranging for delivery and return of the cell phones.
- e. He had not agreed to be an expert and wanted to be neutral.
- f. He was not provided any additional information about this lawsuit by any of the parties.
- g. He reviewed no depositions in the case.

10. Notably, Mr. Conrad also testified that he did not try to learn of the facts of the case because he wanted to be **impartial** and **neutral** towards both Plaintiffs and Defendants.

11. During cross examination, counsel for Plaintiffs provided Mr. Conrad with information about the facts of this case, particularly about 911 calls that Mr. Crompton made on May 9, 2009. This was done even though Mr. Conrad specifically testified on direct examination that he did not try to learn of the facts of the case. Mr. Conrad testified that he wanted to be **impartial** and **neutral** towards both Plaintiffs and Defendants.

³ However, Mr. Conrad was able to use his laptop to view the DVD, which contained protected data and information, throughout the entire deposition.

⁴ Plaintiffs' expert witness disclosure, attached hereto as Exhibit "2", confirms that Mr. Conrad was not retained as an expert witness for Plaintiffs.

12. Counsel for Plaintiff asked Mr. Conrad give his opinion as to why data was “missing” from Mr. Crompton’s cell phone on May 9, 2009. Mr. Conrad testified that he did not know the answers to the questions. Mr. Conrad said he could only offer possibilities of what could have happened. Plaintiffs’ counsel insisted that Mr. Conrad give the possibilities, and Mr. Conrad began giving speculation and not factual testimony. These hypothetical questions were clearly compelling Mr. Conrad to give expert opinions on Plaintiffs’ behalf. And, there was no predicate for whether 911 calls would be recorded on Mr. Crompton’s cell phone. Undersigned counsel objected to these questions and Mr. Conrad gave answers.

13. These questions were so out-of-bounds and oppressive, that undersigned counsel believed that Plaintiffs’ counsel was conducting the cross-examination in bad faith. Counsel for Plaintiff had asked Mr. Conrad, a neutral party, for an expert opinion on the reasons why data was “missing” from Mr. Crompton’s cell phone. The questioning exceeded what the Magistrate Judges permitted to have Mr. Conrad perform. The questioning did not have a proper predicate, and forced Mr. Conrad to assume data was “missing” from Mr. Crompton’s cell phone and then speculate on why it was missing, when he did not know why.

14. Moreover, Plaintiffs counsel asked Mr. Conrad if Mr. Crompton’s cell phone had the storage capacity to record the 911 call data on May 9, 2009. He asked if there was any reason why 911 call data was “missing” based on other data that was on Mr. Crompton’s cell phone. Counsel for Plaintiff specifically asked Mr. Conrad to answer based on Mr. Conrad’s knowledge and review of the **data that was on Mr. Crompton’s cell phone prior to May 8-9, 2009.**

15. At that point, undersigned counsel had a good-faith belief that data protected under this Court’s Orders would be divulged to Plaintiff. The question called for Mr. Conrad to identify and testify to data from outside of the permitted date range. [See, e.g., DE 118].

16. Therefore, undersigned counsel instructed Mr. Conrad not to answer the question, in order to enforce the limitation on evidence directed by this Court. [DE 118]. A lengthy dialogue ensued wherein counsel for Plaintiff disagreed. Plaintiffs’ counsel

pressed on with this line of questioning, without any apparent regard for Mr. Conrad's obligation to safeguard the data this Court had ordered to be protected, even though the protected data was on the laptop computer sitting in front of Mr. Conrad.

17. Undersigned counsel moved to limit the deposition, and seeks a protective order to limit Mr. Conrad from being made to give expert opinions on behalf of Plaintiff and from answering questions about data that is protected by court orders.

18. Plaintiffs' counsel's cross-examination exceeded the bounds of authorization that the Parties had to the cell phone data, and what was permissible for Mr. Conrad to do under this Court's orders, necessitating this motion for a protective order. The only remedy undersigned counsel had on behalf of Mr. Crompton was to suspend the deposition and move for a protective order to limit the scope of Plaintiffs' counsel's cross-examination.

MEMORANDUM OF LAW

At any time during a deposition, a party may move to limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. *Fed. R. Civ. P. 30(d)(3)(A)*. The Court may limit its scope and manner provided by Rule 26(c), which authorizes entry of a protective order. *Fed. R. Civ. P. 30(d)(3)(B)*.

Rule 30(d) provides protection from unreasonable examination during a deposition. *Provide Commerce, Inc. v. Preferred Commerce, Inc.*, 2008 WL 360591 (S.D. Fla.). Although it is an extraordinary remedy, attorneys can justifiably instruct a witness not to answer a question to enforce a court order and to suspend a deposition for the purposes of filing a Rule 30(d)(3) motion. *Id.* The attorney should instruct on a question-by-question basis, as opposed to not allowing *any* testimony. *Atlantic Sounding Co., Inc. v. Townsend*, 2006 WL 4702150 (M.D. Fla.). When deposition questions are so out-of-bounds that one could say that the deposition was conducted in bad faith, an attorney may resort to Rule 30(d). *See Oy v. Mosley*, 2010 WL 2164329 (S.D. Fla.).

L.R. 7.1 CERTIFICATION

Undersigned counsel and Plaintiffs' counsel conferred at the deposition of Mr. Conrad and intractable disagreements arose as to the relief sought in this Motion.

I HEREBY CERTIFY that on August 7, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached 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.

WICKER, SMITH, O'HARA, MCCOY &
FORD, P.A.

Attorney for Howard K. Crompton and
Andrew L. Schmidt

2800 Ponce de Leon Boulevard
Suite 800

Coral Gables, FL 33134

Phone: (305) 448-3939

Fax: (305) 441-1745

By: /s/ Drew M. Levin

Frederick E. Hasty III
Florida Bar No. 260606
Drew M. Levin
Florida Bar No. 0048419

Service List

Ira H. Leesfield, Esquire
Leesfield & Partners, P.A.
2350 South Dixie Highway
Miami, FL 33133

Robert D. Peltz, Esquire
Leesfield & Partners, P.A.
2350 South Dixie Highway
Miami, FL 33133

William S. Reese, Esquire
Lane, Reese, Summers, Ennis & Perdomo
Douglas Centre, Suite 304
2600 Douglas Road
Coral Gables, FL 33134

Greg M. Gaebe, Esquire
Gaebe, Mullen, Antonelli, Esco & DiMatteo
420 South Dixie Highway, 3rd Floor
Coral Gables, FL 33146

William L. Summers, Esquire
Lane, Reese, Summers, Ennis & Perdomo
2600 Douglas Road, Suite 304
Coral Gables, FL 33134

Ubaldo J. Perez, Jr., Esquire
Law Office of Ubaldo J. Perez, Jr., P.A.
8181 N.W. 154 Street, Suite 210
Miami Lakes, FL 33016