

**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.

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**ORDER ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

This Cause is before the Court in connection with Defendants' Motion for Protective Order As to Carter Conrad, Jr. (DE# 269). The Court has reviewed the motion, the response (DE# 271), the reply (DE# 276) and the pertinent portions of the reocrd. The motion is **granted in part and denied in part**.

The motion concerns Carter Conrad, Jr., a court-appointed telephone data expert authorized by the Court to inspect the cellular telephones of decedent, Michael Slawy-Adelman, and Defendant Howard Crompton. The Court ordered Conrad to inspect the phones, retrieve data for May 8 and 9, 2009 and produce a report identifying all data for those two days found on the telephones (DE# 118).

Although Mr. Conrad has expertise about cellular telephones and methods to inspect those phones and to retrieve data, he is not an "expert witness" as that term is typically used in federal court litigation. In other words, he is not in the case to provide his opinion about relevant issues. Instead, his role was strictly factual, based on specific

tasks he was directed to perform. Mr. Conrad already performed those tasks and already provided the reports required by the Court's Order.

During the Plaintiffs' cross-examination of Mr. Conrad at a deposition noticed by Defendants, Plaintiffs' counsel asked Mr. Conrad questions about his opinion on why data reflecting certain telephone calls were not found on Defendant Crompton's cellular telephone. In other words, Mr. Conrad was asked to speculate about a potential opinion - - a task beyond the duties outlined in the Court Order.

In addition, Plaintiffs' counsel also asked Mr. Conrad about whether data existed for May 7, 2009. Plaintiffs asked these questions because Mr. Conrad speculated that the telephone may have overwritten data for calls on May 9, 2009 but noted that this potential overwriting theory would not be viable if data for May 7, 2009 was on the telephone. Plaintiffs did not ask Mr. Conrad to divulge any information about the May 7, 2009 telephone calls (assuming they were on the phone). Instead, he asked only if any calls *existed* for May 7, 2009.

This last line of questioning, however, related to the prior subject of why certain phone calls for May 9, 2009 were not present on Defendant Crompton's cellular phone when Mr. Conrad inspected it. As noted above, this issue is beyond the scope of Mr. Conrad's responsibility in the case.

Defendants Crompton and Schmidt objected to this line of questioning and, instead of merely instructing Mr. Conrad to not answer those questions but permitting him to answer other deposition questions, **terminated** the deposition in order to file the motion for protective order.

Defendants contend that Plaintiffs were out of bounds with their deposition questions and that they needed to terminate the deposition in order to enforce the limitation on the scope of Mr. Conrad's involvement in this case.

Plaintiffs, on the other hand, say that the questions are permissible because they did not focus on the content or substance of the data relating to the calls. They also argue that Defendants themselves asked Mr. Conrad opinion-type questions in their multi-hour deposition which preceded Plaintiffs' comparatively limited cross-examination. And they say that Defendants over-reacted by terminating the entire deposition, rather than providing specific instructions to Mr. Conrad to not answer questions on a question-by-question basis. Plaintiffs note that their counsel and defense counsel are based in Miami and that the deposition was in West Palm Beach – a four-hour round-trip which Plaintiffs say their counsel will need to make again in order to resume the deposition. Consequently, Plaintiffs want Defendants to pay for all additional costs associated with a resumed deposition in West Palm Beach.

Because Defendants did not retain Mr. Conrad as their own witness, because Mr. Conrad is not their client, and because defense counsel do not represent Mr. Conrad, Plaintiffs have not explained how Defendants could have properly given the “do-not-answer-the-question” instruction to an independent witness.

Based on this procedural background and the issues framed above, the Court **grants in part** Defendants' motion for protective order. Mr. Conrad's involvement in this case is limited and questions about his speculative opinions or about phone calls other than those made on May 8 and 9, 2009 are beyond the scope of relevant discovery.

Therefore, the questions at issue were objectionable and Defendants' had a good faith basis to object.

Plaintiffs have not proffered a list or summary of additional questions which they wish to ask Mr. Conrad. Nevertheless, the Court understands that they do, in fact, have additional questions which they were foreclosed from pursuing because Defendants terminated the deposition. The Court will therefore permit the deposition to resume.

Defendants' counsel did not have the ability to *instruct* Mr. Conrad, a non-client, not to answer questions. Instead, they had only two alternatives: terminate the deposition and seek a protective order (which they did) or seek to contact the Undersigned for a ruling during the deposition. Because the dispute arose after 7:00 p.m., the parties apparently assumed that the Undersigned would not be available in chambers and Defendants did not pursue this alternative.

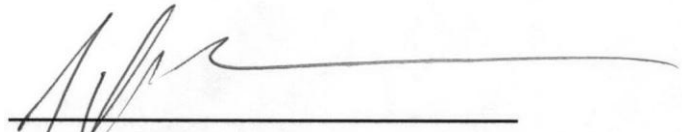
The Court appreciates the fact that it will be inconvenient for counsel to travel to West Palm Beach to continue the deposition. Plaintiffs may resume the deposition by telephone, continue it in person in West Palm Beach or persuade Mr. Conrad to complete the deposition in Miami.<sup>1</sup>

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<sup>1</sup> The Court is not suggesting that Mr. Conrad should bear the inconvenience of traveling to Miami without receiving additional compensation for his travel time and other expenses.

Finally, Plaintiffs' request that Defendants pay for the additional costs associated with the deposition when it resumes is **denied**.<sup>2</sup>

DONE AND ORDERED in Chambers, at Miami, Florida, this 18th day of August, 2011.



Jonathan Goodman  
UNITED STATES MAGISTRATE JUDGE

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

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<sup>2</sup> Federal Rules of Civil Procedure 26(c) and 37(a)(5) require the entry of an expense award in favor of the party who filed a motion for protective order which gets granted, unless one (or more) of three limited exceptions apply. Given that Defendants themselves asked Mr. Conrad opinion-type questions and given that Plaintiffs' counsel expressly cautioned Mr. Conrad to not discuss the substance of the data about the calls and sought only yes or no answers about the *existence* of calls, the Court finds that an expense award should not be entered. *See* Fed. R. Civ. P. 37(a)(5)(A)(ii) and (iii).